

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Parties

This Settlement Agreement is entered into by and between Russell Brimer (“Brimer”) and Big 5 Corp. (“Big 5”) (erroneously named as Big 5 Sporting Goods Corporation), with Brimer and Big 5 individually referred to as a “Party” and collectively as the “Parties.” Brimer is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Big 5 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, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

### 1.2 General Allegations

Brimer alleges that Big 5 sells and/or offers for sale in the state of California, chairs with travel bags that contain lead without first providing the clear and reasonable exposure warning required by Proposition 65. Lead is listed pursuant to Proposition 65 as a chemical that is known to the state of California to cause birth defects and other reproductive harm.

### 1.3 Product Description

The products covered by this Settlement Agreement are chairs with travel bags allegedly containing lead supplied by Bam Brokerage, Inc. d/b/a On the Edge Marketing, Inc., and that are sold, or distributed for sale in California by Big 5, including, but not limited to, the *On The Edge Marketing Kingpin Folding Chair, Part No. 810170 (#8 11799 01671 0)*, *Big 5 SKU 4232039 (Red)*; *On The Edge Marketing Kingpin Folding Chair, Part No. 810169 (#8 11799 01670 3)*, *Big 5 SKU 4216248 (Black)*; and *On The Edge Marketing Kingpin Folding Chair, Part No. 810202 (#8 11799 01724 3)*, *Big 5 SKU 4232021 (Blue)* (“Products”).

### 1.4 Notice of Violation

On or about November 9, 2012, Brimer served Big 5 and certain requisite public enforcement agencies with a “60-Day Notice of Violation” (“Notice”), a document that informed

the recipients of Brimer's allegation that Big 5 violated Proposition 65 by failing to warn consumers in California that the Products expose users to lead. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

### **1.5 No Admission**

Big 5 denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products it has manufactured, sold, or distributed 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 Big 5 of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Big 5 of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by Big 5. This section shall not, however, diminish or otherwise affect Big 5'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 February 1, 2013.

## **2. INJUNCTIVE RELIEF**

### **2.1 Reformulated Products**

Commencing on the Effective Date and continuing thereafter, Big 5 shall only sell or offer for sale in California Products that are sold with a clear and reasonable warning in accordance with section 2.2., or Reformulated Products. For purposes of this Settlement Agreement, Reformulated Products are Products that contain a maximum of 100 parts per million of lead when analyzed pursuant to Environmental Protection Agency testing methodologies 3050B and 6010B, or equivalent methodologies authorized under Proposition 65 for determining lead content in a solid substance.

## **2.2 Clear and Reasonable Warnings**

Commencing on the Effective Date, for all Products sold or offered for sale in California that are not Reformulated Products, Big 5 shall provide a clear and reasonable warning. Big 5 shall provide the warning affixed to the packaging or labeling, or directly to a Product, with the following statement or a substantially similar statement:

**WARNING:** This product contains a chemical known to the State of California to cause cancer, birth defects or other reproductive harm.

The 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 of purchase or use.

## **3. MONETARY PAYMENTS**

### **3.1 Payments Pursuant to Health & Safety Code Section 25249.7(b)**

Pursuant to Health & Safety Code Section 25249.7(b), Big 5 shall pay \$10,000 in civil penalties and credits. Pursuant to title 11, California Code of Regulations section 3203(c), Brimer agrees to automatically waive \$7,500 and credit the penalty payment in response to Big 5's representations that, upon receiving the Notice, it took immediate action to investigate the alleged violations and ensure that the Products were offered with a clear and reasonable warning, and that once it has exhausted its current inventory of Products, it will only recommence sales of Reformulated Products within the California market.

Within fifteen (15) days of the Effective Date, Big 5 shall make a civil penalty payment of \$2,500. The penalty payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d) with seventy-five percent of the penalty amount paid to the California Office of Health Hazard Assessment ("OEHHA") and the remaining twenty-five percent of the penalty amount paid to Brimer. Big 5 shall provide its payment in two checks for the following amounts made payable to: (a) "OEHHA" in the amount of \$1,875; and (b) "The Chanler Group in Trust for Russell Brimer" in the amount of \$625.

Big 5 shall issue a separate 1099 form for each of its penalty payments to: (a) “Office of Environmental Health Hazard Assessment,” (EIN: 68-0284486); and (b) “Russell Brimer,” whose address and tax identification number shall be furnished, upon request, after this Settlement Agreement has been fully executed by the Parties. Payment shall be delivered to the payment address provided in Section 3.3.

### **3.2 Attorney Fees and Costs**

The Parties reached an accord on the compensation due to Brimer and his counsel under general contract principles and the private attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work performed in this matter. Under these legal principles, Big 5 shall pay \$15,000 for all fees and costs incurred investigating, bringing this matter to the attention of Big 5’s management, and negotiating a settlement in the public interest. Big 5 shall deliver its payment within fifteen days of the Effective Date in a check payable to “The Chanler Group,” and provide a separate 1099 form for fees and costs reimbursed to The Chanler Group (EIN: 94-3171522).

### **3.3 Payment Addresses**

All payments and tax forms for Brimer and The Chanler Group made under this Settlement Agreement shall be delivered to the following address:

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

All payments and tax forms for OEHHA (EIN: 68-0284486) made under this Settlement Agreement shall be delivered directly to OEHHA (Memo line “Prop 65 Penalties”) at the following address:

Mike Gyrics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
P.O. Box 4010  
Sacramento, CA 95812-4010

With a copy of the checks payable to OEHHA mailed to The Chanler Group at the address payment address provided above, as proof of payment to OEHHA.

**4. CLAIMS COVERED AND RELEASED**

**4.1 Brimer's Release of Big 5**

This Settlement Agreement is a full, final, and binding resolution between Brimer and Big 5 of any violation of Proposition 65 that was or could have been asserted by Brimer, on behalf of himself, or on behalf of his past and current agents, representatives, attorneys, successors, and assignees, against Big 5, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, franchisees, and cooperative members, and all of its downstream customers, distributors, wholesalers, retailers, licensors, licensees, or any other downstream person in the course of doing business, and the successors and assigns of any of them, who may use, maintain, manufacture, distribute, advertise, market or sell the Products, and the officers, directors, managers, employees, members, shareholders, agents, insurers and representatives of each of them ("Releasees"). This Settlement Agreement expressly does not provide any releases for any violations or alleged violations by any upstream entity or entities that imported, manufactured, distributed or sold the Products to Big 5 and Releasees.

In further consideration of the promises and agreements herein contained, Brimer, on his own behalf and on behalf of his 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 that he may have against Big 5 and Releasees, 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, without limitation, investigation fees, expert fees, and attorneys' fees of any nature whatsoever

(“Claims”) that were brought or could have been brought against Releasees arising under Proposition 65 for alleged failures to warn about exposures to lead in Products sold or offered for sale in California by Big 5 prior to the Effective Date.

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 expressly 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 released matters.

#### **4.2 Big 5’s Release of Brimer**

Big 5 hereby waives any and all claims that it may have 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.

Big 5 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.**

Big 5 expressly relinquishes any and all rights and benefits which it 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 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 released matters.

**5. POST EXECUTION CONVERSION TO CONSENT JUDGMENT**

Within twelve months of the execution of this Settlement Agreement, Big 5 may request in writing that Brimer draft and file a complaint, incorporate the terms of this Settlement Agreement into a proposed consent judgment providing a release for the Products in the public interest, and seek court approval of the consent judgment pursuant to Health and Safety Code section 25249.7, or as may be otherwise allowed by law. If requested, Brimer and Big 5 agree to reasonably cooperate and to use their best efforts, and those of their counsel, to obtain an entry of judgment in accordance with the terms of this Settlement Agreement by a superior court in California in a timely manner.

Pursuant to Code of Civil Procedure sections 1021 and 1021.5, if so requested, Big 5 agrees to reimburse Brimer and his counsel for the reasonable fees and costs incurred in connection with work performed pursuant to this section in an amount not to exceed \$15,000, exclusive of fees and cost on appeal, if any. Within fifteen days of receiving a monthly invoice from Brimer's counsel for work performed under this section, Big 5 will remit payment to The Chanler Group at the address provided in section 3.3.

**6. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any provision of this Settlement Agreement is held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

**7. 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 Big 5 may provide written notice to Brimer of any asserted change in the law, and have no further obligations pursuant to this Settlement Agreement, with respect to, and to the extent that, the Products are so affected.

**8. NOTICES**

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

For Big 5:

Legal Department  
Big 5 Corp.  
2525 East El Segundo Boulevard  
El Segundo, CA 90245

with a copy to:

Patricia J. Chen, Esq.  
PC Law Group  
18201 Von Karman Avenue, Suite 1080  
Irvine, CA 92612



For Brimer:

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

Any party may, from time to time, specify in writing to the other party a change of address to which all notices and other communications shall be sent.

9. **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.

10. **POST-EXECUTION ACTIVITIES**

Brimer agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f).

11. **MODIFICATION**

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

12. **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:**

**AGREED TO:**

Date: 2-13-13

Date: 2-21-13

By:   
Russell Brimer

By:   
Luke D. Thompson, V.P. & Corporate  
Counsel, Big 5 Corp.