

## **PROPOSITION 65 SETTLEMENT AGREEMENT**

### **1. INTRODUCTION**

#### **1.1 The Parties**

This Settlement Agreement is entered into by and between, on the one hand, Russell Brimer (hereinafter "Brimer") and on the other hand, Richards Homewares, Inc. (hereinafter "Richards Homewares" or "Defendant"), with Brimer and Richards Homewares 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. Richards Homewares employs ten or more persons and is a person in the course of doing business for purposes of Proposition 65.

#### **1.2 General Allegations**

Brimer alleges that Richards Homewares has manufactured, distributed and/or sold in the State of California hanging storage shelves made with materials containing lead. Lead is listed pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§25249.5 *et seq.* ("Proposition 65"), as a chemical known to the State of California to be a reproductive toxicant. Lead shall be referred to herein as the "Listed Chemical."

#### **1.3 Product Description**

The products covered by this Settlement Agreement are the West Hills Six Shelf Sweater and Accessory Organizers in Chocolate, model #640741. Such products shall be referred to herein as the "Covered Products."

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

On or about November 23, 2010, Brimer served Richards Homewares and various public enforcement agencies with a document entitled "60-Day Notice of Violation" (the "Notice") that

provided Richards Homewares and such public enforcers with notice that alleged that Richards Homewares was in violation of California Health & Safety Code §25249.6 for failing to warn consumers and customers that the Covered Products exposed users in California to lead. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

### **1.5 No Admission**

Richards Homewares denies the material factual and legal allegations contained in Brimer's Notice and maintains that all 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 Richards Homewares 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 Richards Homewares of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Richards Homewares. However, this section shall not diminish or otherwise affect the obligations, responsibilities and duties of Richards Homewares under this Settlement Agreement.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean August 1, 2011.

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

### **2.1 Product Warnings**

As to all Covered Products manufactured, caused to be manufactured by Defendant for distribution, sale or other consumer use in California and as to all Covered Products distributed, caused to be distributed, sold or caused to be sold by Defendant in California that are not Lead Free, Defendant shall not sell, ship or otherwise distribute any such Covered Products unless each such

Covered Product, or each such shipment or distribution of Covered Products, includes a number of hang tags or self-adhesive stickers, equal to 120% the number of Covered Products being shipped or distributed, each of a dimension no less than 2 in. x 4 in., that contain the following printed language:

**WARNING: This product is made with materials containing lead, a chemical known to the state of California to cause birth defects or other reproductive harm.**

Each such shipment or distribution of Covered Products under this Section must also include a letter, attached to the shipping label or invoice for such shipment that includes the wording and format as that contained in Exhibit A to this Agreement.

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

#### **3.1 Penalty Assessment**

As partial consideration for settlement of all the claims referred to in this Settlement Agreement, Defendant shall pay \$8,500.00 in civil penalties to be apportioned in accordance with California Health & Safety Code §25192, with 75% of these funds remitted to the State of California's Office of Environmental Health Hazard Assessment and the remaining 25% of these penalty monies remitted to Brimer as provided by California Health & Safety Code §25249.12(d). Defendants shall issue two separate checks for the penalty payment: (a) one check made payable to The Chanler Group in Trust for the State of California's Office of Environmental Health Hazard Assessment (OEHHA) in the amount of \$6,375.00, representing 75% of the total penalty and (b) one check to The Chanler Group in Trust for Brimer in the amount of \$2,125.00, representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments: The first 1099 shall be issued to Office of Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-

0284486) in the amount of \$6,375.00. The second 1099 shall be issued to Brimer in the amount of \$2,125.00, whose address and tax identification number shall be furnished, upon request, five calendar days before payment is due.

Payments shall be delivered on or before the Effective Date, at the following address:

THE CHANLER GROUP  
Attn: Proposition 65 Controller  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710

### **3.2 Optional Penalty Reductions**

Defendant may reduce its hereinabove stated penalty obligation by agreeing to perform and performing any or all of the following commitments:

(a) Defendant may realize a \$1,000.00 reduction in the total penalty amount due under Section 3.1 above if that party agrees, by express, written confirmation, from a director or officer of Defendant, served upon Brimer and his counsel by the Effective Date, that Defendant has issued a written letter (electronic or otherwise) notice to (1) each California retail store or establishment to which it supplied any Covered Products within one year prior to the Effective Date (for any chain stores, such notice shall be sent to each individual store), (2) any business entity for which Defendant shipped Covered Products inside the State of California, (3) any other business entity to which Defendant sold or distributed Covered Products and which entity Defendant is reasonably aware of having sold any Covered Product in California within one year prior to the Effective Date and (4) any other business entity to which Defendant sold or distributed Covered Products, within one year prior to the Effective Date, and which entity Defendant is reasonably aware of having made any Covered Product available for sale through a web-based store, portal or other internet connected electronic

method, that identifies the West Hills Six Shelf Sweater and Accessory Organizer, advises the recipient that each such Covered Product “is made with materials that contain LEAD, a chemical known to the State of California to cause birth defects and other reproductive harm”, and requests such recipient to either label the Covered Product with the product label identified in Section 2.2 or to return the Covered Product to Defendant at Defendant’s sole expense. Defendant shall maintain records of all compliance correspondence or other communication generated pursuant to this Section for two (2) years from the Effective Date and shall produce copies of such records upon written request by Brimer.

Agreement to perform and the performance of the commitments identified in (a) of this Section shall reduce Defendant’s penalty obligation as stated in Section 3.1 to the sum of \$7,500.00.

#### **4. REIMBURSEMENT OF FEES AND COSTS**

The parties reached 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, Defendants shall reimburse Brimer’s counsel for fees and costs, incurred as a result of investigating, bringing this matter to Defendant’s attention, and negotiating a settlement in the public interest. Defendant shall pay Brimer and his counsel \$30,000.00 for all attorneys’ fees, expert and investigation fees, and related costs. This \$30,000 settlement payment shall be made payable to The Chanler Group and shall be made by six monthly payments of \$5,000 each, with the first \$5,000 payment to be made on September 1, 2011, followed by \$5,000 payments to The Chanler Group on October 1, 2011, November 1, 2011, December 1, 2011, January 1, 2012, and February 1, 2012. Each such monthly \$5,000 payment shall be delivered to the Chanler Group at the following address:

THE CHANLER GROUP  
Attn: Proposition 65 Controller

2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710

Defendants shall issue a separate 1099 for fees and cost paid in the amount of \$30,000.00 to The Chanler Group, 2560 Ninth Street, Parker Plaza, Suite 214, Berkeley, CA 94710.

In recognition of the unique circumstances of this serial payment obligation stretching until February 1, 2011, Robert Freeland, president of Richards Homewares, Inc., agrees to be personally responsible for payment of any such due and owing fees and costs reimbursement obligation not paid by Richards Homewares Inc. within 15 days of the payment due date.

## **5. RELEASE OF ALL CLAIMS**

### **5.1 Release of Defendants and Downstream Customers**

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4 above, Brimer, on behalf of himself, his past and current agents, representatives, attorneys, successors and/or assignees, and in the interest of the general public, 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, arising out of Brimer's November 23, 2010, 60-Day Notice of Violation (collectively "Claims"), against Defendants and each of their 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"). This release is expressly limited to those claims that arise under Proposition 65, as such claims relate to Defendants'

alleged failure to warn about exposures to or identification of the Listed Chemical contained in the Covered Products and as such claims are identified in the Proposition 65 60-Day Notice to Defendant and to the extent that any alleged violations occur prior to one month after the Effective Date. This Release does not release any person, party or entity from any liability for any violation of Proposition 65 regarding the Covered Products that occur after the Effective Date

The Parties further understand and agree that this release shall not extend upstream to any entities, other than Defendant, that manufactured the Covered Products or any component parts thereof, or any distributors or suppliers who sold the Covered Products or any component parts thereof to Defendants.

#### **5.2 Defendants' Release of Brimer**

Defendants waive any and all claims against Brimer, 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 or otherwise seeking enforcement of Proposition 65 against Defendant in this matter, and/or with respect to the Covered Products.

#### **6. ELECTION TO SECURE JUDGMENT UPON SETTLEMENT**

The Parties intend and agree that this Settlement Agreement shall be given full effect for purposes of precluding claims regarding the Covered Products against Richards Homewares or the Releasees under Proposition 65 as covered under the terms of the release in Section 5. If requested in writing by Richards Homewares, within six months of the Effective Date, Richards Homewares may ask Brimer to file a complaint and seek judicial approval of this Settlement Agreement through a court approved consent judgment incorporating the terms of this Settlement Agreement pursuant to California Health and Safety Code Section 25249.7, or as may be otherwise allowed by law. If so

requested, Brimer agrees to reasonably cooperate with Richards Homewares and to use best efforts and that of his counsel to support the entry of an Order, from a Superior Court of California, approving any consent judgment incorporating the terms of this Settlement Agreement and for entry of Judgment thereupon. Pursuant to CCP Sections 1021 and 1021.5, should Richards Homewares request Brimer to file a complaint and seek judicial approval of this settlement agreement, Richards Homewares will reimburse Brimer and his counsel for their reasonable fees and costs incurred in filing the complaint and seeking judicial approval of this Settlement Agreement, in an amount not to exceed \$15,000.00.

Should Richards Homewares request Brimer to file such a complaint and seek judicial approval of this settlement agreement, Richards Homewares agrees to reimburse Brimer, within ten (10) days of receipt of an invoice therefor and subject to the \$15,000.00 maximum, all fees and costs incurred by Brimer and his counsel in completing such request at their then effective billing rates. No fees under this paragraph will be due and owing to Brimer or his counsel unless a written request is made by Richards Homewares to have Brimer file a complaint and seek settlement approval and a judgment. Richards Homewares will remit payment to The Chanler Group, at the address set forth in Section 4 above.

## **7. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are 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. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Covered Products, then



Defendants 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 Covered 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 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 Richards Homewares:

Robert Freeland, President  
Richards Homewares, Inc.  
10675 North Lombard Street  
Portland, OR 97203

With a copy to:

John R. Valencia, Esq.  
Wilke, Fleury, Hoffelt, Gould & Birney, LLP  
400 Capital Mall, 22<sup>nd</sup> Floor  
Sacramento, CA 95814

For 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.

## **10. 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.

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


Brimer agrees to comply with the reporting form requirements referenced in Health & Safety Code § 25249.7(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.

<p><b>AGREED TO:</b></p> <p>Date: August __, 2011</p> <p>By: _____ Russell Brimer</p>	<p><b>AGREED TO:</b></p> <p>Date: August <u>3</u>, 2011</p> <p>By:  _____ Robert Freeland, President, Richards Homewares, Inc.</p>
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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.

<p><b>AGREED TO:</b>  Date: <del>June</del> <sup>July</sup> <u>1</u>, 2011</p> <p>By:   _____  Russell Brimer</p>	<p><b>AGREED TO:</b>  Date: June __, 2011</p> <p>By: _____  Robert Freeland, President,  Richards Homewares, Inc.</p>
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