

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Evelyn Wimberley and Fountainhead

This Settlement Agreement is entered into by and between Evelyn Wimberley (hereinafter “Wimberley”), on the one hand, and Fountainhead Group, Inc. (hereinafter collectively “Fountainhead ”), with Wimberley and Fountainhead collectively referred to as the “Parties.” Wimberley 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. Wimberley contends that Fountainhead Group, Inc. is a company in the course of doing business for purposes of Proposition 65.

### 1.2 General Allegations

Wimberley alleges that Fountainhead distributed and/or sold in the State of California Black Flag Propane Fogger (UPC34457900958), among others, that when used as directed, produces and exposes users to carbon monoxide and other chemicals. Wimberly alleges that such sales have not included warnings pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 *et seq.* (“Proposition 65”). Carbon monoxide, carbon black and soot are listed under Proposition 65 as chemicals known to the State of California to cause cancer and reproductive harm.

### 1.3 Product Description

The products that are covered by this Settlement Agreement are defined as Black Flag Propane Powered Fogger (UPC034457900958), Burgess Propane Powered Insect Fogger (UPC34457830095), Repel Propane Powered Insect Fogger (UPC841688003354), and Cutter

Propane Powered Insect Fogger (UPC841688003330). All such items shall be referred to herein as the “Product.”

**1.4 Notice of Violation**

On or about November 18, 2014 Wimberley served Fountainhead, and all public enforcement agencies eligible to initiate Proposition 65 actions on behalf of the People of the State of California with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided Fountainhead and such public enforcers with notice that Fountainhead was allegedly in violation of California Health & Safety Code § 25249.6 for failing to warn consumers and customers that the Product exposed users in California to carbon monoxide, carbon black and soot, (hereinafter “Chemicals”). No public enforcer has diligently prosecuted the allegations set forth in the Notice.

**1.5 No Admission**

Fountainhead denies the material factual and legal allegations contained in Wimberley’s Notice. Fountainhead does not believe it knowingly and intentionally violated any requirements of Prop 65. Fountainhead further believes that all products that it has sold and distributed in California, including the Product, have been and are in compliance with Proposition 65 and all other applicable laws. Nothing in this Settlement Agreement shall be construed as an admission by Fountainhead 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 Fountainhead of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Fountainhead.

## **1.6 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean the date this Settlement Agreement is fully executed by all Parties but such date shall not be later than February 19, 2015. If not executed by such date then this agreement shall be null and void.

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

**2.1 Cease Sales of Products Option.** Fountainhead can comply with the terms of this settlement by ceasing all sales, direct or indirect, of the Product in California within thirty (30) days of the Effective Date, or by providing the warnings in Section 2.2 below.

**2.2 Warning Alternative.** Products shall be accompanied by a warning as described below. The warning requirements set forth below shall apply only to Products that Fountainhead offers for sale thirty (30) days after the Effective Date that are distributed, marketed, sold or shipped for sale or use inside the State of California. The warning requirement shall not apply to Products that are already in the stream of commerce as of the Effective Date. Fountainhead shall provide Proposition 65 warnings by affixing a warning to the Product packaging, or by providing the warning as part of the posted Product information associated with on-line sales. Such on-line warning shall be accessible prior to final checkout.

- (a) Fountainhead’s warning shall include the following warning statement:
  - (1) **WARNING:** This product contains and/or produces chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.
- (b) The requirements for warnings, set forth in subsection (a) above are imposed pursuant to the terms of this Settlement Agreement. The Parties recognize that these are not the exclusive methods of providing a warning under Proposition 65 and its implementing regulations.

(c) If Proposition 65 warnings for the Chemicals should no longer be required, Fountainhead shall have no further obligations pursuant to this Settlement Agreement.

**3. MONETARY PAYMENTS**

In settlement of all claims referred to in this Settlement Agreement, the total monetary settlement payments to be paid by Fountainhead are set forth in section 3 and 4, which shall subsequently and within a commercially reasonable time be distributed by Law Offices of Stephen Ure, PC as specified herein.

**4. REIMBURSEMENT OF FEES AND COSTS**

The Parties reached an accord on the compensation due to Wimberley and her counsel under the private attorney general doctrine and principles of contract law. Under these legal principles, Fountainhead shall reimburse Wimberley's counsel for fees and costs, incurred as a result of investigating, bringing this matter to Fountainhead's attention, and negotiating a settlement in the public interest. Fountainhead shall pay Wimberley's counsel \$27,500.00 for all attorneys' fees, expert and investigation fees, and related costs associated with this matter and the Notice. Fountainhead shall make payment of \$27,500.00 by electronic wire transfer to the account of "Law Offices of Stephen Ure, PC" at Union Bank, N.A. Los Angeles, 4660 La Jolla Village Dr., Ste.175, San Diego, CA 92122 no later than February 20, 2015. The Law Offices of Stephen Ure, PC have provided and Fountainhead has confirmed receipt of bank wire instructions. Other than the payment required hereunder, each side shall bear its own attorneys fees and costs.

**5. RELEASE OF ALL CLAIMS**

**5.1 Release of Fountainhead and Downstream Customers**

In consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4 above, Wimberley, on behalf of herself, her past and current agents, representatives, attorneys, successors and/or assignees, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims, 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) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against Fountainhead and each of its downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers, franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and parent entities (collectively "Releasees"), as of the Effective Date of this Settlement Agreement. This release is limited to those claims that arise under Proposition 65, as such claims relate to Fountainhead's or the Releasees' alleged failure to warn about exposures to the Chemicals produced by the Product.

Wimberley also, in her individual capacity, on behalf of herself, her past and current agents, representatives, attorneys, successors, and/or assignees and *not* in her representative capacity, 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 any nature, character or kind, known or unknown, suspected or unsuspected, against Fountainhead and the Releasees arising under

Proposition 65, as such claims relate to Fountainhead and the Releasees' alleged failure to warn under Proposition 65 about exposures to or identification the Chemicals produced by the Products sold by Fountainhead and the Releasees. Wimberley acknowledges that she is familiar with Section 1542 of the 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.

Plaintiff, in her individual capacity only and *not* in her representative capacity, and on behalf of herself, her past and current agents, representatives, attorneys, successors, and/or assignees expressly waives and relinquishes any and all rights and benefits which she may have under, or which may be conferred on her by the provisions of Civil Code § 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 the released matters.

Compliance with the terms of this Settlement Agreement resolves any issue, now and in the future, concerning compliance by Fountainhead and Fountainhead's Releasees with the requirements of Proposition 65 with respect to alleged exposure to the Chemicals produced by the Product.

The Parties intend and agree that this Settlement Agreement shall be given full effect for purposes of precluding claims regarding the Product against Fountainhead and Fountainhead's Releasees under Proposition 65 as covered under this release.

**5.2 Fountainhead's Release of Wimberley**

Fountainhead waives any and all claims against Wimberley, her attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Wimberley and her attorneys and other representatives, whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the Product.

Fountainhead acknowledges that it is familiar with Section 1542 of the 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.

Fountainhead on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees 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 Civil Code § 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters.

**6. 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.

7. **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:

For Fountainhead :

The Fountainhead Group., Inc.  
Mr. Daniel O'Toole, President  
23 Garden St.  
New York Mills, NY 13417

And

For Wimberley:

Mr. Stephen Ure  
Law Offices of Stephen Ure, PC.  
11622 El Camino Real, 1st Floor  
Del Mar, California 92130

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.

8. **COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

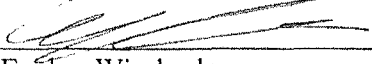


10. **MODIFICATION**

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

11. **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.

<b>AGREED TO:</b>	<b>AGREED TO:</b>
Date: <u>2-19</u> , 2015	Date: _____, 2015
By:  Evelyn Wimberley	By: _____ On Behalf of Fountainhead Group, Inc.

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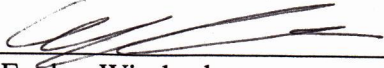
<b>AGREED TO:</b>	<b>AGREED TO:</b>
Date : _____, 2015	Date: <u>Feb. 19</u> , 2015
By: _____ Evelyn Wimberley	By: <u>[Signature]</u> <u>President</u> On Behalf of Fountainhead Group, Inc.

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