

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 Russell Brimer and Rooster Products International, Inc.**

This Settlement Agreement (“Settlement Agreement”) is entered into by and between Russell Brimer (“Brimer”) and Rooster Products International, Inc. and any person or entity acting by, for, through, or on behalf of Rooster Products International, Inc. (collectively, “Rooster”). Brimer and Rooster are hereinafter referred to collectively as the “Parties.” Brimer 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. Rooster 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”).

### **1.2 General Allegations**

Brimer alleges that Rooster manufactured, distributed, sold, marketed, offered for sale, (including through the internet and/or any other means), or otherwise placed into the stream of commerce that were ultimately sold in the State of California (collectively, “Sold”), bags containing lead, without first providing a clear and reasonable warning regarding the risk of birth defects or reproductive toxicity as required by Proposition 65. Lead is a chemical known to the State of California to cause birth defects and other reproductive harm.

### **1.3 Product Description**

The products covered by this Settlement Agreement are defined as bags containing lead, including tool bags/holders, combo bags, construction bags, tote bags, and other bags used to carry tools or other objects, Sold by Rooster including, but not limited to (i) AWP 3 Bag Combo with Snap Hook #117620, #IL-1001P (#0 19374 94770 5), and (ii) McGuire-Nicholas 2 Bags with Snap Hook #32001-P (#19734 96770 3) (collectively, the “Products”).

#### **1.4 Notice of Violation**

On September 21, 2011, Brimer served Rooster and various public enforcement agencies with a document titled “60-Day Notice of Violation” (“Notice”) that provided the recipients with notice that Rooster was in violation of California Health & Safety Code § 25249.6 for failing to warn their consumers and customers in California that the Products exposed users in California to lead. No public enforcer has commenced and diligently prosecuted the allegations set forth in the Notice.

#### **1.5 No Admission**

Rooster denies the material, factual, and legal allegations contained in the Notice, and maintains that all of the Products it has Sold in California, including the Products, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Rooster of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute, or be construed as, an admission by Rooster of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Rooster. However, this section shall not diminish or otherwise affect the obligations, responsibilities, and duties of Rooster under this Settlement Agreement.

#### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean December 31, 2012.

### **2. INJUNCTIVE RELIEF: REFORMULATION**

No more than 30 days after the date upon which Rooster executes this Settlement Agreement, Rooster shall provide the reformulation standard as described in Section 2.1 below, to its then-current vendors of Products that will be sold or offered for sale to California consumers and shall instruct each vendor to use reasonable efforts to provide Products that comply with such reformulation standard expeditiously. In addressing the obligation set forth in the preceding

sentence, Rooster shall not employ statements that will encourage a vendor to delay compliance with the reformulation standard. Upon request, Rooster shall provide Plaintiff with copies of such vendor notification and Plaintiff shall regard such copies as confidential business information

### **2.1 Reformulated Products**

As used herein, "Reformulated Products" are Products containing lead in concentrations less than 1.0 micrograms when using a wipe test pursuant to NIOSH Test method 9100, *and* yield less than 90 parts per million ("ppm") of lead when analyzed pursuant to EPA testing methodologies 3050B and 6010B, or equivalent methodologies utilized by federal or state agencies for purpose of determining the lead content in a solid substance.

### **2.2 Reformulation Commitment**

As of the Effective Date, all Products manufactured, imported, distributed, sold, or offered by Rooster for sale in the State of California shall be Reformulated Products, as defined in section 2.1 above.

### **3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

Pursuant to Health & Safety Code § 25249.7(b), and in settlement of all of the claims and violations alleged in the Notice, and referred to in this Settlement Agreement, Rooster has been assessed \$18,000 in civil penalties. As a result of Rooster's commitment to reformulate the Products as provided in section 2 above, however, Rooster had been provided a credit of \$12,000. As such, Rooster shall pay the remaining penalty sum of \$6,000.

The civil penalty shall be apportioned in accordance with California Health & Safety Code §§ 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the State of California Environmental Protection Agency's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% remitted to Brimer. Rooster shall issue two separate checks for the civil penalty payment: (a) one check payable to "The Chanler Group in Trust for the State of California's Office of Environmental Health Hazard Assessment" in the amount of \$4,500, representing 75% of the total penalty; and (b) one check to "The Chanler Group in Trust for Russell

Brimer” in the amount of \$1,500, representing 25% of the total penalty. Two separate 1099 forms shall issued for the above payments: The first 1099 shall be issued to Office of Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486). The second 1099 shall be issued to Brimer, whose address and tax identification number shall be furnished upon request, at least five calendar days before payment is due. The payments shall be sent via overnight express to Brimer’s counsel, within ten (10) days after the full execution of this Settlement Agreement, to the following address:

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

**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. Rooster 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, in fact, 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 (“CCP”) §1021.5, for all work performed through the mutual execution of this Settlement Agreement. Rooster shall pay the total amount of \$22,500.00, for fees and costs incurred as a result of investigating, bringing this matter to Rooster’s attention and negotiating a settlement in the public interest. Rooster shall issue a separate 1099 for fees and costs (EIN: 94-3171522), and shall make the check payable to The Chanler Group, and shall send this payment via overnight express, within ten (10) days after the full execution of this Settlement Agreement, to the following address:

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

**5. CLAIMS COVERED AND RELEASED**

**5.1 Full, Final and Binding Resolution of Proposition 65 Allegations**

This Settlement Agreement is a full, final, and binding resolution between Brimer and Rooster, of any violation of Proposition 65 that was or could have been asserted by Brimer on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assigns against Rooster its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom any of the Products Rooster distributes or sells Products including, but not limited to, downstream distributors, wholesalers, customers, resellers, retailers, franchisees, cooperative members and licensees (collectively, the “Rooster Releases”), based on their failure to warn about alleged exposure to lead contained in the Products that were manufactured, distributed, sold and/or offered for sale by Rooster in California before the Effective Date.

In further consideration of the promises and agreements herein contained, Brimer, on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all Brimer’s rights to institute or participate in, directly or indirectly, any form of legal action; and releases all claims that Brimer might have, including, without limitation, all actions and causes of action in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses, including, but not limited to, investigation fees, expert fees, and attorneys’ fees, but exclusive of fees and costs on appeal – limited to and arising under Proposition 65 with respect to lead in the Products Sold by any of the Rooster Releases before the Effective Date (collectively “Claims”).

**5.2 Rooster’s Release of Brimer**

Rooster, 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.

6. **OBTAINING COURT APPROVAL OF THIS SETTLEMENT AGREEMENT.**

If requested in writing by Rooster, within twelve months of the Effective Date, Brimer shall file a complaint and seek approval of this Settlement Agreement through a court approved consent judgment incorporating the terms of this Settlement Agreement pursuant to California Health and Safety Code § 25249.7, or as may be otherwise allowed by law. If requested, Brimer agrees to reasonably cooperate with Rooster and use his best efforts, along with Brimer's counsel, to enable Rooster to obtain the entry of a consent judgment incorporating the terms of this Settlement Agreement for approval by a superior court in California. Pursuant to Code of Civ. Proc. §§1021 and 1021.5, Rooster will reimburse Brimer and his counsel for their reasonable attorney's fees and costs, in an amount not to exceed \$10,000, exclusive of fees and cost that may be incurred on appeal., for filing the complaint and seeking a court approved consent judgment incorporating the terms of this Settlement Agreement. Rooster acknowledges that where appropriate, counsel for Rooster shall provide Brimer's counsel with drafts of all documents required by the Court to effectuate such court approval. Upon review, Brimer's counsel shall finalize all such drafts and submit to the Court for approval. No fees or costs under this paragraph will be due and owing to Brimer or his counsel unless a written request is made by Rooster to have Brimer file a complaint and seek a consent judgment. Rooster will remit payment to The Chanler Group, at the address set forth in section 4 above, within ten days after its receipt of monthly invoices from Brimer for work performed under this paragraph.

7. **SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are deemed 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 Settlement Agreement 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 if any of the provisions of this Settlement Agreement are rendered inapplicable or no longer require as a result of any such repeal or preemption or rendered inapplicable by reason of law generally as to the Products, then Rooster shall provide written notice to Brimer of any asserted change in the law and shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected. Nothing in this Settlement Agreement shall be interpreted to relieve Defendant from any obligation to comply with any pertinent state or federal toxics control law.

9. **NOTICES**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and: (i) sent by electronic transmission; (ii) personally delivered; (iii) sent by first-class, registered or certified mail, return receipt requested; or (iv) sent by overnight courier, by one party to the other party at the following addresses:

For Defendant:

Kenneth E. Chyten, Esq.  
Law Office of Kenneth E. Chyten  
300 East Esplanade Drive, Suite 900  
Oxnard, California 93036

For Brimer:

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

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 Settlement Agreement may be executed in counterparts, and by facsimile or e-mail, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

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

Brimer agrees to comply with the reporting requirements referenced in Health & Safety Code § 25249.7(f).

**12. MODIFICATION**

This Settlement Agreement may be modified only by a written agreement of the parties.

**13. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement and have read, understood, and agree to all of the terms and conditions contained herein.

AGREED TO:

Date: September 19, 2012

  
\_\_\_\_\_  
Russell Brimer

Date: September 14, 2012

Rooster Products International, Inc.

  
\_\_\_\_\_  
By: JUAN PABLO CABRERA, CEO