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7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF ALAMEDA  
10 UNLIMITED CIVIL JURISDICTION

11  
12 RUSSELL BRIMER,

13 Plaintiff,

14 v.

15 DMI SPORTS, INC.; and DOES 1-150,  
16 inclusive,

17 Defendants.

Case No. RG12634679

**[PROPOSED] CONSENT JUDGMENT**

*(Cal. Health & Saf. Code, § 25249.6 et seq.)*

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and DMI Sports, Inc.**

3 This Consent Judgment is entered into by and between Russell Brimer (“Brimer” or  
4 “Plaintiff”) and DMI Sports, Inc. (“DMI” or “Defendant”), with Brimer and DMI collectively  
5 referred to as the “Parties.”

6 **1.2 Plaintiff**

7 Brimer is an individual residing in California who seeks to promote awareness of  
8 exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous  
9 substances contained in consumer and commercial products.

10 **1.3 Defendant**

11 DMI employs ten or more persons and is a person in the course of doing business for  
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code  
13 section 25249.6 et seq. (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that DMI has manufactured, imported, distributed, and/or sold in California  
16 table tennis sets containing lead without the requisite Proposition 65 warnings. Lead is on the  
17 Proposition 65 list as a chemical known to cause birth defects and other reproductive harm.

18 **1.5 Product Description**

19 The products that are covered by this Consent Judgment are table tennis sets containing  
20 Di(2-ethylhexyl)phthalate (“DEHP”) and/or lead, including, but not limited to, the *Prince 2*  
21 *Player Racket Set, Item #: 2PLAYSET (#7 19981 70590 2)*, manufactured, imported, distributed,  
22 and/or sold by DMI, directly or through others, to consumers in California (“Products”).

23 **1.6 Notices of Violation**

24 On or about January 19, 2012, Brimer served DMI and various public enforcement  
25 agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that provided DMI  
26 and such officials with notice that alleged that DMI was in violation of Proposition 65 for failing  
27 to warn its direct customers and end users that its table tennis sets exposed users in California to

1 lead. No public enforcer has commenced and is diligently prosecuting the allegations set forth in  
2 the Notice.

3 Brimer shall, within thirty days of the execution of this agreement, serve DMI and various  
4 public enforcement agencies with a notice consistent with Health and Safety Code §  
5 25249.7(d)(1) entitled “Supplemental 60-Day Notice of Violation” (“Supplemental Notice”)  
6 alleging that DMI is or was in violation of Proposition 65 for failing to warn its direct customers  
7 and end users that its table tennis sets exposed users in California to DEHP.

### 8 **1.7 Complaint**

9 On June 14, 2012, Brimer filed a complaint in Alameda County Superior Court against  
10 DMI and Does 1 through 150 (the “Complaint” or “Action”), alleging violations of Proposition  
11 65, based on the alleged exposures to lead contained in certain table tennis sets sold by DMI.

12 Upon entry of this Consent Judgment, and provided that no public enforcer has  
13 commenced and is diligently prosecuting the allegations set forth in the Supplemental Notice, the  
14 Complaint shall be deemed amended *nunc pro tunc* to include the violations of Proposition 65  
15 alleged in the Supplemental Notice.

### 16 **1.8 No Admission**

17 DMI denies the material factual and legal allegations contained in the Notice,  
18 Supplemental Notice, and Complaint and maintains that all products that it has manufactured,  
19 imported, distributed, and/or sold in California, including the Products, have been, and are, in  
20 compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission  
21 by DMI of any fact, finding, conclusion of law, issue of law, or violation of law, nor shall  
22 compliance with this Consent Judgment constitute or be construed as an admission by DMI of any  
23 fact, finding, conclusion of law, issue of law, or violation of law, such being specifically denied  
24 by DMI. However, this Section shall not diminish or otherwise affect DMI’s obligations,  
25 responsibilities and duties under this Consent Judgment.

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**1.9 Consent to Jurisdiction**

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over DMI as to the allegations contained in the Complaint, that venue is proper in Alameda County, and that this Court has jurisdiction to enter and enforce the provisions of this Consent Judgment, pursuant to California Code of Civil Procedure section 664.6, as a full and binding resolution of all claims that were or could have been raised in the Complaint against DMI based on the facts alleged therein and in the Notice.

**1.10 Effective Date**

For purposes of this Consent Judgment, the term “Effective Date” shall mean November 12, 2012.

**2. INJUNCTIVE RELIEF**

**2.1 Reformulation**

As of the Effective Date, except as described in section 2.2, DMI shall not ship, sell, distribute, or supply any Product that will be sold or offered for sale to California businesses, users, or consumers unless each Accessible Component (i.e., any component that can be touched, handled, or mouthed by a person during reasonably foreseeable use) of any table tennis set meets both the Lead Standard and the Phthalate Standard, defined as follows:

**(a) Lead Standard**

Each Accessible Component of a Product shall contain lead in concentration less than 50 parts per million when analyzed pursuant to U.S. Environmental Protection Agency (“EPA”) testing methodologies 3050B and/or 6010B, and 1.0 microgram when analyzed pursuant to the NIOSH 9100 testing protocol.

**(b) Phthalate Standard**

Each Accessible Component of a Product shall contain each of the following phthalates in concentration less than 1,000 parts per million when analyzed pursuant to EPA sample preparation and test methodologies 3580A and 8270C: DEHP, Butyl benzyl phthalate (“BBP”),

1 Di-isodecyl phthalate (“DIDP”), Di-n-butyl phthalate (“DBP”), and Di-n-hexyl phthalate  
2 (“DnHP”).

3 **2.2 Sell-Through Warnings for Non-Conforming Products**

4 For each Product in DMI’s possession or control as of the Effective Date which is shipped  
5 to, or for ultimate sale to, or use by, California consumers, businesses, or users to which DMI has  
6 not already affixed a clear and reasonable warning as required by Proposition 65 as of August 1,  
7 2012, and which does not meet both the Lead Standard and the Phthalate Standard described  
8 above (“Non-Conforming Product”), DMI shall provide a warning as set forth in this section.

9 The Lead Warning Language shall be used if the Non-Conforming Product is not in compliance  
10 with the Lead Standard but is in compliance with the Phthalate Standard; the Phthalate Warning  
11 Language shall be used if the Non-Conforming Product is not in compliance with the Phthalate  
12 Standard but is in compliance with the Lead Standard; and, if the Non-Conforming Product is in  
13 compliance with neither the Lead Standard nor the Phthalate Standard, the Dual Warning  
14 Language shall be used. That Warning language is defined as follows:

15 **(a) Lead Warning Language**

16 **WARNING:** This product contains lead, a chemical known  
17 to the State of California to cause cancer, birth  
defects and other reproductive harm.

18 **(b) Phthalate Warning Language**

19 **WARNING:** This product contains phthalate chemicals  
20 known to the State of California to cause  
21 cancer, birth defects and other reproductive  
harm.

22 **(c) Dual Warning Language**

23 **WARNING:** This product contains phthalate chemicals and  
24 lead, chemicals that are known to the State of  
California to cause cancer, birth defects and  
25 other reproductive harm.

26 **(d) Warning Location**

27 Each Warning shall be prominently placed with such conspicuousness as compared with  
28 other words, statements, designs, or devices as to render it likely to be read and understood by an

1 ordinary individual under customary conditions before purchase or use. Each Warning shall be  
2 provided in a manner such that the consumer or user understands to which specific Non-  
3 Conforming Product the Warning applies, so as to minimize the risk of consumer or user  
4 confusion.

5 If the Non-Conforming Product is to be sold in retail outlets in California by any person or  
6 entity, including DMI, then DMI shall affix (or cause to be affixed) the appropriate Warning  
7 Language to the packaging or labeling of that Non-Conforming Product, or directly on each Non-  
8 Conforming Product (“On-Product Warning”).

9 DMI shall provide a Warning for Non-Conforming Products sold via mail order catalog to  
10 California consumers, businesses, or users in any mail order catalog printed after the Effective  
11 Date. Any Warning provided in a mail order catalog must be in the same type size or larger than  
12 the product description text within the catalog. The Warning shall be provided on the same page  
13 and in the same location as the display and description of the product it accompanies. Warnings  
14 given in the mail order catalog shall identify the specific Non-Conforming Product to which the  
15 Warning applies.

16 DMI shall provide a Warning for Non-Conforming Products sold via the Internet to  
17 California consumers, businesses, or users on any website controlled by DMI. Any such Warning  
18 must appear in one or more of the following locations: (a) on the same Web page on which the  
19 Non-Conforming Product is displayed; (b) on the same Web page as the order form for the Non-  
20 Conforming Product; (c) on the same page on which the price of the Product is provided to the  
21 purchaser; or (d) on one or more Web pages displayed to the purchaser during the checkout  
22 process. The Warning shall appear in any of the above instances adjacent to or immediately  
23 following the display, description, or price of the Non-Conforming Product for which it is given  
24 in the same type size or larger than the product description text. Warnings given on the Internet  
25 shall identify the specific Non-Conforming Product to which the Warning applies.

26 DMI shall provide an On-Product Warning for any Non-Conforming Product sold via the  
27 Internet to California consumers, businesses, or users on any website not controlled by DMI  
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1                                   **(e) Prohibition Against Over-Warning**

2           DMI shall not provide, nor require or request that any other person or entity provide, a  
3 Warning for any Product it knows or should know does not contain at least one chemical listed  
4 pursuant to Proposition 65.

5 **3. MONETARY PAYMENTS**

6           All payments made under this Consent Judgment shall be held in trust by the Chanler  
7 Group until the Court approves the Consent Judgment. All payments transmitted to the Chanler  
8 Group shall be delivered to the following address (“Payment Address”):

9                                   The Chanler Group  
10                                  Attn: Proposition 65 Controller  
11                                  2560 Ninth Street  
12                                  Parker Plaza, Suite 214  
13                                  Berkeley, CA 94710

14           In the alternative, payments may be made by wire transfer, instructions for which will be  
15 provided upon request.

16                                   **3.1 Penalties**

17           Payments of all penalties by DMI under this Agreement shall be apportioned in  
18 accordance with Health & Safety Code section 25249.12(c)(1) and (d). In each instance,  
19 payments equal to 75% of the civil penalty shall be earmarked for the State of California’s Office  
20 of Environmental Health Hazard Assessment (“OEHHA”) made payable to “The Chanler Group  
21 in Trust for OEHHA,” and the remaining 25% of the penalty monies shall be earmarked for  
22 Brimer made payable to “The Chanler Group in Trust for Russell Brimer.”

23           Upon payment of each penalty, DMI shall issue two 1099 forms, one to the Office of  
24 Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-  
25 0284486) for the civil penalties payable to OEHHA, and a second to Brimer, whose address and  
26 tax identification number shall be furnished upon request, for the civil penalties payable to  
27 Brimer.

28                                   **(a) Initial Civil Penalty**

          On or before the Effective Date DMI shall pay a penalty of \$6,000.

1                                   **(b)     Second Civil Penalty**

2             DMI shall pay a second civil penalty of \$18,000 on or before December 10, 2012. The  
3 second civil penalty shall be waived in its entirety if an officer or director of DMI certifies, in  
4 writing, that, as of December 10, 2012, all of the Products that DMI distributes, ships, sells, or  
5 offers to ship for sale in California comply with the Lead Standard and the Phthalate Standard.  
6 Such certification must be received by The Chanler Group on or before December 17, 2012.

7                                   **3.2     Reimbursement of Plaintiff’s Fees and Costs**

8             The Parties have reached an accord on the compensation to be paid to Brimer and his  
9 counsel, which the parties agree is appropriate under general contract principles and the private  
10 attorney general doctrine codified at California Code of Civil Procedure section 1021.5, for all  
11 work performed in this matter, except fees that may be incurred in the event of an appeal. DMI  
12 shall pay \$25,000, on or before the Effective Date, and \$24,000 on or before January 31, 2013, for  
13 fees and costs incurred investigating, litigating and enforcing this matter, including the fees and  
14 costs incurred (and yet to be incurred) negotiating, drafting, and obtaining the Court’s approval of  
15 this Consent Judgment in the public interest.

16             Payments of all fees and costs by DMI under this Agreement shall be by check or wire  
17 transfer to “The Chanler Group in Trust.” Upon each payment of fees and costs, DMI shall issue  
18 a 1099 form to The Chanler Group (EIN: 94-3171522) for the amount paid.

19                                   **4.     CLAIMS COVERED AND RELEASED**

20                                   **4.1     Plaintiff’s Public Release of Proposition 65 Claims**

21             Brimer acting on his own behalf and in the public interest releases DMI from all claims  
22 for violations of Proposition 65 up through the Effective Date based on exposure to lead and/or  
23 DEHP from the Products. Compliance with the terms of this Consent Judgment constitutes  
24 compliance with Proposition 65 with respect to exposures to lead and/or DEHP from the  
25 Products.



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**4.2 Plaintiff’s Individual Release of Claims.**

Brimer also, in his individual capacity only and *not* in his representative capacity, provides a release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of plaintiff of any nature, character or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to lead, DEHP, BBP, DIDP, DBP, and/or DnHP in the Products manufactured, distributed, or sold by DMI.

**4.3 Defendant’s Release of Plaintiff**

DMI on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against Brimer, his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Brimer and his attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with respect to the Products.

**5. COURT APPROVAL**

This Consent Judgment is not effective until it is approved and entered by the Court and shall be null and void if, for any reason, it is not approved and entered by the Court within one year after it has been fully executed by the Parties, in which event any monies that have been provided to Brimer or his counsel pursuant to Sections 3 above shall be refunded within fifteen (15) days after receiving written notice from DMI that the one-year period has expired.

**6. SEVERABILITY**

If, subsequent to the execution of this Consent Judgment, any of the provisions of this Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

**7. GOVERNING LAW**

The terms of this Consent Judgment shall be governed by the laws of the State of California and apply within the State of California.

1 **8. NOTICES**

2 Unless specified herein, all correspondence and notices required to be provided pursuant  
3 to this Consent Judgment shall be in writing and sent by (i) personal delivery, (ii) first-class,  
4 registered or certified mail, return receipt requested, or (iii) overnight courier on any party by the  
5 other party at the following addresses:

6 For DMI:

7 Peter McGaw, Esq.  
8 Archer Norris  
9 2033 N. Main St., Suite 800  
10 Walnut Creek, CA 94596  
11 *Attorneys for DMI Sports, Inc.*

12 For Brimer:

13 Proposition 65 Coordinator  
14 The Chanler Group  
15 2560 Ninth Street  
16 Parker Plaza, Suite 214  
17 Berkeley, CA 94710

18 Any party, from time to time, may specify in writing to the other party a change of address  
19 to which all notices and other communications shall be sent.

20 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

21 This Consent Judgment may be executed in counterparts and by facsimile or .pdf  
22 signature, each of which shall be deemed an original, and all of which, when taken together, shall  
23 constitute one and the same document.

24 **10. POST EXECUTION ACTIVITIES**

25 Brimer agrees to comply with the reporting form requirements referenced in Health and  
26 Safety Code section 25249.7, subdivision (f). In addition, the Parties acknowledge that, pursuant  
27 to Health and Safety Code section 25249.7, a noticed motion is required to obtain judicial  
28 approval of this Consent Judgment. In furtherance of obtaining such approval, Brimer and DMI  
and their respective counsel agree to mutually employ their best efforts to support the entry of this  
agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a

1 timely manner. For purposes of this section, best efforts shall include, at a minimum, cooperating  
2 on the drafting and filing of any papers in support of the required motion for judicial approval.

3 **11. MODIFICATION**

4 This Consent Judgment may be modified only: (1) by written agreement of the Parties  
5 and upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful  
6 motion of any party and entry of a modified consent judgment by the Court.

7 **12. AUTHORIZATION**

8 The undersigned are authorized to execute this Consent Judgment and have read,  
9 understood, and agree to all of the terms and conditions of this Consent Judgment.

10 **AGREED TO:**

11   
12  
13 By: \_\_\_\_\_  
14 RUSSELL BRIMER

**AGREED TO:**

By: \_\_\_\_\_  
Gary Giegerich, President  
DMI SPORTS, INC.

15  
16 Date: November 1, 2012

Date: \_\_\_\_\_

1 timely manner. For purposes of this section, best efforts shall include, at a minimum, cooperating  
2 on the drafting and filing of any papers in support of the required motion for judicial approval.

3 **11. MODIFICATION**

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5 and upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful  
6 motion of any party and entry of a modified consent judgment by the Court.

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10 **AGREED TO:**

**AGREED TO:**

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12  
13 By: \_\_\_\_\_  
14 RUSSELL BRIMER

13 By:   
14 Gary Giegerich, President  
DMI SPORTS, INC.

15  
16 Date: \_\_\_\_\_

16 Date: 11-7-12

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