

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Parties

This Settlement Agreement is entered into by and between Russell Brimer (“Brimer”), CVS Pharmacy, Inc. (“CVS”) and Navajo Manufacturing Company (“Navajo”), with Brimer, CVS and Navajo collectively referred to 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. Navajo and CVS both employ ten or more persons and are persons 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 Navajo and CVS manufacture, distribute, import, sell, and/or offer for sale in the State of California tools with grips containing di(2-ethylhexyl)phthalate (“DEHP”) and lead without the requisite Proposition 65 health hazard warnings. DEHP and lead, hereinafter referred to collectively as the “Listed Chemicals,” are listed pursuant to Proposition 65 as chemicals known to the State of California to cause birth defects and other reproductive harm.

### 1.3 Product Description

The products that are covered by this Settlement Agreement are defined as tools with grips containing the Listed Chemicals supplied to CVS by Navajo and offered for sale by CVS in California, limited specifically to the *Pennzoil 6” Slip Joint Pliers, No. 14723 (#0 24291 14723 7)* and the *Pennzoil 6-in-1 Interchangeable Screwdriver, No. 14752 (#0 24291 14752 7)*, hereinafter referred to as the “Products.”

### 1.4 Notices of Violation

On or about January 19, 2012, Brimer served Navajo and various public enforcement agencies with a “60-Day Notice of Violation” (“Initial Notice”), alleging that Navajo was in

violation of Proposition 65 for failing to warn its customers and consumers in California that the Products exposed users to the Listed Chemicals.

On or about August 31, 2012, Brimer served Navajo, CVS, CVS Caremark Corporation, and various public enforcement agencies with a “Supplemental 60-Day Notice of Violation” (“Supplemental Notice”), alleging that Navajo and CVS were in violation of Proposition 65 for failing to warn customers and consumers in California that the Products exposed users to the Listed Chemicals. The Initial Notice and the Supplemental Notice are hereinafter referred to collectively 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.

### **1.5 No Admission**

Navajo and CVS deny the material, factual, and legal allegations contained in the Notices and maintain that all of the products manufactured, distributed, imported and/or 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 Navajo or CVS 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 Navajo or CVS of any fact, finding, conclusion of law, issue of law, or violation of law, such being specifically denied by Navajo and CVS. This Section shall not, however, diminish or otherwise affect Navajo or CVS’ obligations, responsibilities, and duties under this Settlement Agreement.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean September 2, 2013.

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

Commencing on the Effective Date and continuing thereafter, Navajo and CVS shall not purchase, manufacture or cause to be manufactured, and/or distribute or cause to be distributed any Product, that will be sold and/or offered for sale to California consumers, unless it is a Reformulated Product. For purposes of this Settlement Agreement, a “Reformulated Product” is

defined as a Product 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; and (3) contain less than or equal to 1,000 ppm (0.1%) DEHP when analyzed pursuant to EPA testing methodologies 3580A and 8270C.

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

In settlement of all the claims referred to in this Settlement Agreement, Navajo and CVS shall collectively pay a total of \$6,500 in civil penalties in accordance with this Section. Each penalty payment will be allocated in accordance with California Health & Safety Code §§ 25249.12(c)(1) & (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, as follows:

**3.1 Initial Civil Penalty**

Navajo and CVS shall collectively pay an initial civil penalty in the amount of \$2,500 on or before the Effective Date. Two separate checks shall be issued: (a) one to “OEHHA” in the amount of \$1,875; and (b) one to “The Chanler Group in Trust for Russell Brimer” in the amount of \$625. All penalty payments shall be delivered to the addresses listed in Section 3.3 below.

**3.2 Final Civil Penalty**

Navajo and CVS shall collectively pay a final civil penalty of \$4,000 on or before September 15, 2013. The final civil penalty shall be waived in its entirety, however, if, no later than September 1, 2013, an officer of Navajo and an officer of CVS provide Brimer with written certification that, as of the date of such certification and continuing into the future, Navajo and CVS have met the reformulation standard specified in Section 2 above, such that all Products purchased, manufactured, , and/or distributed in California by Navajo and CVS 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. Two separate checks shall be issued for the final civil penalty payments: (a) one to “OEHHA” in the amount of \$3,000; and (b) one to “The Chanler Group in Trust for Russell Brimer” in the amount of \$1,000.

### **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 (EIN: 68-0284486), pursuant to Sections 3.1 and 3.2, shall be delivered directly to OEHHA (Memo line “Prop 65 Penalties”) at the following addresses:

For United States Postal Service Delivery:

Mike Gyrics  
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 Gyrics  
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.

**3.3.2 Issuance of 1099 Forms.** After each penalty payment, Navajo and CVS shall issue separate 1099 forms for each payment to Brimer, whose address and tax identification number shall be furnished upon request after this Settlement Agreement has been fully executed by the Parties, and OEHHA at the addresses listed in Section 3.3.1 above.

#### **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. Navajo and CVS shall collectively pay \$26,000 for fees and costs incurred as a result of investigating, bringing this matter to Navajo and CVS' attention, and negotiating a settlement in the public interest. Navajo and CVS shall issue a separate 1099 for fees and costs (EIN: 94-3171522), shall make the check payable to "The Chanler Group" and shall deliver payment on or before the Effective Date, to the address listed in Section 3.3.1 above.

#### **5. RELEASES**

##### **5.1 Brimer's Release of Navajo and CVS**

This Settlement Agreement is a full, final and binding resolution between Brimer, Navajo and CVS, 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 assignees, against Navajo and/or CVS, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom Navajo and/or CVS directly or indirectly distributes or sells Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees ("Releasees"), based on their failure to warn about alleged exposures to the Listed Chemicals contained in any Products that were first manufactured, distributed, sold, and/or offered for sale by Navajo and/or CVS 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 may 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 the Listed Chemicals in the Products manufactured, distributed, sold and/or offered for sale by Navajo and/or CVS before the Effective Date (collectively "claims"), against Navajo, CVS and Releasees.

#### **5.2 Navajo's Release of Brimer**

Navajo on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against Brimer and 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, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

#### **5.3 CVS' Release of Brimer**

CVS on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against Brimer and 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, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

### **6. POST-EXECUTION CONVERSION TO CONSENT JUDGMENT**

Within twelve months of the execution of this Settlement Agreement, Navajo and CVS together may send Brimer a written request to draft and file a complaint, to incorporate the terms

of this Settlement Agreement into a proposed consent judgment that provides a release in the public interest for the released Products, and to seek court approval of the consent judgment pursuant to Health & Safety Code § 25249.7, or as may be otherwise allowed by law. If so requested, the Parties agree to reasonably cooperate, and to use their best efforts and that of their counsel to support the entry of the terms of this Settlement Agreement as a consent judgment by a superior court in California in a timely manner.

If so requested by Navajo and CVS in writing, pursuant to Code of Civil Procedure §§ 1021 and 1021.5, then Navajo and CVS will reimburse Brimer and his counsel for their reasonable fees and costs incurred drafting and filing the complaint, converting this Settlement Agreement into a proposed consent judgment, and seeking judicial approval of the settlement in an amount not to exceed \$16,000, exclusive fees and costs incurred on appeal, if any. Navajo and CVS shall remit payment to The Chanler Group at the payment address provided in Section 3.1 within five business days of receiving a monthly invoice from Brimer's counsel for work performed under this section.

**7. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any provision is 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 Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California.

**9. NOTICES**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be sent by: (i) personal delivery; (ii) first-class, registered or certified mail, return receipt requested; or (iii) overnight courier on any Party by the other Party at the following addresses:

For Navajo:

Gordon Levy, CEO  
Navajo Manufacturing Company  
5330 Fox Street  
Denver, CO 80216

For Brimer:

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

For CVS:

Karen Feisthamel, Corporate Counsel  
CVS Pharmacy, Inc.  
One CVS Drive  
Woonsocket, RI 02895

With copy to:

Thomas H. Kao  
Cadden & Fuller LLP  
114 Pacifica, Suite 450  
Irvine, CA 92618

Any Party may, from time to time, 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 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.

**11. POST-EXECUTION ACTIVITIES**

Brimer agrees to comply with the reporting form requirements referenced in Health & Safety Code § 25249.7, subdivision (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 on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this Settlement Agreement.

**AGREED TO:**

**AGREED TO:**

Date: August 6, 2013

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

By:  \_\_\_\_\_  
Russell Brimer

By: \_\_\_\_\_  
Navajo Manufacturing Company

**AGREED TO:**

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

By: \_\_\_\_\_  
CVS Pharmacy, Inc.

**13. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this Settlement Agreement.

**AGREED TO:**

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

By: \_\_\_\_\_  
Russell Brimer

**AGREED TO:**

Date: July 31, 2013

By:   
Navajo Manufacturing Company

**AGREED TO:**

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

By: \_\_\_\_\_  
CVS Pharmacy, Inc.

13. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this Settlement Agreement.

**AGREED TO:**

**AGREED TO:**

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

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

By: \_\_\_\_\_  
Russell Brimer

By: \_\_\_\_\_  
Navajo Manufacturing Company

**AGREED TO:**

Date: 7/31/2013

By:   
CVS Pharmacy, Inc.