

1 Josh Voorhees, State Bar No. 241436
THE CHANLER GROUP
2 2560 Ninth Street
Parker Plaza, Suite 214
3 Berkeley, CA 94710-2565
Telephone: (510) 848-8880
4 Facsimile: (510) 848-8118

5 Attorneys for Plaintiff
RUSSELL BRIMER
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
10 UNLIMITED CIVIL JURISDICTION
11

12 RUSSELL BRIMER,
13 Plaintiff,
14 v.
15 M. JACOB & SONS, *et al.*
16 Defendants.
17

Case No. CGC-16-553012

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (“Plaintiff”),
4 and M. Jacob & Sons, dba Sprayco, (“Defendant”), with Plaintiff and Defendant each individually
5 referred to as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Plaintiff alleges that Defendant manufactures, imports, sells, or distributes for sale in
16 California, metal sprayer nozzles that contain lead without first providing the exposure warning
17 required by Proposition 65. Lead is listed pursuant to Proposition 65 as a chemical known to the
18 State of California to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are metal sprayer nozzles containing Lead
21 that are manufactured, imported, sold, or distributed for sale in California by Defendant including,
22 but not limited to, *Sprayco All Purpose Plant Sprayer, UPC #0 46412 10374 8*, hereinafter the
23 “Products”.

24 **1.6 Notice of Violation**

25 On or about January 29, 2016, Plaintiff served Defendant, and certain requisite public
26 enforcement agencies with a “60-Day Notice of Violation” (“Notice”) alleging that Defendant
27 violated Proposition 65 by failing to warn its customers and consumers in California that the Products
28

1 expose users to lead. To the best of the Parties’ knowledge, no public enforcer has commenced and is
2 diligently prosecuting the allegations set forth in the Notice.

3 **1.7 Complaint**

4 On July 13, 2016 Plaintiff filed the instant action (“Complaint”) naming Defendant as a
5 defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of
6 the Notice.

7 **1.8 No Admission**

8 Defendant denies the material, factual, and legal allegations contained in the Notice and
9 Complaint, and maintains that all of the products it has sold and distributed for sale in California,
10 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
11 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or
12 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
13 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
14 not, however, diminish or otherwise affect Defendant’s obligations, responsibilities, and duties under
15 this Consent Judgment.

16 **1.9 Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over Defendant as to the allegations contained in the Complaint, that venue is proper in
19 the County of San Francisco, and that the Court has jurisdiction to enter and enforce the provisions of
20 this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
23 the motion for approval of the Consent Judgment is granted by the Court.

24 **2. INJUNCTIVE RELIEF: REFORMULATION**

25 **2.1 Reformulated Products**

26 Defendant shall not manufacture, distribute, sell or offer for sale in California any Products
27 with a production date after the Effective date except for “Reformulated Products.” For purposes of
28 this Consent Judgment, Reformulated Products are Products that: (a) contain no more than to 90

1 parts per million (“ppm”) lead when analyzed pursuant to U.S. Environmental Protection Agency
2 testing methodologies 3050B and 6010B or equivalent methodologies utilized by federal or state
3 agencies for the purpose of determining lead content in a solid substance; and (b) yield no more than
4 1.0 microgram (“µg”) of lead when a wipe is applied to all surfaces according to NIOSH Test
5 Method No. 9100.

6 **2.2 Interim Warning**

7 For any products remaining in inventory with a production date before the Effective Date that
8 are not Reformulated Products, Defendant shall apply a clear and reasonable warning as set forth
9 herein.

10 **WARNING:** This product contains lead, a chemical known to
11 the State of California to cause birth defects or
12 other reproductive harm.

13 **3. MONETARY SETTLEMENT TERMS**

14 **3.1 Civil Penalty Payments**

15 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
16 this Consent Judgment, Defendant shall pay \$4,000 in civil penalties to “Russell Brimer, Client Trust
17 Account.” Each civil penalty payment shall be allocated according to Health and Safety Code section
18 25249.12(c)(1) and (d), with seventy-five percent (75%) of the funds paid to the California Office of
19 Environmental Health Hazard Assessment (“OEHHA”), and twenty-five percent (25%) of the funds
20 remitted to Plaintiff.

21 **3.2 Reimbursement of Attorney’s Fees and Costs**

22 The parties acknowledge that Plaintiff and his counsel offered to resolve this dispute without
23 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
24 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
25 other settlement terms had been finalized, Defendant expressed a desire to resolve Plaintiff’s fees and
26 costs. The Parties then attempted to (and did) reach an accord on the compensation due to Plaintiff
27 and his counsel under general contract principles and the private attorney general doctrine codified at
28 California Code of Civil Procedure section 1021.5 for all work performed through the mutual

1 execution of this Consent Judgment. Defendant shall pay \$25,000 for the fees and costs incurred by
2 Plaintiff investigating, bringing this matter to Defendant’s attention, litigating and negotiating a
3 settlement in the public interest.

4 **3.3 Payments Held in Trust**

5 All payments due under this Consent Judgment shall be held in trust until such time as the
6 Court approves the Parties’ settlement. All payments due under this agreement shall be delivered
7 within five (5) days of the date that this Consent Judgment is fully executed by the Parties, and held
8 in trust by Defendant’s counsel until the Court grants the motion for approval of this Consent
9 Judgment contemplated by Section 5. Within two business days of the Court’s approval of this
10 Consent Judgment, Defendant’s counsel shall tender the initial civil penalty payments and attorneys’
11 fee and costs reimbursements required by Sections 3.1 and 3.2, as follows:

12 3.3.1 A check in the amount of \$3,000 paid to “OEHHA”;

13 3.3.2 A check in the amount of \$1,000 paid to “Russell Brimer Client Trust
14 Account”;

15 3.3.3 A check in the amount of \$25,000 paid to “The Chanler Group.”

16 **3.4 Payment Address**

17 All payments required by this Consent Judgment shall be delivered to the following
18 address:

19 The Chanler Group
20 Attn: Proposition 65 Controller
21 2560 Ninth Street
22 Parker Plaza, Suite 214
23 Berkeley, CA 94710

24 **4. CLAIMS COVERED AND RELEASED**

25 **4.1 Plaintiff’s Public Release of Proposition 65 Claims**

26 Plaintiff, acting on his own behalf and in the public interest, releases Defendant and its
27 shareholders, parents, subsidiaries, affiliated entities under common ownership, directors, officers,
28 employees, and attorneys (“Releasees”) and each entity to whom it directly or indirectly distributes
or sells the Products including, but not limited to, its downstream distributors, wholesalers,
customers, retailers, franchisers, cooperative members, licensors and licensees (“Downstream

1 Releasees”) for any violations arising under Proposition 65 for unwarned exposures to Lead from
2 Products sold by Releasees and/or Downstream Releasees with a production date prior to the
3 Effective Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment
4 constitutes compliance with Proposition 65 with respect to exposures from failures to warn about
5 lead from the Products sold by Defendant before the Effective Date, as set forth in the Notice.

6 **4.2 Plaintiff’s Individual Release of Claims**

7 Plaintiff, in his individual capacity only and *not* in his representative capacity, also provides a
8 release to Defendant, Releasees, and Downstream Releasees which shall be effective as a full and
9 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
10 attorneys’ fees, damages, losses, claims, liabilities and demands of Plaintiff of any nature, character
11 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
12 exposures to Lead in the Products sold or distributed for sale by Defendant before the Effective Date.

13 **4.3 Defendant’s Release of Plaintiff**

14 Defendant, on its own behalf, and on behalf of its past and current agents, representatives,
15 attorneys, successors, and assignees, hereby waives any and all claims against Plaintiff and his
16 attorneys and other representatives, for any and all actions taken or statements made by Plaintiff and
17 his attorneys and other representatives, whether in the course of investigating claims, otherwise
18 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

19 **5. COURT APPROVAL**

20 This Consent Judgment is not effective until it is approved and entered by the Court and shall
21 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
22 has been fully executed by the Parties.

23 **6. SEVERABILITY**

24 If, subsequent to the Court’s approval and entry of this Consent Judgment as a judgment, any
25 provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be
26 adversely affected.

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1 **7. GOVERNING LAW**

2 The terms of this Consent Judgment shall be governed by the laws of the state of California
3 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
4 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Defendant
5 may provide written notice to Plaintiff of any asserted change in the law, and shall have no further
6 injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
7 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Defendant
8 from any obligation to comply with any pertinent state or federal toxics control laws.

9 **8. NOTICE**

10 Unless specified herein, all correspondence and notice required by this Consent Judgment
11 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
12 return receipt requested; or (iii) a recognized overnight courier to the following addresses:

13 **M. Jacob:**

14 David Lubin, President
15 M. Jacob & Sons
16 35601 Veronica Street
17 Livonia, MI 48150

 P. Mark Mahoney, Esq.
 Schiff Hardin LLP
 One Market Street
 Spear Street Tower, Suite 3200
 San Francisco, CA 94105

17 **Brimer:**

18 Proposition 65 Coordinator
19 The Chanler Group
20 2560 Ninth Street
21 Parker Plaza, Suite 214
22 Berkeley, CA 94710-2565

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

25 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

26 This Consent Judgment may be executed in counterparts and by facsimile or portable
27 document format (PDF) signature, each of which shall be deemed an original, and all of which, when
28 taken together, shall constitute one and the same document.

1 **10. POST EXECUTION ACTIVITIES**

2 Plaintiff agrees to comply with the reporting form requirements referenced in Health and
3 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
4 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
5 furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, and
6 those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial
7 approval of their settlement in a timely manner. For purposes of this Section, "best efforts" shall
8 include, at a minimum, cooperating on the drafting and filing of the necessary moving papers,
9 supporting the motion, and appearing at the hearing before the Court.

10 **11. MODIFICATION**

11 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
12 entry of a modified consent judgment by the Court; or (ii) a successful motion or application of any
13 Party, and the entry of a modified consent judgment by the Court.

14 **12. AUTHORIZATION**

15 The undersigned are authorized to execute this Consent Judgment and have read, understood,
16 and agree to all of the terms and conditions contained herein.

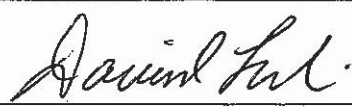
17
18 **AGREED TO:**

19
20 Date: 10/31/2016

21
22 By:  _____
23 Russell Briner

AGREED TO:

24 Date: 10/31/16

25 By:  _____
26 David Lubin, President
27 M. Jacob & Sons
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