

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 Russell Brimer and MSRF, Inc.**

This Settlement Agreement is entered into by and between Russell Brimer (“Brimer” or “Plaintiff”) and MSRF, Inc. (“MSRF” or “Defendant”), with Brimer and MSRF collectively referred to as the “parties.” Brimer is an individual residing in the State of California who seeks to promote awareness of exposure to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer and commercial products. Brimer alleges that MSRF 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 MSRF has manufactured, imported, distributed, sold, and/or offered for sale in the State of California, mugs with colored artwork or designs containing lead, without the requisite Proposition 65 warnings. Lead is on the Proposition 65 list as a chemical known to cause birth defects and other reproductive harm.

### **1.3 Product Description**

The products that are covered by this Settlement Agreement are defined as mugs with colored artwork or designs on the exterior including, but not limited to, the *Vintage Classics Hot Cocoa Mix & Mug*, #65802, #45802 (#7 02014 65802 3), manufactured, imported, distributed, shipped, sold, and/or offered for sale or shipment by MSRF in the State of California, hereinafter “Product” or “Products.”

### **1.4 Notice of Violation**

On September 20, 2011, Brimer served MSRF and various public enforcement agencies with a document entitled “60-Day Notice of Violation” (the “Notice”) that

provided the recipients with notice of alleged violations of California Health & Safety Code § 25249.6 for failing to warn consumers and customers that the Products exposed users in California to lead. To the best of the parties' knowledge, no public enforcer has prosecuted the allegations set forth in the Notice.

### **1.5 No Admission**

MSRF denies the material, factual and legal allegations contained in Brimer's Notice and maintains that all products that it has sold, manufactured, imported, distributed, and/or offered for sale 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 MSRF 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 MSRF of any fact, finding, conclusion, issue of law, or violation of law. However, this section shall not diminish or otherwise affect MSRF's obligations, responsibilities, and duties under this Settlement Agreement.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean thirty (30) days after execution of this Agreement by all parties.

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

### **2.1 Reformulation Standards - Testing Protocols<sup>1</sup>**

A Product qualifies as a Reformulated Product by meeting the Testing Protocols outlined in subsection 2.1 (a) and (b) below. If the Product contains exterior artwork decorations in the lip-and rim-area (the top 20 millimeters of the Product), in addition to subsection 2.1 (a) and (b) below, the Product must also satisfy subsection 2.1 (c) below to qualify as a Reformulated Product.

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<sup>1</sup> In the event that any test method identified in this section becomes outdated, withdrawn and/or replaced, the parties shall use their best efforts and in good faith agree on a reasonable alternative test method and limit/requirement that is used by State and Federal government agencies to determine lead content in a solid substance and such method shall be utilized if one exists.

(a) **Decorating Material Content-Based Standard.** Those Products with exterior artwork decorations containing a total lead content of less than or equal to 90 parts per million, exclusive of the lip and rim area, when analyzed pursuant to Environmental Protection Agency testing methodologies 3050B and/or 6010B; and

(b) **Wipe Test-Based Standard.** Those Products containing lead in concentrations less than 1.0 microgram of lead when using a wipe test, exclusive of the lip-and-rim area, when analyzed pursuant to NIOSH Test Method 9100.

(c) **Lip and Rim Area Exterior Decoration.** If the Product contains exterior artwork decorations in the lip-and-rim area, the Product must yield a test result showing a concentration level of 0.5 ug/ml or less of lead when analyzed pursuant to ASTM C927-80.

## **2.2 Reformulation Commitment**

As of the Effective Date, MSRF agrees that it shall institute the Testing Protocols outlined in Section 2.1, above, and shall only acquire for potential distribution to or sale in California Products that comply with Section 2.1. Provided that MSRF institutes the Testing Protocols outlined in Section 2.1 above as of the Effective Date, sales of Products that were ordered, purchased, imported, manufactured, or supplied to unaffiliated third parties prior to the Effective Date shall not be separately actionable in another case brought pursuant to Section 25249.7(d) of the Health and Safety Code alleging a failure to warn for lead in the Products under Proposition 65.

## **3. PAYMENT OF PENALTIES**

### **3.1 Initial Civil Penalty**

In settlement of all the claims referred to in this Settlement Agreement, MSRF shall pay an initial civil penalty in the amount of \$12,000. The civil penalty shall 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 Russell Brimer. MSRF shall issue two separate checks for the penalty payment: (a) one check made payable to “The Chanler Group in Trust For OEHHA” in the amount of \$9,000 representing 75% of the total penalty; and (b) one check to “The Chanler Group in Trust for Russell Brimer” in the amount of \$3,000, representing 25% of the total 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.

Payment shall be delivered to Brimer’s counsel on or before November 9, 2012, at 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**

Pursuant to Health & Safety Code § 25249.7(b), on April 30, 2013, MSRF shall pay a final civil penalty in the amount of \$25,000. The final civil penalty shall be waived in its entirety, if, on or before April 15, 2013, an officer of MSRF certifies to Brimer’s counsel, in writing, that all Products sold or offered for sale by MSRF in California after April 1, 2013, are Reformulated Products, and that MSRF will continue to do so after the date of certification.

Unless waived, the final civil penalty shall be allocated according to Health & Safety Code § 25249.7(c)(1) and (d), with seventy-five percent of the penalty payment earmarked for OEHHA, and the remaining twenty-five percent of the penalty earmarked for Brimer. MSRF shall issue two separate checks for the final penalty payment: (a) one check made payable to “The Chanler Group in Trust For OEHHA” in the amount of \$18,750 representing 75% of the total penalty; and (b) one check to “The Chanler Group

in Trust for Russell Brimer” in the amount of \$6,250, representing 25% of the total 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. Payment shall be delivered to Brimer’s counsel at the address listed in section 3.1 above.

**4. REIMBURSEMENT OF ATTORNEY’S 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. MSRF 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 codified at California Code of Civil Procedure (“CCP”) § 1021.5, for all work performed through the mutual execution of this agreement. MSRF shall reimburse Brimer and his counsel \$38,000 for fees and costs incurred as a result of investigating, bringing this matter to its attention, and negotiating a settlement. MSRF 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 November 9, 2012, to the following address:

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

**5. RELEASES**

**5.1 Brimer's Release of MSRF**

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

In addition, Brimer acknowledges that he is familiar with Section 1542 of the California 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.**

Brimer, in his individual capacity only and *not* in his representative capacity, on behalf of himself and his agents, attorneys, representatives, successors and assigns, expressly waives and relinquishes any and all rights and benefits which he may have

under, or which may be conferred on him by the provisions of Section 1542 of the California Civil Code 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. In furtherance of such intention, the release hereby given shall be and remain in effect as a full and complete release notwithstanding the discovery or existence of any such additional or different claims or facts arising out of the Notice and/or the alleged failure to warn about exposures to lead in the Products.

## **5.2 MSRF's Release of Brimer**

MSRF 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.

In addition, MSRF acknowledges that it is familiar with Section 1542 of the California 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.**

MSRF, on behalf of itself and its agents, attorneys, representatives, successors and assigns, 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 Section 1542 of the California Civil Code 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. In furtherance of such intention, the release hereby given shall be and remain in effect as a full and complete release notwithstanding

the discovery or existence of any such additional or different claims or facts arising out of the Notice and/or the alleged failure to warn about exposures to lead in the Products.

**6. POST-EXECUTION CONVERSION TO CONSENT JUDGMENT**

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

**7. 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.

**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, preempted 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 require as a result of any such repeal or preemption or rendered inapplicable by



reason of law generally as to the Products, then MSRF 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 MSRF from an obligation to comply with any pertinent state or federal toxic control laws.

**9. ENTIRE AGREEMENT**

This Settlement Agreement contains the sole and entire agreement and understanding of the parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the parties.

**10. 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:

To MSRF:

Jay W. Connolly, Esq.  
Seyfarth Shaw LLP  
560 Mission Street, Suite 3100  
San Francisco, CA 94105-2930

To 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 and his attorneys agree 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: October 25, 2012

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

By:  \_\_\_\_\_  
Russell Brimer

By: \_\_\_\_\_  
David Reich, President – MSRF, Inc.

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 and his attorneys agree to comply with the reporting requirements referenced in Health & Safety Code § 25249.7(f).

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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: 10/12/2012

By: [Signature]  
David Reich, President - MSRF, Inc.