

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 Russell Brimer and Sculpture House, Inc.**

This Settlement Agreement is entered into by and between Russell Brimer (“Brimer”) and Sculpture House, Inc. (“Sculpture House”), with Brimer and Sculpture House collectively referred to as the “parties.” Brimer is an individual residing in the State of California who seeks to promote awareness of exposure to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer and commercial products. Brimer alleges that Sculpture House 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 Sculpture House has manufactured, imported, distributed, sold, and/or offered for sale in the State of California, vinyl/PVC art supply pouches containing di (2-ethylhexyl) phthalate (“DEHP”), without the requisite Proposition 65 health hazard warnings. DEHP is 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 vinyl/PVC art supply pouches including, but not limited to, *Sculpture House Studio Clay Modeling Kit, K17 (#8 12124 00206 4)*, manufactured, imported, distributed, shipped, sold and/or offered for sale or shipment by Sculpture House in the State of California, hereinafter “Products.”

### **1.4 Notice of Violation**

On December 20, 2012, Brimer served Sculpture House 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 California Health & Safety Code §25249.6 for failing to warn consumers and customers that the Products exposed users in California to DEHP. The Notice only applied to the *Sculpture House Studio Clay Modeling Kit, K17 (#8 12124 00206 4)* and, not to other products. 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**

Sculpture House denies the material, factual and legal allegations contained in Brimer's Notice and maintains that all products that it has sold, manufactured, imported, distributed, and/or offered for sale 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 Sculpture House of any fact, finding, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Sculpture House of any fact, finding, conclusion, issue of law, or violation of law. However, this section shall not diminish or otherwise affect Sculpture House's obligations, responsibilities, and duties under this Settlement Agreement.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean April 24, 2013.

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

### **2.1 Reformulated Products**

Commencing on the Effective Date and continuing thereafter, Sculpture House agrees that the Products it manufactures, imports, distributes, ships, sells or offers to ship for sale in California, will be "Reformulated Products." For purposes of this Settlement, Reformulated Products comply with the following content limits: DEHP in concentration less than 1,000 parts per million ("ppm") DEHP by weight in any Accessible Component (i.e. any component that may be touched or handled during a reasonably foreseeable use)

when analyzed pursuant to EPA testing methodologies 3580A and 8270C, or equivalent methodologies utilized by state or federal agencies for the purpose of determining DEHP content in a solid substance.

**2.2 Sales of Existing Products with Warnings**

Nothing in this Settlement Agreement shall preclude Sculpture House from shipping and selling in California its existing inventory of Products. Commencing on April 24, 2013, Sculpture House agrees that any Products that Sculpture House manufactured prior to April 24, 2013, and which Sculpture House directly distributes to, imports to, ships to, sells in, or offers for sale in California that are not Reformulated Products as defined in Section 2.1 will include a warning affixed to the packaging, labeling, or directly on each Product that states:

**WARNING:** This product contains a chemical known to the State of California to cause cancer, birth defects and other reproductive harm.

**3. PAYMENT OF PENALTIES**

**3.1 Initial Civil Penalty**

In settlement of all the claims referred to in this Settlement Agreement, Sculpture House shall pay an initial civil penalty in the amount of \$3,000.00 no later than May 3, 2013. The civil penalty shall 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 Russell Brimer. Sculpture House shall issue two separate checks for the penalty payment: (a) one check made payable to OEHHA in the amount of \$2,250.00, representing 75% of the total penalty; and (b) one check to "The Chanler Group in Trust for Russell Brimer" in the amount of \$750.00, representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments. The checks and 1099s shall be delivered to the addresses listed in Section 3.3 below.

### **3.2 Final Civil Penalty**

Pursuant to Health & Safety Code § 25249.7(b), on August 1, 2013, Sculpture House shall pay a final civil penalty in the amount of \$10,000.00. The final civil penalty shall be waived in its entirety, if, on or before July 20, 2013, an officer of Sculpture House certifies to Brimer's counsel, in writing, that all Products sold or offered for sale by Sculpture House in California after April 24, 2013, are Reformulated Products, and that Sculpture House will continue to do so after the date of certification. Sculpture House shall also provide certification, on or before July 20, 2013, that its inventory that existed prior to April 24, 2013, that is sold in California shall be affixed with the warnings identified in Section 2.2.

Unless waived, the final civil penalty shall be allocated according to Health & Safety Code § 25249.7(c)(1) and (d), with seventy-five percent of the penalty payment earmarked for OEHHA, and the remaining twenty-five percent of the penalty earmarked for Brimer. Sculpture House shall issue two separate checks for the final penalty payment: (a) one check made payable to OEHHA in the amount of \$7,500.00, representing 75% of the total penalty; and (b) one check to "The Chanler Group in Trust for Russell Brimer" in the amount of \$2,250.00, representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments. The checks and 1099s shall be delivered to the addresses listed in Section 3.3 below.

### **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 through 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 through 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, Sculpture House 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 ATTORNEY’S 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 issue to be resolved after the material terms of the agreement had

been settled. Sculpture House 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 (“CCP”) § 1021.5, for all work performed through the mutual execution of this agreement. Sculpture House shall reimburse Brimer and his counsel \$29,000.00 for fees and costs incurred as a result of investigating, bringing this matter to its attention, and negotiating a settlement. Sculpture House 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 May 3, 2013, to the following address:

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

## **5. RELEASES**

### **5.1 Brimer's Release of Sculpture House**

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

## **5.2 Sculpture House's Release of Brimer**

Sculpture House 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, Sculpture House may ask Brimer, in writing, to file a complaint, incorporate the terms of this Settlement Agreement into a consent judgment, and seek the court's approval of the consent judgment pursuant to Health and Safety Code § 25249.7, or as may otherwise be allowed by law. If so requested, Brimer agrees to reasonably cooperate with Sculpture House, and the Parties and their respective counsel agree to mutually employ their best efforts to support the entry of a consent judgment by a superior court in California. Pursuant to Code of Civil Procedure sections 1021 and 1021.5, Sculpture House will reimburse Brimer and his counsel for their reasonable fees and costs incurred in filing the

complaint, converting the Settlement Agreement into a proposed consent judgment and seeking judicial approval of the consent judgment, in an amount not to exceed \$15,000, exclusive of fees and costs that may be incurred on appeal. Sculpture House will remit payment to The Chanler Group, at the address set forth in Section 4 above. Such additional fees shall be paid by Sculpture House within ten (10) 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, preempted 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 Sculpture House 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 Sculpture House from an obligation to comply with any pertinent state or federal toxic control laws.

**9. ENTIRE AGREEMENT**

This Settlement Agreement 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.

**10. NOTICES**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement 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 Sculpture House:

Brian M. Ledger, Esq.  
Gordon & Rees, LLP  
101 W. Broadway, Ste. 1600  
San Diego, CA 92101-8217

To 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.

**11. 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.

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

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

**13. MODIFICATION**

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

**14. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement and have

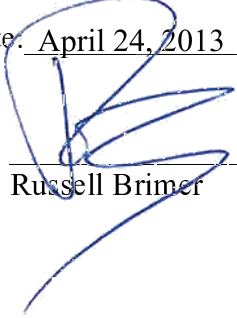
read, understood and agree to all of the terms and conditions contained herein.

AGREED TO:

AGREED TO:

Date: April 24, 2013

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

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

By: \_\_\_\_\_  
Bruner Barrie, President  
Sculpture House, Inc.

**14. 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:

AGREED TO:

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

Date: April 24, 2013

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

By:   
Bruner Barrie, President  
Sculpture House, Inc.