

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Russell Brimer and Ace Hardware Corporation

This Settlement Agreement is entered into by and between Russell Brimer (“Brimer”) and Ace Hardware Corporation (“Ace”), with Brimer and Ace collectively referred to as the “Parties.” Brimer is an individual residing in the State of California who asserts that he seeks to promote awareness of exposure to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Ace 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 Ace has manufactured, distributed, sold and/or offered for sale in California portable utility lamps containing lead with insufficient Proposition 65 health hazard warnings. Lead is listed pursuant to Proposition 65 as a chemical known to cause birth defects and other reproductive harm.

1.3 Product Description

The products that are covered by this Settlement Agreement are defined as portable utility lamps with a metal clamp and rubber protective bumper containing lead including, but not limited to, the *Ace Clamp Lamp 5-1/2” Reflector, #31271 (#0 82901 31271 0)*, manufactured, distributed, sold and/or offered for sale in California by Ace, hereinafter the “Products.”

1.4 Notice of Violation

On or about March 29, 2012, Brimer served Ace and various public enforcement agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that provided the recipients with notice of alleged violations of Proposition 65 by Ace for failing to warn its customers and consumers in California that the portable utility lamps it sold

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

1.5 No Admission

Ace denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products that it has sold and distributed 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 Ace of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Ace of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Ace. However, this section shall not diminish or otherwise affect Ace's obligations, responsibilities, and duties agreed to under this Settlement Agreement.

1.6 Effective Date

For purposes of this Settlement Agreement, the term "Effective Date" shall mean March 1, 2013.

2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS

2.1 Reformulation Commitment

As of the Effective Date, Ace shall only manufacture, cause to be manufactured, or acquire Products for distribution or sale in California that are "Reformulated Products" or that are properly labeled under Proposition 65 as agreed upon in Section 2.2 below. For purposes of this Settlement Agreement, "Reformulated Products" shall mean Products containing components that may be handled, touched, or mouthed by a consumer, and which components yield less than 1.0 microgram of lead when using a wipe test pursuant to NIOSH test method 9100 and yield less than 100 parts per million ("ppm") lead when analyzed pursuant to EPA testing methodologies 3050B and 6010B, or equivalent methodologies utilized by federal or state agencies for the purpose of determining lead content in a solid substance.

2.2 Product Warnings

Ace currently uses the following warning language on the Product packaging for all of its Products sold in the State of California:

WARNING: The power cord on this product contains lead, a chemical known to the State of California to cause birth defects or other reproductive harm. **Wash hands after handling.**

Due to specific Proposition 65 warning language requirements for the Products contained in a prior Consent Judgment entered into by Ace in *Mateel Environmental Justice Foundation v. Sprint Communications, et al.* (Superior Court of San Francisco, Case No. 312962), the Parties agree that in the event that Ace continues to manufacture, cause to be manufactured, or acquire for distribution or sale in California Products that are not Reformulated Products after the Effective Date, all such Products manufactured, caused to be manufactured, or acquired for distribution or sale in California after the Effective Date must provide clear and reasonable warnings as set forth below:

WARNING: This product including the electrical cord contains chemicals, including lead, known to the State of California to cause cancer and birth defects or other reproductive harm; **Wash hands after handling.**

Additionally, the Parties agree that the location of the warning shall be moved from the current placement on the interior fold of the product packaging to the exterior of the product packaging such that the warning will be likely to be read and understood by an ordinary individual under customary conditions before purchase or use. Furthermore, Ace shall not sell Products via the internet to customers located in California, after the Effective Date, that are not Reformulated Products.

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

3.1 Initial Civil Penalty

Ace shall pay an initial civil penalty of \$2,000, to be apportioned in accordance with California Health & Safety Code §§ 25249.12(c) & (d), with 75% of these funds remitted to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Brimer. Ace shall issue two separate checks for the penalty payment: (a) one check made payable to "The Chanler Group in Trust for OEHHA" in the amount of \$1,500, representing 75% of the initial civil penalty; and (b) one check made payable to "The Chanler Group in Trust for Russell Brimer" in the amount of \$500, representing 25% of the initial civil penalty. Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486); and (b) Russell 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 delivered on or before the Effective Date, to the following address:

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

3.2 Final Civil Penalty

Ace shall pay a final civil penalty in the amount of \$4,000 on April 15, 2013. As incentive for Ace to reformulate the Products, however, this final civil penalty shall be waived in its entirety if an officer of Ace certifies in writing that it, as of April 1, 2013, will sell, ship and/or offer for sale in California only Reformulated Products. Such certification must be received by The Chanler Group on or before April 15, 2013. The final civil penalty payment shall be apportioned in accordance with California Health & Safety Code §§ 25249.12(c) & (d), with 75% of these funds remitted to OEHHA and the

remaining 25% of the penalty remitted to Russell Brimer. Ace shall issue two separate checks for the final civil penalty payment: (a) one check made payable to “The Chanler Group in Trust For OEHHA” in the amount of \$3,000 representing 75% of the total final penalty; and (b) one check made payable to “The Chanler Group in Trust for Russell Brimer” in the amount of \$1,000, representing 25% of the total final penalty. Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Russell Brimer, whose information shall be provided five calendar days before the payment is due (if different than the information already provided to Ace under Section 3.1 above).

Payment shall be delivered to Brimer’s counsel at 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. Ace 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 the private attorney general doctrine and principles of contract law. Under these legal principles, Ace shall reimburse Brimer’s counsel for fees and costs incurred as a result of investigating, bringing this matter to Ace’s attention, and negotiating a settlement in the public interest. Ace shall pay Brimer’s counsel \$31,000 for all attorneys’ fees, expert and investigation fees, and related costs. The payment shall be issued in a third check made payable to “The Chanler Group” and shall be delivered on or before the Effective Date to the following address:

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

Ace shall issue a separate 1099 for attorneys' fees and costs paid to The Chanler Group (EIN: 94-3171522).

5. CLAIMS COVERED AND RELEASED

5.1 Brimer's Release of Ace

This Settlement Agreement is a full, final and binding resolution between Brimer and Ace, 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 Ace, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom Ace 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 lead contained in the Products that were manufactured, distributed, sold and/or offered for sale by Ace 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 of his rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims that he 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 lead in the Products manufactured, distributed, sold and/or offered for sale by Ace before the Effective Date (collectively "Claims"), against Ace and Releasees.

5.2 Brimer's Individual Release of Claims Against Ace

Brimer also provides 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 of any nature, character or kind, whether known or unknown, suspected or unsuspected, against Ace and Releasees, limited to and arising out of alleged or actual exposures to lead in the Products manufactured, distributed, sold and/or offered for sale by Ace.

Brimer acknowledges that he is familiar with Section 1542 of the California Civil Code, which provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

Brimer expressly waives and relinquishes any and all rights and benefits which he may have under, or which may be conferred on him by the provisions of California Civil Code Section 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that he may lawfully waive such rights or benefits pertaining to alleged exposures to lead from the Products sold by Ace in California prior to the Effective Date.

5.3 Ace's Release of Brimer

Ace 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.

Ace also provides a general 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 Ace of any nature, character or kind, known or unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to lead pursuant to Proposition 65 in the Products manufactured, distributed, sold and/or offered for sale by Releases. Ace acknowledges that it is familiar with Section 1542 of the California Civil Code which provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

Ace expressly waives and relinquishes any and all rights and benefits which it may have under, or which may be conferred on it by, the provisions of Section 1542 of the California Civil Code as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that Ace may lawfully waive such rights or benefits pertaining to 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 ACTIVITIES

Within twelve months of the execution of this Settlement Agreement, Ace 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, Brimer and Ace 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 Ace in writing, pursuant to Code of Civil Procedure §§ 1021 and 1021.5, then Ace 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. Ace shall remit payment to The Chanler Group at the payment address provided in section 9 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 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 as to the Products, then Ace may 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.

9. NOTICES

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

To Ace:

Ray Griffith, President
Ace Hardware Corporation
2200 Kensington Court
Oak Brook, IL 60523

To Brimer:

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

With copy to:

Lee N. Smith
Weintraub Tobin Chediak Coleman Grodin
400 Capitol Mall, 11th Floor
Sacramento, CA 95814

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 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. A facsimile or .pdf signature shall be as valid as the original.

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

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

12. MODIFICATION

This Settlement Agreement may be modified only by 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:

Date: January 24, 2013

By: 

Russell Brimer

AGREED TO:

Date: Feb 26 2013

By: 

Ace Hardware Corporation