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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,

Plaintiff,

v.

OMAHA DISTRIBUTING CO., INC., et al;

Defendants.

Case No. RG11575578

[PROPOSED] CONSENT JUDGMENT

1. INTRODUCTION

1.1 Parties

This Consent Judgment is entered into by and between plaintiff Russell Brimer ("Brimer"), John Moore[1] ("Moore")(with Moore and Brimer referred to collectively as the "Plaintiffs") and defendant Omaha Distributing Co., Inc. ("Omaha" or "Defendant"), with Plaintiffs and Defendant collectively referred to as the "Parties" and each individually referred to as a "Party."

1.2 Plaintiffs

Brimer is an individual residing in California who seeks to promote awareness of exposure to toxic chemicals and improve human health by reducing or eliminating hazardous substances in consumer products. Moore is an individual residing in California who seeks to promote awareness of exposure to toxic chemicals and improve human health by reducing or eliminating hazardous substances in consumer products.

1.3 Defendant

Omaha is a distributor based in Nebraska, employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.6 *et seq.* ("Proposition 65"). Omaha does not have a place of business in the State of California; however, Omaha does distribute and ship products into the State of California for sale to California consumers.

1.4 General Allegations

Plaintiffs allege that Omaha manufactured, imported, distributed, sold and/or offered for sale in the State of California without the health hazard warnings required by Proposition 65 the following products: (1) tape measures with grips and hand straps containing lead; (2) vinyl/PVC hand tool grips containing di(2-ethylhexyl)phthalate ("DEHP") and lead; and (3) glue guns with

[1] Mr. Moore is a party to the settlement but not a party to the action. Moore agrees to dismiss the action known as Moore v. Giovanetti, Inc. SCAC Case Number HG13671767 with prejudice within five business days of the mutual execution of this Agreement.

vinyl/PVC cords containing DEHP and lead. Lead and DEHP are listed pursuant to Proposition 65 as known to the State of California to cause birth defects and other reproductive harm.

1.5 Product Description

The products that are covered by this Consent Judgment are defined as: (1) tape measures with grips and hand straps containing lead including, but not limited to, the *Omaha Distributing ¾" x 16' Tape Measure, #07030 (#0 97427 07030 3)*; (2) vinyl/PVC hand tool grips containing DEHP and/or lead including, but not limited to, the *Omaha Distributing 6 in 1 Screwdriver, #07034 (#0 97427 07034 1)* and the *Black & Sage Hi-Viz Hot Neon 6" Diagonal Pliers, #807 (#7 04673 79807 2)*; and (3) glue guns with vinyl/PVC cords containing DEHP and/or lead including, but not limited to, the *Tool Mart Hot Melt Glue Gun 110 V, Item# 10551 (#6 43117 10551 2)*, which Omaha sold and/or distributed to Giovanetti, Inc. ("Giovanetti") and which were sold and/or offered for sale by Giovanetti in the State of California. All tape measures with grips and hand straps containing lead are hereinafter referred to as the "Lead Products" and all vinyl/PVC hand tool grips containing DEHP and/or lead and glue guns with vinyl/PVC cords containing DEHP and/or lead are hereinafter referred to as the "DEHP/Lead Products." Lead Products and DEHP/Lead Products are hereinafter referred to collectively as the "Products."

1.6 Notices of Violation

On February 1, 2011, Brimer served Omaha and certain requisite public enforcement agencies with a 60-Day Notice of Violation ("Brimer Notice") that provided the recipients with notice of alleged violations of Proposition 65 for failing to warn consumers that tape measures with grips and hand straps exposed users in California to lead.

On November 9, 2012, Moore served Giovanetti and certain requisite public enforcement agencies with a Supplemental 60-Day Notice of Violation ("Moore Notice") alleging that vinyl tool grips including, but not limited to, the *Black & Sage Hi-Viz Hot Neon 6" Diagonal Pliers, #807 (#7 04673 79807 2)* sold by Giovanetti exposes users to DEHP. For purposes of this Consent Judgment, Omaha represents that it, or one of its affiliates, supplied Giovanetti with the

product specifically referenced in the Moore Notice, the *Black & Sage Hi-Viz Hot Neon 6" Diagonal Pliers* which was sold by Giovanetti in California.

On April 19, 2013, Brimer served Omaha, Giovanetti, and various public enforcement agencies with a document entitled "Second Supplemental 60-Day Notice of Violation" ("Supplemental Brimer Notice") that provided the recipients with notice of alleged violations of Proposition 65 for failing to warn consumers that the Products exposed users in California to lead and/or DEHP. The Brimer Notice, Moore Notice and Supplemental Brimer Notice are hereinafter referred to as the Notices. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notices.

1.7 Complaint

On or about May 13, 2011, Brimer, who was and is acting in the interest of the general public in California, filed a complaint in the Superior Court in and for the County of Alameda against Omaha and Does 1 through 150, alleging, *inter alia,* violations of Proposition 65 based on the alleged exposures to lead contained the Lead Products sold by Omaha in the State of California. On or about February 13, 2014, Brimer filed a Second Amended Complaint ("Complaint"), alleging additional violations of Proposition 65 against Omaha, including unwarned exposures to lead and/or DEHP in the DEHP/Lead Products.

1.8 No Admission

Omaha denies the material, factual and legal allegations contained in the Notices and Complaint. Nothing in this Consent Judgment shall be construed as an admission by Omaha of any fact, finding, issue of law, or violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an admission by Omaha of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Omaha. However, this section shall not diminish or otherwise affect Omaha's obligations, responsibilities, and duties under this Consent Judgment.

1.9 **Consent to Jurisdiction**

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Omaha as to the allegations contained in the Complaint, that venue is proper in the County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions of this Consent Judgment.

1.10 **Effective Date**

For purposes of this Consent Judgment, the term "Effective Date" shall mean the date this Consent Judgment is approved by the Court.

2. INJUNCTIVE RELIEF: REFORMULATION

As of the Effective Date, and continuing thereafter, Omaha shall (a) not manufacture, distribute and/or ship for sale to Giovanetti any Products to be sold and/or offered for sale by Giovanetti in California that are not "Reformulated Products;" or (b) shall cease sales of the Products in California entirely. For purposes of this Consent Judgment Agreement, "Reformulated Products" shall mean Products containing components that may be handled, touched or mouthed by a consumer, and which components yield: (1) less than 1.0 microgram of lead when using a wipe test pursuant to NIOSH Test Method 9100; (2) less than 100 parts per million ("ppm") lead when analyzed pursuant to EPA testing methodologies 3050B and 6010B, or equivalent methodologies utilized by state or federal agencies for purposes of determining lead content in a solid material; and (3) less than or equal to 1,000 ppm (0.1%) DEHP when analyzed pursuant to EPA testing methodologies 3580A and 8270C, or equivalent methodologies utilized by state or federal agencies for purposes of determining DEHP content in a solid material.

3. MONETARY PAYMENTS

In settlement of all claims referred to in this Consent Judgment, Omaha shall pay a total of $33,000 in civil penalties in accordance with this Section. Each penalty payment will be allocated in accordance with California Health & Safety Code §§ 25249.12(c) & (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Brimer.

3.1 Initial Civil Penalty

Omaha shall pay an initial civil penalty of $10,000. Omaha shall issue a check in the amount of $10,000 to "Salisbury Law Group, Client Trust Account" to be held in trust for OEHHA and Brimer within fifteen (15) days of the mutual execution of this Consent Judgment by the Parties. Salisbury Law Group shall provide The Chanler Group with written confirmation within five (5) days of receipt that the funds have been deposited in a trust account. Within two (2) days of the Effective Date, Salisbury Law Group shall issue two separate checks for the initial civil penalty payment to: (a) "OEHHA" in the amount of $7,500; and (b) "Russell Brimer, Client Trust Account" in the amount of $2,500.

3.2 Final Civil Penalty

Omaha shall pay a final civil penalty of $23,000 on or before May 15, 2015. The final civil penalty shall be waived in its entirety, however, if, no later than May 1, 2015, an officer of Omaha provides Brimer with written certification that, as of the date of such certification and continuing into the future, Omaha has met the reformulation standard specified in Section 2.1 above, such that all Products manufactured, imported, distributed, sold and offered for sale in California by Omaha are Reformulated Products. The certification in lieu of a final civil penalty payment provided by this Section is a material term, and time is of the essence. In the event the final civil penalty is not waived, Omaha shall issue two separate checks for its final civil penalty payments to: (a) "OEHHA" in the amount of $17,250; and (b) "Russell Brimer, Client Trust Account" in the amount of $5,750.

3.3 Payment Procedures

3.3.1 Issuance of Payments. Payments shall be delivered as follows:

(a) All payments owed to Brimer pursuant to Sections 3.1 and 3.2 shall be delivered to the following payment address:

The Chanler Group
Attn: Proposition 65 Controller
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

(b) All payments owed to OEHHA, pursuant to Sections 3.1 and 3.2, shall be delivered to OEHHA (Memo line "Prop 65 Penalties") at the following addresses:

For United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

For Non-United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

With a copy of the checks payable to OEHHA mailed to The Chanler Group at the address set forth above in 3.3.1(a), as proof of payment to OEHHA.

4. REIMBURSEMENT OF FEES AND COSTS

The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. Brimer then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on the compensation due to Brimer and his counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of this agreement. Omaha shall pay $35,000 for fees and costs incurred as a result of investigating, bringing this matter to Omaha' attention, and negotiating a settlement in the public interest. Omaha shall issue a check payable to "Salisbury Law Group, Client Trust Account" in the amount of $35,000 within fifteen (15) days of the mutual execution of this Consent Judgment by the Parties. Salisbury Law Group shall provide The Chanler Group with written confirmation within five (5) days of receipt that the funds have been deposited in a trust account. Within two (2) days of the Effective Date, Salisbury Law Group shall issue a check payable to "The Chanler Group" to the address listed in Section 3.3.1(a) above.

5. CLAIMS COVERED AND RELEASED

5.1 Brimer's Public Release of Proposition 65 Claims

Brimer acting on his own behalf and in the public interest, releases Omaha, its parents, subsidiaries, affiliated entities that are under common ownership, directors, officers, employees, attorneys, and Omaha's downstream retailer, Giovanetti, from all claims for violations of Proposition 65 based on exposure to lead in the Lead Products and DEHP and/or lead in the DEHP/Lead Product which were distributed by Omaha specifically to Giovanetti and sold and/or offered for sale by Giovanetti in the State of California before the Effective Date. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to lead and/or DEHP in the Products.

5.2 Brimer and Moore's Individual Release of Claims

Brimer and Moore, in their individual capacity only and *not* in their representative capacity, provide 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 Brimer and Moore of any nature, character or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of any violation of Proposition 65 regarding the failure to warn about exposure to lead and/or DEHP in the Products which were distributed by Omaha specifically to Giovanetti and sold and/or offered for sale by Giovanetti in the State of California before the Effective Date.

5.3 Omaha's Release of Brimer and Moore

Omaha on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against Brimer and Moore and their 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 Moore and their 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.

6. 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 all Parties.

7. 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.

8. 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. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Omaha may provide written notice to Brimer of any asserted change in the law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Omaha from any obligation to comply with any pertinent state or federal toxics control laws.

9. NOTICES

Unless specified herein, all correspondence and notices required to be provided pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any Party by the other Party at the following addresses:

To Omaha:

Willis Woodring.
President
Omaha Distributing Co., Inc.
13737 Chandler Road
Omaha, NE 68138

To Brimer/Moore:

Proposition 65 Coordinator
The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

With Copy to:

Lisa G. Salisbury
Salisbury Law Group
A Professional Law Corporation
3720 S. Susan Street, Suite #110
South Coast Metro, CA 92704

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

10. COUNTERPARTS; FACSIMILE SIGNATURES

This Consent Judgment may be executed in counterparts and by facsimile or portable document format (".pdf"), each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document. A facsimile or .pdf signature shall be as valid as the original.

11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

Brimer and Moore agree to comply with the reporting form requirements referenced in California Health & Safety Code § 25249.7(f).

12. POST EXECUTION ACTIVITIES

The Parties further acknowledge that, pursuant to Health & Safety Code § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In furtherance of obtaining such approval, Brimer, Moore and Omaha agree to mutually employ their best efforts, and that of their counsel, to support the entry of this agreement as a Consent Judgment, and to obtain judicial approval of the settlement in a timely manner. For purposes of this Section, "best efforts" shall include, at a minimum, cooperating on the drafting and filing of the necessary moving papers, and supporting the motion for judicial approval.

13. MODIFICATION

This Consent Judgment may be modified only: (1) by written agreement of the Parties and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion of any Party and entry of a modified Consent Judgment by the court.

14. ENTIRE AGREEMENT

This Consent Judgment contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments, and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any Party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties.

15. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment on behalf of their respective parties and have read, understood, and agree to all of the terms and conditions of this Consent Judgment.

AGREED TO:

Date: January 6, 2015

By: _____
Russell Brimer

Date: JANUARY 5, 2014

By: _____
John Moore

AGREED TO:

Date: Jan. 15, 2015

By: _____
Omaha Distributing Co., Inc.