

## SETTLEMENT AGREEMENT

### **1. INTRODUCTION**

#### **1.1 Parties**

This Settlement Agreement is entered into by and between Russell Brimer (“**Brimer**”) and KC HiLiTES, Inc. (“**KCH**”) with Brimer and KC HiLiTES each individually referred to as a “**Party**” and collectively as the “**Parties.**” Brimer represents that he is an individual residing in the State of California who seeks to promote awareness of exposures to toxic chemicals, and to improve human health by reducing or eliminating hazardous substances used in consumer products. KCH 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 KCH manufactures, sells, and/or distributes for sale in California vinyl/PVC light covers containing di(2-ethylhexyl)phthalate (“**DEHP**”). DEHP is listed pursuant to Proposition 65 as a chemical known to cause birth defects or other reproductive harm. Brimer alleges that KCH failed to provide the health hazard warning required by Proposition 65 for exposures to DEHP from the vinyl/PVC light covers sold in California.

#### **1.3 Product Description**

The products that are covered by this Settlement Agreement are vinyl/PVC light covers, including, but not limited to the *KC HiLiTES Two 6” Round Vinyl Light Covers Red on Black, Part# 5110, UPC #0 84709 05110 5*, as well as 5”, 6” and 8” vinyl/PVC light covers in black and yellow background colors with a logo that is either white, black or red and that have SKU#s: 5100, 5101, 5117, 5119, 5205, 5400, 5800, 5801, and 5819, sold and/or distributed for sale in California by KCH (the “**Products**”).

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

On April 30, 2014, Brimer served KCH and certain requisite public enforcement agencies with a “60-Day Notice of Violation” (“**Notice**”) alleging that KCH violated Proposition 65 when it failed to warn their customers and consumers in California that the Products expose users to DEHP. 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**

KCH 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 KCH 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 KCH of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by KCH. This Section shall not, however, diminish or otherwise affect KCH’s obligations, responsibilities, and duties under this Settlement Agreement.

KCH alleges that any Products, as defined below, that were sold or distributed in California containing DEHP were done so without the knowledge or understanding of KCH, and that only one batch of Products potentially contained DEHP as a result of a manufacturing error by a supplier to KCH, and that shortly after receipt of the Notice that KCH promptly placed a sufficient Proposition 65 warning on any Products that were sold or distributed to California.

#### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean June 11, 2015.

## **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS**

### **2.1 Reformulation Standards**

“Reformulated Products” are defined as those Products containing DEHP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other methodology utilized by federal or state government agencies for the purpose of determining DEHP content in a solid substance.

### **2.2 Reformulation Commitment**

As of the Effective Date all Products imported, distributed, sold and/or offered for sale in the State of California by KCH shall be Products that qualify as Reformulated Products as defined in Section 2.1, or that contain health hazard warnings pursuant to Section 2.3, below.

### **2.3 Product Warnings**

Commencing on or before the Effective Date, KCH shall provide clear and reasonable warnings as set forth in subsections 2.3(a) for all Products that do not qualify as Reformulated Products. Each warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions *before* purchase or use. Each warning shall be provided in a manner such that the consumer or user understands to which *specific* Product the warning applies, so as to minimize the risk of consumer confusion.

#### **(a) Retail Store Sales.**

**(i) Product Labeling.** KCH shall affix a warning to the packaging, labeling, or directly on each Product provided for sale in retail outlets in California that states:

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



(ii) **Point-of-Sale Warnings.** Alternatively, KCH may provide warning signs in the form below to its customers in California with instructions to post the warnings in close proximity to the point of display of the Products. Such instruction sent to KCH's customers shall be sent by certified mail, return receipt requested.

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

Where more than one Product is sold in proximity to other like items or to those that do not require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement shall be used:<sup>1</sup>

WARNING: The following products contain DEHP, a Chemical, known to the State of California to cause birth defects and other reproductive harm:  
*[list products for which warning is required]*

### 3. **MONETARY SETTLEMENT TERMS**

#### 3.1 **Civil Penalty Payments**

Pursuant to Health and Safety Code Section 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this settlement KCH agrees to pay \$10,500 in civil penalties. Each penalty payment will be allocated in accordance with California Health and Safety Code section 25249.12(c)(1) & (d), with 25% of the penalty amount paid to Brimer, and 75% of the penalty amount remitted to the California Office of Environmental Health Hazard Assessment (“**OEHHA**”) by Brimer.

**3.1.1 Initial Civil Penalty.** Within five days of the Effective Date, KCH shall pay an initial civil penalty of \$3,500. KCH will provide its payment to “Russell Brimer, Client Trust Account” in the amount of \$3,500.

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<sup>1</sup>For purposes of the Settlement Agreement, “sold in proximity” shall mean that the Product and another similar product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

**3.1.2 Final Civil Penalty.** On December 30, 2015, KCH shall pay a final civil penalty of \$7,000. The final civil penalty shall be waived in its entirety if, no later than December 15, 2015, an officer of KCH provides Brimer's counsel with written certification that, as of the date of its certification, all of the Products it manufactures, imports, distributes, sells, and offers for sale in California are Reformulated Products as defined by Section 2, and that it will continue to only offer Reformulated Products in the future. The option to provide a written certification of reformulation in lieu of making the final civil penalty payment otherwise required by this Agreement is a material term, and time is of the essence. In the event that KCH does not provide certification pursuant to this Section 3.1.2, KCH shall issue a check for its final civil penalty payments to: "Russell Brimer, Client Trust Account" in the amount of \$7,000.

**3.2 Reimbursement of Brimer's Attorneys' 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, and instead leaving this fee reimbursement issue to be resolved after the material terms of the agreement had been settled. Shortly after the other settlement terms had been finalized, KCH expressed a desire to resolve the fee and cost issue. 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 section 1021.5 for all work performed through the mutual execution of this agreement. KCH shall pay \$16,250 for fees and costs incurred as a result of investigating, bringing this matter to KCH's attention, negotiating a settlement in the public interest. KCH shall make the check payable to "The Chanler Group" and shall deliver payment within seven (7) business days of the Effective Date, to the address listed in Section 3.3.1(a) below. No other amounts are due to Brimer or his counsel of any kind from KCH for any reason whatsoever in connection with this settlement or the Products.

### **3.3 Payment Procedures**

#### **3.3.1 Payment Addresses.** Payments shall be delivered as follows:

(a) All payments required for Brimer and his counsel under this Settlement Agreement shall be delivered to:

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

## **4. CLAIMS COVERED AND RELEASED**

### **4.1 Brimer's Release of KCH**

This Settlement Agreement is a full, final, and binding resolution between Brimer, and all those acting on his behalf and in concert with him, including, but not limited to, any employees, agents or attorneys, on the one hand (collectively the “**Brimer Releasers**”), and on the other hand, KCH and KCH’s parents, shareholders, divisions, subdivisions, subsidiaries, affiliated entities under common or joint ownership, directors, officers, employees, attorneys, agents, insurers, and their successors and assigns (collectively the “**KCH Releasees**”), and all to whom they directly or indirectly distribute or sell Products including, but not limited to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors and licensees (collectively the “**Downstream Releasees**”), of any violation of Proposition 65 or any other statutory or common law claims that have been or could have been asserted against KCH, as well as any other KCH Releasee and/or Downstream Releasee, based on any failure to warn of or about any exposure to DEHP from the Products prior to the Effective Date, as set forth in the Notice (collectively the “**Brimer Claims**”). Each Brimer Releaser expressly releases, waives and forever discharges KCH, the KCH Releasees and the Downstream Releasees with respect to all of the Brimer Claims. This release is



provided in Brimer's individual capacity and on behalf of each Brimer Releasor and is not a release on behalf of the public.

In further consideration of the promises and payments in this Agreement, Brimer on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees and each and every Brimer Releasor waives any right to institute or participate in, directly or indirectly, any form of legal action or demand arising under Proposition 65 or any law or legal theory whatsoever, including but not limited to Business & Professions Code Section 17200, respect to the failure to warn about exposures to DEHP from Products sold or distributed for sale by KC HiLiTES before the Effective Date, as set forth in the Notice. The releases provided by Brimer under this Settlement Agreement are provided solely on Brimer's behalf and are not releases on behalf of the public.

Brimer represents and warrants that, on behalf of himself, the Brimer Releasors, and his counsel, as of the date of his execution of this Settlement Agreement, other than the violations alleged in the Notice as to the Products and described in this Settlement Agreement, he: (a) has no current knowledge or information based upon any investigation or otherwise that KCH is currently manufacturing, distributing, shipping, selling or offering for sale in California any product(s) that Brimer believes is causing a violation of Proposition 65; and (b) that he has no present intention of filing suit or providing a 60-Day Notice to KCH with respect to any other listed chemical under Proposition 65 with respect to any products manufactured, distributed or sold by KCH, including but not limited to the Products.

#### **4.2 KCH's Release of Brimer**

KCH on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees (the "**KCH Releasors**"), waives any and all claims against Brimer and his attorneys and other representatives (the "**Brimer Releasees**"), for any and all actions taken or statements made by Brimer and his attorneys as well as his other

representatives, in the course of investigating the Brimer Claims and/or otherwise seeking to enforce Proposition 65 against KCH in this matter with respect to the Products.

**5. 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.

**6. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the laws of the State of California without regard to its choice of law provisions. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then KCH may provide written notice to Brimer of any asserted change in the law, and it shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

**7. NOTICE**

All correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (a) personal delivery; (b) first-class, registered or certified mail, return receipt requested; or (c) a recognized overnight delivery service on any Party by the other at the following addresses:

For K C HiLiTES, Inc.:

Michael DeHaas, President  
K C HiLiTES, Inc.  
2843 West Avenida De Lucas  
Williams, AZ 86406

For Brimer:

The Chanler Group  
Attn: Prop 65 Coordinator  
2560 Ninth St.  
Parker Plaza, Suite 214  
Berkeley, CA 94710-2565

with a copy to:

Thomas N. FitzGibbon, Esq.  
Pfeiffer, FitzGibbon & Ziontz, LLP  
233 Wilshire Boulevard, Suite 220  
Santa Monica, CA 90401



Any Party may, from time to time, specify in writing to the other a change of address to which all notices and other communications shall be sent.

**8. COUNTERPARTS; FACSIMILE SIGNATURES**

This Settlement Agreement may be executed in counterparts, each of which shall be deemed an original, and each of which shall constitute together one and the same instrument. The counterparts will be binding on each of the Parties, even though the various Parties may have executed separate counterparts. The counterparts may be transmitted to the other Party via facsimile or via electronic mail transfer of an attachment containing an electronic scanned image in PDF format, if such counterpart is sent to all other Parties to this Agreement or their respective counsel. In the event facsimile or electronic counterparts or signatures are used, they shall have the same force and effect as an original signature, as provided in the California Evidence Code.

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

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

**10. MODIFICATION & AMENDMENT**

No supplement, modification or amendment of any term, provision or condition of this Agreement (including this Paragraph) shall be binding or enforceable unless evidenced in a writing executed by all of the Parties to this Agreement.

**11. COSTS AND ATTORNEYS' FEES**

Other than as set forth in Paragraph 3.2 of this Agreement, the Parties waive any right to seek or collect any attorneys' fees or costs from any other Party in connection with the Notice, the settlement and/or this Agreement and each Party shall bear its own costs and attorneys' fees in connection with the negotiation and drafting of this Agreement. In the event that any Party breaches this Agreement, the non-breaching Party

shall be entitled to all reasonable attorneys fees and costs incurred to enforce this Agreement.

**12. ENTIRE AGREEMENT AND WAIVER**

This Agreement contains the entire agreement between its Parties and supersedes all prior and contemporaneous agreements, arrangements, negotiations and understandings between such Parties, relating to the subject matter of this Agreement. There are no other agreements, understandings, statements, promises or inducements, oral or otherwise, contrary to the terms of this Agreement between the Parties. No representations, warranties, covenants or conditions, express or implied, whether by statute or otherwise, other than as set forth in this Agreement, have been made by any Party to this Agreement. No waiver of any term, provision, or condition of this Agreement, whether written or otherwise, in any one or more instances, shall be deemed to be, or shall constitute, a waiver of any other provision of this Agreement, whether or not similar, nor shall such waiver constitute a continuing waiver, and no waiver shall be binding unless executed in writing by the Party making the waiver.

**13. REPRESENTATION BY COUNSEL**

Each Party is represented by counsel of its choice with regard to the negotiation of this Agreement and the settlement of the Brimer Claims and all matters alleged to be violations of Proposition 65 by Brimer on the part of any KCH Releasee or any Downstream Releasee. Each Party is entering into this Agreement deliberately, advisedly, and of its own free will and volition and without pressure or duress of any kind, including with respect to timing or the ability to read or negotiate this Agreement, which is completely negotiable. The Parties confirm that each Party and its counsel have reviewed this Agreement and that any rule of construction to the effect that ambiguities are to be resolved against the drafting Party shall not apply in the interpretation of this Agreement. In this Agreement the neuter gender includes the feminine and masculine and the singular

includes the plural (and vice versa), and the words "person" and "Party" include corporation, partnership, firm, trust or association wherever the context so requires.

**14. 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: June 16, 2015

By:   
Russell Brimer

**AGREED TO:**

Date: June 11, 2015

By:   
Michael DeHaas, President  
KC HiLiTES, Inc.