

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 Parties**

This Settlement Agreement is entered into by and between Russell Brimer (“Brimer”) and Added Extras LLC (“Added Extras”), with Brimer and Added Extras each individually referred to as a “Party” and collectively as the “Parties.” Brimer 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. Added Extras 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 Added Extras manufactures, sells, and/or distributes for sale in California vinyl/PVC toiletry cases 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 Added Extras failed to provide the health hazard warning required by Proposition 65 for exposures to DEHP from the vinyl/PVC toiletry cases sold in California. Added Extras disputes those allegations.

### **1.3 Product Description**

The products that are covered by this Settlement Agreement are vinyl/PVC toiletry cases containing DEHP, specifically, *Diva Couture Contact Lens Kit*, LOT#13017367FW, UPC #7 34418 97386 0, manufactured, sold and/or distributed for sale in California by Added Extras (collectively, “Products”).

#### **1.4 Notices of Violation**

On December 13, 2013, Brimer served Added Extras, E.S. Sutton Inc., and certain requisite public enforcement agencies with a “60-Day Notice of Violation” (“Notice”) alleging that Added Extras violated Proposition 65 when it failed to warn its 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. On July 11, 2014, Brimer served Added Extras, E.S. Sutton Inc., Office Depot, Inc., Officemax Incorporated, and certain requisite public enforcement agencies with a “Supplemental 60-Day Notice of Violation” (“Supplemental Notice”) alleging that Added Extras violated Proposition 65 when it failed to warn its customers and consumers in California that the Products expose users to DEHP. The Notice and Supplemental Notice shall hereinafter be collectively referred to as the “Notices.” To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notices.

#### **1.5 No Admission**

Added Extras denies the material, factual, and legal allegations contained in the Notices 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, including Proposition 65. Nothing in this Settlement Agreement shall be construed as an admission by Added Extras 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 Added Extras of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Added Extras. This Section shall not, however, diminish or otherwise affect Added Extras’ obligations, responsibilities, and duties under this Settlement Agreement.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean March 30, 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 Injunctive Commitment**

As of the Effective Date, all Products manufactured, imported, distributed, sold and/or offered for sale in the State of California by Added Extras shall be Products that qualify as Reformulated Products as defined in Section 2.1, or shall contain reasonable health hazard warnings as provided in section 2.3.

### **2.3 Product Warnings**

Commencing on the Effective Date, Added Extras shall provide clear and reasonable warnings for all Products 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.** Added Extras 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 phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

**(ii) Point-of-Sale Warnings.** Alternatively, Added Extras 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 Added Extra's customers shall be sent by certified mail, return receipt requested.

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

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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. 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 Notices or referred to in this settlement, Added Extras has been assessed \$16,500 in civil penalties. Each penalty payment will be allocated in accordance with California Health and Safety Code section 25249.12(c)(1) & (d), with 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 date this Settlement Agreement is executed, Added Extras shall pay an initial civil penalty of \$4,500. Added Extras will provide its payment in a check for the following amounts made payable to: "Russell Brimer, Client Trust Account" in the amount of \$4,500.

**3.1.2 Final Civil Penalty.** On or before December 15, 2015, Added Extras shall pay a final civil penalty of \$12,000. The final civil penalty shall be waived in its entirety if, no later than December 1, 2015, an officer of Added Extras 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 Added Extras does not provide certification pursuant to this Section 3.1.2, Added Extras shall issue a check for its final civil penalty payments to: "Russell Brimer, Client Trust Account" in the amount of \$12,000.

#### **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,

thereby 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, Added Extras 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. Added Extras shall pay \$22,250 for fees and costs incurred as a result of investigating, bringing this matter to Added Extras' attention, and negotiating a settlement. Added Extras shall make the check payable to "The Chanler Group" and shall deliver payment within five days of the date this Settlement Agreement is executed, to the address listed in Section 3.3.1 below.

**3.3. Payment Procedures**

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

All payments required for OEHHHA, 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 Added Extras**

This Settlement Agreement is a full, final and binding resolution between Brimer and Added Extras, 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 Added Extras, its parents, subsidiaries, affiliated entities that are under common ownership, directors, officers, employees, attorneys, and each entity to whom Added Extras directly or indirectly distributes or sells Products, including but not limited to downstream distributors, wholesalers, customers,

retailers, franchisees, cooperative members, licensors, and licensees (collectively, “Releasees”), based on their failure to warn about alleged exposures to DEHP in Products that Added Extras sold or distributed for sale by Added Extras prior to the Effective Date. This release is provided in Brimer’s individual capacity, and is not a release on behalf of the public.

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 any right 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 and in equity, all suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses including, but not exclusively, investigation fees, expert fees, and attorneys’ fees, but exclusive of fees and costs on appeal, if any, arising under Proposition 65 with respect to the failure to warn about exposures to DEHP from Products sold or distributed for sale by Releasees before the Effective Date. 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.

#### **4.2 Added Extras’ Release of Brimer**

Added Extras 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.

**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 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 Added Extras 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.

**7. NOTICE**

Unless specified herein, 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 courier on any Party by the other at the following addresses:

For Added Extras:

Rick Darling, President  
Added Extras LLC  
1400 Broadway Floor 27  
New York, NY 10018

Kevin C. Mayer, Esq.  
Crowell & Moring LLP  
515 South Flower Street, 40<sup>th</sup> Fl.  
Los Angeles, California 90071

For Brimer:

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

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 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.

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**

This Settlement Agreement may be modified only by 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.

**AGREED TO:**

Date: 3-12-15

By:   
Russell Brimer

**AGREED TO:**

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

By: \_\_\_\_\_  
Rick Darling, President  
Added Extras LLC

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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.

AGREED TO:

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

By: \_\_\_\_\_

Russell Brimer

AGREED TO:

Date: 3-13-15

By: [Signature]

~~Rick Darling~~, President  
Added Extras LLC

Robert K. Smits  
EVP - Secretary