

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Russell Brimer and ModCloth, Inc.

This Settlement Agreement (“Settlement Agreement”) is entered into by and between Russell Brimer (“Brimer”), and ModCloth, Inc. (“ModCloth”), with Brimer and ModCloth 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. ModCloth employs ten or more persons and is a person in the course of doing business for purposes of Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.5 *et seq.* (“Proposition 65”).

1.2 General Allegations

Brimer alleges that ModCloth has manufactured, distributed and/or sold in the State of California, glassware with colored artwork or designs (containing lead) on the exterior. Lead is listed pursuant to Proposition 65 as a chemical 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 glassware with colored artwork or designs (containing lead) on the exterior manufactured, imported, distributed, sold and/or offered for sale in the State of California by ModCloth including, but not limited to, *Vintage Tumblers Set, Glassware by Torre & Tagus, #116254, #1119-100050 (#6 26404 15014 3)* and *The Mango Juice Machine Glass, #15287*, hereinafter the “Products,” and *The Kind Kitchen Tea Cup with Saucer, #50737, #03-000283, #5015830 (#7 394150 158302)* and manufactured, imported, distributed, sold and/or offered for sale in the State of California by ModCloth, hereinafter the “Additional Products.”

1.4 Notice of Violation

On September 20, 2011, Brimer served ModCloth and various public enforcement agencies with a document entitled “60-Day Notice of Violation” that provided the recipients with notice that ModCloth was in violation of Proposition 65 for failing to warn consumers and customers that its Products exposed users in California to lead (“Notice”). No public enforcer has diligently prosecuted the allegations set forth in the Notice.

1.5 No Admission

ModCloth 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 ModCloth 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 ModCloth of any fact, finding, conclusion, issue of law or violation of law. However, this section shall not diminish or otherwise affect the obligations, responsibilities and duties of ModCloth under this Settlement Agreement.

1.6 Effective Date

For purposes of this Settlement Agreement, the term “Effective Date” shall mean September 30, 2012.

2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS

2.1 Reformulation Standards

“Reformulated Products” are Products that contain:

- (a) no detectable amount of lead in the lip-and rim area of the Product (the top 20 millimeters of the Products);

- (b) a total lead content of less than or equal to 50 ppm, exclusive of the lip-and-rim area, when analyzed pursuant to Environmental Protection Agency testing methodologies 3050B and/or 6010B; *and*
- (c) residual surface lead in an amount that does not exceed 1.0 microgram (μg) when analyzed pursuant to the NIOSH 9100 testing protocol.

2.2 Reformulation Commitment

As of the Effective Date, all Products and Additional Products manufactured, imported, distributed, sold and/or offered for sale by means other than through the internet, in the state of California by ModCloth, shall qualify as Reformulated Products as defined in Section 2.1 above. All Products and Additional Products manufactured, imported, distributed, sold and/or offered for sale in the state of California by ModCloth via the internet only shall qualify as Reformulated Products as defined in Section 2.1 above, or shall carry Proposition 65 warnings as set forth in Section 2.3 below.

2.3 Product Warnings

Commencing on the Effective Date, ModCloth shall, for all Products and Additional Products sold via the internet, other than Reformulated Products, provide clear and reasonable warnings as set forth in subsection 2.2(a). 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 and/or Additional Product the warning applies, so as to minimize the risk of consumer confusion.

(a) Internet Sales. In the event that ModCloth sells Products and/or Additional Products via the internet, to customers located in California, after the Effective Date, that are not Reformulated Products, ModCloth shall provide warnings for such Products and/or Additional Products sold via the internet to California residents. Warnings given on the internet

shall identify the *specific* Product to which the warning applies as further specified in Section 2.2(b). A warning shall be given in conjunction with the sale of the Products and/or Additional Products via the internet, which shall appear either: (a) on the same web page on which a Product and/or Additional Product is displayed; (b) on the same web page as the order form for a Product and/or Additional Product; (c) on the same page as the price for any Product and/or Additional Product; or (d) on one or more web pages displayed to a purchaser during the checkout process. The following warning statement shall be used and shall appear in any of the above instances adjacent to or immediately following the display, description, or price of the Product and/or Additional Product for which it is given in the same type size or larger than the Product and/or Additional Product description text:

WARNING: Products identified on this page with the following symbol ▼ contain lead, a chemical known to the State of California to cause birth defects and other reproductive harm.

Alternatively, the designated symbol may appear adjacent to or immediately following the display, description, or price of the Product and/or Additional Product for which a warning is being given, provided that the following warning statement also appears elsewhere on the same web page, as follows:

WARNING: Products identified on this page with the following symbol ▼ contain lead, a chemical known to the State of California to cause birth defects and other reproductive harm.

3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)

In settlement of all the claims referred to in this Settlement Agreement, ModCloth shall pay \$6,000, in civil penalties as follows:

3.1 Initial Civil Penalty

ModCloth shall pay an initial civil penalty of \$2,000, to 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 Brimer. ModCloth 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 ("The Chanler Group in Trust for OEHHA") in the amount of \$1,500, representing 75% of the initial civil penalty and (b) one check to "The Chanler Group in Trust for Russell Brimer" in the amount of \$500, representing 25% of the initial civil penalty. Two separate 1099s shall be issued for the above payments: The first 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486). The second 1099 shall be issued to Brimer, whose address and tax identification number shall be furnished, upon request, at least five calendar days before payment is due. The payments shall be delivered on or before September 30, 2012, to the following address:

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

3.2 Final Civil Penalty

ModCloth shall pay a final civil penalty in the amount of \$4,000 on January 31, 2013. As incentive for ModCloth to reformulate the Products sold by means of the internet, however, this final civil penalty shall be waived in its entirety if an officer of ModCloth certifies in writing that, as of January 31, 2013, 2012, it shall sell, ship and offer for sale, in the state of California, only Reformulated Products. Such certification must be received by The Chanler Group on or before January 15, 2013.

The final civil penalty payment shall be apportioned in accordance with California Health & Safety Code § 25249.12(c) & (d), with 75% of these funds remitted to OEHHA and the remaining 25% of the penalty remitted to Russell Brimer. ModCloth shall issue two separate checks for the final civil penalty payment: (a) one check made payable to "The Chanler Group in Trust For OEHHA" in the amount of \$3,000, representing 75% of the total final penalty; and (b) one check to "The Chanler Group in Trust for Russell Brimer" in the amount of \$1,000,

representing 25% of the total final penalty. Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Russell Brimer, whose information shall be provided five calendar days before the payment is due (if different than the information already provided to ModCloth under Section 3.1 above). Payment shall be delivered to Brimer's counsel at the following address:

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

4. REIMBURSEMENT OF 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 issue to be resolved after the material terms of the agreement had been settled. ModCloth 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, for all work performed through the mutual execution of this agreement. ModCloth shall pay the total amount of \$24,000 for fees and costs incurred as a result of investigating, bringing this matter to ModCloth's attention and negotiating a settlement in the public interest. ModCloth 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 September 30, 2012, to the following address:

The Chanler Group
Attn: Proposition 65 Controller
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

5. RELEASES

5.1 Brimer's Release of ModCloth

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

5.2 ModCloth's Release of Brimer

ModCloth 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 and Additional Products.

6. ADDITIONAL ENFORCEMENT FOR NONCONFORMING PRODUCTS

6.1 Products and Additional Products Sold Via Means Other Than the Internet

If, on or after September 1, 2012, Brimer alleges that ModCloth offered for retail sale by means other than the internet to California consumers, or to a distributor for the purpose of retail sales in California, a Product or Additional Products that does meet the reformulation standard set forth in section 2.2 above (“Nonconforming Product”), then prior to Brimer serving a new 60-Day Notice under Proposition 65, or using other means to enforce this Settlement Agreement, including filing an action for Breach of Contract or Contempt, Brimer shall notify ModCloth of such alleged violation via written letter.

6.2 Products and Additional Products Sold Via the Internet

If, on or after September 1, 2013, Brimer alleges that ModCloth offered for retail sale by means of the internet to California consumers, or to a distributor for the purpose of retail sales in California, a Product or Additional Product that does not meet the reformulation standard pursuant to section 2.2 above, and is without the appropriate warning per section 2.3 above (“Nonconforming Internet Product”), then prior to Brimer serving a new 60-Day Notice under Proposition 65, or using other means to enforce this Settlement Agreement, including filing an action for Breach of Contract or Contempt, Brimer shall notify ModCloth of such alleged violation via written letter.

6.3 Notification of Alleged Violation

The required notice by Brimer pursuant to sections 6.1 and 6.2 above shall contain the following information: (a) the date the alleged violation was observed and the product was purchased; (b) the location or website at which the product was offered for sale; (c) a description of the product; and (d) data obtained by Brimer regarding the product such as laboratory results

associated with the testing of the product. Upon issuance of such letter, ModCloth shall have 45 days within which to attempt to resolve the additional claims with Brimer.

7. POST EXECUTION CONVERSION TO CONSENT JUDGMENT

Within twelve months of the execution of this Settlement Agreement ModCloth may ask Brimer, in writing, to file a complaint, incorporate the terms of this Settlement Agreement into a proposed consent judgment, and to seek the court's approval of the consent judgment pursuant to Health and Safety Code section 25249.7, or as may be otherwise allowed by law. If so requested, Brimer agrees to reasonably cooperate with ModCloth and the Parties agree to use 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, ModCloth 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 \$16,000, exclusive of fees and cost that may be incurred on appeal. ModCloth will remit payment to The Chanler Group, at the address set forth in Section 4 above. Such additional fees shall be paid by ModCloth within ten days after its receipt of monthly invoices from Brimer for work performed under this paragraph.

8. 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.

9. 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 if any of the provisions of this Settlement Agreement are rendered inapplicable or no longer required as a result of any such repeal or preemption or rendered inapplicable by reason of law generally as to the Products, then

ModCloth 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 ModCloth from any obligation to comply with any pertinent state or federal toxics control law.

10. NOTICES

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and: (i) personally delivered; (ii) sent by first-class (registered or certified mail) return receipt requested; or (iii) sent by overnight courier, to one party by the other party at the following addresses:

For ModCloth:

John G. Connolly, Esq.
Connolly & Finkel, LLP
601 S. Figueroa St., Ste. 2610
Los Angeles, CA 90017-5704

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.

11. COUNTERPARTS; FACSIMILE SIGNATURES

This Settlement Agreement may be executed in counterparts and by facsimile, or .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 agrees 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: Sept 19 2012

Date: _____

By:  _____
Russell Brimer

By: _____
Eric Kroger, Chief Executive Officer
ModCloth, Inc.

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:

Date: _____

By: _____
Russell Brimer

AGREED TO:

Date: 9/19/12

By: 
~~Eric Kroger, Chief Executive Officer~~
ModCloth, Inc.

Jeff Shotts, CFO