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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

EVELYN WIMBERLEY,

Plaintiff,

v.

THE CHAMBERLAIN GROUP, INC.;
THE HOME DEPOT, INC.;
AND DOES 1 THROUGH 25 INCLUSIVE,
Defendants.

Case No.

Assigned For All Purposes To The
Honorable _____

**CONSENT JUDGMENT AS TO
DEFENDANT THE
CHAMBERLAIN GROUP, INC.**

Complaint Filed: _____, 2014

1. INTRODUCTION

1.1 **The Parties.** This Consent Judgment is entered into by and between plaintiff Evelyn Wimberley acting on behalf of the public interest (hereinafter “Wimberley”), on the one hand, and defendant The Chamberlain Group, Inc. (hereinafter “Chamberlain”), on the other hand, with Wimberley and Chamberlain collectively referred to as the “Parties” and each of them as a “Party.” Wimberley is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Chamberlain 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, Cal. Health & Safety Code §§ 25249.5 et seq. (“Proposition 65”).

1.2 **General Allegations.** Wimberley alleges that Chamberlain has offered for sale in the State of California and has sold in California, the Chamberlain Power Station, which

1 Wimberley alleges contains lead and lead compounds, and that such sales have not been
2 accompanied by Proposition 65 warnings. Lead and lead compounds have been listed under
3 Proposition 65 as chemicals known to the State of California to cause cancer since October 1,
4 1992, and birth defects or other reproductive harm since February 27, 1987.

5 **1.3 Notices of Violation/Complaint.** On or about December 27, 2013, Wimberley
6 served Chamberlain, and various public enforcement agencies, with a document entitled "60-
7 Day Notice of Violation" pursuant to Health & Safety Code § 25249.7(d) (the "Notice"),
8 alleging that Chamberlain was in violation of Proposition 65 for failing to warn consumers and
9 customers in California that the Chamberlain Power Station exposes users in California to lead
10 and lead compounds. No public enforcer diligently prosecuted the claims threatened in the
11 Notice within sixty days plus service time. Therefore, Wimberley initiated this action by filing
12 her complaint on _____, 2014 ("Complaint").

13 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court
14 has jurisdiction over Chamberlain as to the allegations contained in the Complaint, that venue
15 is proper in the County of San Diego, and that this Court has jurisdiction to approve, enter, and
16 enforce this Consent Judgment as a full and final binding resolution of all claims which were
17 or could have been asserted in the Complaint based on the facts or conduct alleged therein
18 and/or in the Notice.

19 **1.5** Wimberley and Chamberlain enter into this Consent Judgment as a full and final
20 settlement of all claims which were or could have been asserted in the Complaint arising out of
21 the facts or conduct alleged therein and/or in the Notice. Chamberlain denies the material
22 allegations contained in the Notice and Complaint and maintains that it has not violated
23 Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by
24 Chamberlain of any fact, finding, issue of law, conclusion of law, or violation of law; nor shall
25 compliance with this Consent Judgment constitute or be construed as an admission by
26 Chamberlain of any fact, finding, conclusion of law, issue of law, or violation of law, such
27 being specifically denied by Chamberlain. However, this section shall not diminish or
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1 otherwise affect the obligations, responsibilities, and duties of Chamberlain under this Consent
2 Judgment. Nothing in this Consent Judgment shall prejudice, waive or impair any right,
3 remedy, argument or defense the Parties may have in any other pending or future legal
4 proceedings. This Consent Judgment is the product of negotiation and compromise and is
5 accepted by the Parties solely for purposes of settling, compromising, and resolving issues
6 disputed in the Complaint. This Consent Judgment shall not be used for any other purpose or
7 in any other manner.

8 **2. DEFINITIONS**

9 2.1 **Complaint.** The term “Complaint” shall have the meaning given in Section 1.3.

10 2.2 **Compliance Deadline.** The term “Compliance Deadline” shall mean sixty (60)
11 days after the Effective Date of this Consent Judgment.

12 2.3 **Covered Product.** The term “Covered Product(s)” shall mean the Chamberlain
13 Power Station, Model # A7008890-MC1.

14 2.4 **Effective Date.** The term “Effective Date” shall mean the date this Consent
15 Judgment is entered as a Judgment of the Court.

16 2.5 **Execution Date.** The term “Execution Date” shall mean the date this Consent
17 Judgment is fully executed by the Parties and their respective counsel.

18 2.6 **Listed Chemicals:** The term “Listed Chemicals” shall mean lead and lead
19 compounds.

20 2.7 **Notice.** The term “Notice” shall have the meaning given in Section 1.3.

21 2.8 **Releasees.** The terms “Defendant Releasees” and “Downstream Defendant
22 Releasees” shall have the meanings given in Section 5.1.

23 **3. INJUNCTIVE RELIEF: REFORMULATE OR PROVIDE WARNINGS**

24 3.1 A Covered Product that is manufactured by or on behalf of Chamberlain and
25 distributed or sold by Chamberlain in California on or after the Compliance Deadline shall
26 either (a) be reformulated pursuant to Section 3.2 below or (b) include a warning as provided
27 in Section 3.3 below. Moreover, the packaging for all such Covered Products manufactured
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on or after the Compliance Deadline shall be date coded in a manner sufficient to allow Wimberley to determine the manufacture date.

3.2 Reformulation Option. Covered Products manufactured by or on behalf of Chamberlain and distributed or sold by Chamberlain in California on or after the Compliance Deadline shall be deemed to comply with Proposition 65 with regard to lead and lead compounds and be exempt from any Proposition 65 warning requirements for lead and lead compounds if the exposed brass that is part of the Covered Product is made of an alloy which contains no intentionally added lead and no lead content by weight of more than 0.03% (300 parts per million, or “300 ppm”). Chamberlain may comply with these reformulation requirements by relying on information obtained from its suppliers regarding the content of the alloy from which the brass is made, provided such reliance is in good faith, or by obtaining test results on a random sampling of shipments of Covered Products for a 6-month period after the Compliance Deadline or until such time that compliance with this Section 3.2 is consistently established showing that the lead content in the exposed brass is no more than 0.03%, using a method of sufficient sensitivity to establish a limit of quantification (as distinguished from detection) of no more than 300 ppm.

3.3 Warning Alternative. Covered Products that do not meet the reformulation requirements set forth in Section 3.2 above shall be accompanied by a warning as described in Section 3.4 below. The warning requirements set forth in Section 3.4 below shall apply only to Covered Products manufactured by or on behalf of Chamberlain and distributed or sold by Chamberlain in California on or after the Compliance Deadline.

3.4 Warnings. Where required under Section 3.3 above, Chamberlain shall provide Proposition 65 warnings as follows:

California Prop. 65 WARNING: This product contains lead, a chemical known to the State of California to cause birth defects or other reproductive harm.

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OR

California Prop. 65 WARNING: This product contains one or more chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

3.5 Where utilized as an alternative to meeting the reformulation requirements set forth in Section 3.2 above, Chamberlain shall provide the warning language set forth in Section 3.4 on the exterior of the unit package of the Covered Products. Such warning shall be prominently affixed to or printed on each Covered Product's unit package. The warning shall be prominently displayed on the Covered Product's unit package with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual prior to sale. Chamberlain may continue to utilize, on an ongoing basis, unit packaging containing substantively the same Proposition 65 warnings as those set forth in Section 3.4 above, but only to the extent such packaging materials have already been printed within ninety days of the Effective Date.

3.6 The requirements for warnings set forth in Section 3.4 above are imposed pursuant to the terms of this Consent Judgment. The Parties recognize that these are not the exclusive methods of providing a warning under Proposition 65 and its implementing regulations and that they may or may not be appropriate in other circumstances.

3.7 If Proposition 65 warnings for lead or lead compounds should no longer be required, either by statutory or regulatory amendments or court order, Chamberlain shall have no further warning obligations pursuant to this Consent Judgment. In the event that Chamberlain ceases to implement or modifies the warnings required under this Consent Judgment, Chamberlain shall provide written notice to Wimberley (through counsel) of its intent to do so, and of the basis for its intent, no less than thirty (30) days in advance.

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4. MONETARY TERMS

4.1 **Civil Penalty.** Chamberlain shall pay a civil penalty of One Thousand Dollars (\$1000.00) pursuant to Health and Safety Code section 25249.7(b), with 75% of these funds to be forwarded by Wimberley to OEHHA, and the remaining 25% of the penalty remitted to Wimberley, as provided by California Health & Safety Code §§ 25249.12(c) and 25249.12(d).

4.2 **Attorney Fees and Costs.** Chamberlain agrees to pay and will not oppose an application made by Wimberley’s counsel for an award of attorney fees, inclusive of all expenses and costs incurred as a result of investigating, bringing this matter to Chamberlain’s attention, litigating, negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure section 1021.5, in an amount of Twenty Six Thousand Dollars (\$26,000.00). Other than the payment required hereunder, each side is to bear its own attorney’s fees and costs (including but not limited to expert and consultant fees, if any).

4.3 Chamberlain shall make the payment required by Section 4.1 within ten (10) days of the Effective Date, and shall make the payment required by Section 4.2 within ten (10) days of the Execution Date. Chamberlain shall wire Wimberley’s counsel \$1000.00, representing the civil penalty payment required by Section 4.1, and \$26,000.00, representing the attorney fee and cost payment required by Section 4.2, based on wire instructions to be provided by Wimberley’s counsel. Wimberley’s counsel shall deposit the \$26,000.00 attorney fee and cost payment required by Section 4.2 in a trust account, shall not use any portion of such payment for any purpose until after the Effective Date, and if the Court does not approve and enter this Consent Judgment within nine (9) months after the Execution Date, shall return such payment to Chamberlain within fifteen (15) days of expiration of that nine-month period.

5. BINDING EFFECT, CLAIMS COVERED AND RELEASED

5.1 This Consent Judgment is a full, final, and binding resolution between Wimberley acting in the public interest, and Chamberlain and its parent companies, officers, directors,

1 shareholders, divisions, subdivisions, subsidiaries, partners, sister companies, affiliates,
2 employees, agents, and their respective successors and assigns (“Defendant Releasees”), and
3 all persons and entities from whom they obtain and/or to whom they directly or indirectly
4 distribute or sell Covered Products, including but not limited to manufacturers, suppliers,
5 distributors, wholesalers, customers, licensors, licensees, retailers, franchisees, cooperative
6 members, and all other entities in the distribution chain down to the consumers of any
7 Covered Products, and their respective successors and assigns (including but not limited to
8 The Home Depot, Inc. (“Home Depot”) and its subsidiaries and affiliates) (collectively
9 referred to as “Downstream Defendant Releasees”), of all claims for alleged violation of
10 Proposition 65 that have been or could have been asserted regarding any alleged exposure to
11 Listed Chemicals in any Covered Products manufactured, distributed or sold by or on behalf
12 of Chamberlain before the Compliance Deadline (hereinafter, the “Released Claims”).
13 Wimberley, acting in the public interest, releases, waives and forever discharges Defendant
14 Releasees and Downstream Defendant Releasees from the Released Claims. Compliance
15 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with
16 regard to the Covered Products.

17 5.2 In addition to the foregoing, Wimberley, on behalf of herself, her past and current
18 agents, representatives, attorneys, and successors and assigns, and *not* in her representative
19 capacity, hereby releases, waives and forever discharges Defendant Releasees and
20 Downstream Defendant Releasees from any and all manner of actions, causes of action,
21 claims, demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities,
22 damages, charges, losses, costs, expenses, and attorney’s fees, of any nature whatsoever,
23 known or unknown, in law or equity, fixed or contingent, now or in the future, with respect to
24 any alleged exposure to Listed Chemicals in any Covered Products manufactured, distributed
25 or sold by or on behalf of Chamberlain before the Compliance Deadline. Wimberley, on
26 behalf of herself, her past and current agents, representatives, attorneys, and successors and
27 assigns, also shall not institute or participate in, directly or indirectly, any form of legal action
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1 against Defendant Releasees or Downstream Defendant Releases with regard to the claims
2 released and waived in this Section 5.2, unless such action is to enforce this Consent
3 Judgment. With respect to the foregoing waivers and releases in this Section 5.2, Wimberley
4 hereby specifically waives any and all rights and benefits which she now has, or in the future
5 may have, conferred by virtue of the provisions of Section 1542 of the California Civil Code,
6 which provides as follows:
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8 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
9 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE
10 TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE
11 MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

12 5.3 Chamberlain hereby releases, waives and forever discharges Wimberley, her
13 attorneys and other representatives from any and all manner of actions, causes of action,
14 claims, demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities,
15 damages, charges, losses, costs, expenses, and attorney's fees, of any nature whatsoever,
16 known or unknown, in law or equity, fixed or contingent, now or in the future, with respect to
17 any and all actions taken or statements made by Wimberley and her attorneys and other
18 representatives in the course of investigating claims or otherwise seeking enforcement of
19 Proposition 65 against it in this matter, and/or with respect to Covered Products.

20 5.4 Within ten (10) days of the Effective Date, Wimberley shall file with the Court a
21 request for dismissal of the Complaint as to Home Depot with prejudice.

22 **6. INTEGRATION**

23 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
24 any and all prior negotiations and understandings related hereto shall be deemed to have been
25 merged within it. No representations or terms of agreement other than those contained herein
26 exist or have been made by any Party with respect to the other Party or the subject matter
27 hereof.
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1 **7. GOVERNING LAW**

2 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
3 California and apply within the State of California. In the event that Proposition 65 is
4 repealed or is otherwise rendered inapplicable by reason of law generally, or as to any
5 Covered Products, then Chamberlain shall provide written notice to Wimberley of any
6 asserted change in the law, and shall have no further obligations pursuant to this Consent
7 Judgment with respect to, and to the extent that, Covered Products are so affected.

8 **8. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f); COURT**
9 **APPROVAL**

10 8.1 Wimberley shall comply with the requirements set forth in California Health &
11 Safety Code §25249.7(f) and promptly bring a Motion for Approval and Entry of this Consent
12 Judgment. Chamberlain shall support approval of such Motion.

13 8.2 This Consent Judgment shall not be effective until it is approved and entered by
14 the Court and shall be null and void if, for any reason, it is not approved and entered by the
15 Court within nine (9) months after the Execution Date. In such case, the Parties agree to meet
16 and confer on how to proceed and if such agreement is not reached within fifteen (15) days of
17 expiration of that nine-month period, this action shall proceed on its normal course.

18 8.3 If the Court approves and enters this Consent Judgment, but such order is reversed
19 or vacated by an appellate court, the Parties shall meet and confer as to whether to modify the
20 terms of this Consent Judgment. If the Parties do not jointly agree on a course of action to
21 take, any monies that have been paid pursuant to Section 4 shall be refunded within fifteen
22 (15) days after remittitur to the trial court, and this action shall proceed on its normal course
23 on the trial court's calendar. Both Parties shall support fully entry of this Consent Judgment
24 and shall waive any right to appeal if entered.

25 **9. RETENTION OF JURISDICTION**

26 9.1 This Court shall retain jurisdiction of this matter to implement, modify and enforce
27 this Consent Judgment.
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10. MODIFICATION; CONSTRUCTION; SEVERABILITY

10.1 This Consent Judgment may be modified only by further stipulation of the Parties and the approval of the Court, or upon the granting of a motion brought to the Court by either Party.

10.2 The terms and conditions of this Consent Judgment have been reviewed by the Parties' respective counsel, and each Party has had the opportunity to fully discuss the terms and conditions with its counsel. In any subsequent interpretation or construction of this Consent Judgment, the terms and conditions shall not be construed against any Party based on any role it or its counsel may have played in drafting this Consent Judgment.

11. ATTORNEY'S FEES

11.1 A party who unsuccessfully brings or contests an action arising out of this Consent Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs, unless the unsuccessful party has acted with substantial justification. For purposes of this Consent Judgment, the term "substantial justification" shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

11.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions pursuant to law with respect to any alleged violation of this Consent Judgment.

11.3 Except as explicitly provided herein, each Party is to bear its own attorney's fees and costs.

12. AUTHORIZATION

12.1 The undersigned are authorized to execute this Consent Judgment on behalf of the Party they represent, and to legally bind that Party to all terms and conditions of this Consent Judgment. The undersigned have read, understood and agree to all of the terms and conditions of this Consent Judgment.

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13. NOTICES

13.1 Unless specified herein, all correspondence and notices required by 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, to the following addresses:

For The Chamberlain Group, Inc.:

Susan Bell, Esq.
The Chamberlain Group, Inc.
845 Larch Avenue
Elmhurst, Illinois 60126

With a copy to:

Thomas M. Donnelly, Esq.
Jones Day
555 California Street, 26th Floor
San Francisco, California 94104

For Wimberley:

Stephen Ure, Esq.
Law Offices of Stephen Ure, PC
11622 El Camino Real, Ste. 100
San Diego, California 92130

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.

14. COUNTERPARTS; FACSIMILE SIGNATURES

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

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APPROVED AS TO FORM:

Date: <u>October 6</u> , 2014	Date: _____, 2014
By: 	By: _____
On Behalf of Evelyn Wimberley Stephen Ure Law Offices of Stephen Ure, PC	On Behalf of The Chamberlain Group, Inc. Thomas M. Donnelly Jones Day

IT IS HEREBY SO STIPULATED:

Date: <u>10/6/14</u>	Date: _____
By:  EVELYN WIMBERLEY	By: _____ THE CHAMBERLAIN GROUP, INC.

IT IS SO ORDERED:

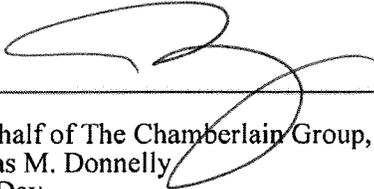
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By: _____
Hon. _____

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APPROVED AS TO FORM:

Date : _____, 2014	Date: <u>Oct. 13</u> , 2014
By: _____	By: 
On Behalf of Evelyn Wimberley Stephen Ure Law Offices of Stephen Ure, PC	On Behalf of The Chamberlain Group, Inc. Thomas M. Donnelly Jones Day

IT IS HEREBY SO STIPULATED:

Date: _____	Date: <u>Oct. 13, 2014</u>
By: _____ EVELYN WIMBERLEY	By:  THE CHAMBERLAIN GROUP, INC.

IT IS SO ORDERED:

Date: _____

By: _____
Hon. _____

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