

## SETTLEMENT AGREEMENT

### 1. INTRODUCTION

**1.1 The Parties.** This Settlement Agreement is entered into by and between Anthony Ferreiro ("Ferreiro") and Chigger Creek Products, LLC ("Chigger"). Together, Ferreiro and Chigger are collectively referred to as the "Parties." Ferreiro is an individual that resides in the State of California, and seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Ferreiro alleges that Chigger is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code § 25249.6, et seq. ("Proposition 65").

**1.2 General Allegations.** Ferreiro alleges that Chigger has exposed individuals to the chemical carbon monoxide from its sales of Sweet n' Smoky deserts without first providing users and consumers of the product with a clear and reasonable health hazard exposure warning as required pursuant to Proposition 65. Carbon monoxide is listed pursuant to Proposition 65 as a chemical known to the State of California to cause reproductive toxicity.

**1.3 Product Description.** The products covered by this Settlement Agreement are Sweet n' Smoky BBQ Wood Chips and Chunks (the "Products") that have been imported, distributed, offered for sale and/or sold in California by Chigger.

**1.4 Notice of Violation.** On November 19, 2019, Ferreiro served Chigger and Ace Hardware Corporation ("Ace"), and various public enforcement agencies with a document entitled "Notice of Violation of California Health & Safety Code § 25249.6, et seq." (the "Notice"). The Notice provided Chigger and such others, including public enforcers, with notice that alleged that Chigger was in violation of California Health & Safety Code § 25249.6, for failing to warn California consumers and customers that use of the Products will expose them to carbon monoxide. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

**1.5 No Admission.** Chigger denies the material factual and legal allegations contained in the Notice and maintains that, to the best of its knowledge, all products that are or have been

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 Chigger 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 Chigger of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Chigger. However, this § 1.5 shall not diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement. Notwithstanding the allegations in the Notice, Chigger maintains that it has not knowingly manufactured, or caused to be manufactured, the Products for sale in California in violation of Proposition 65.

**1.6 Effective Date.** For purposes of this Settlement Agreement, the term “Effective Date” shall mean the date this Agreement is last executed by the Parties.

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

**2.1 Clear and Reasonable Warning.** As of the Effective Date, and continuing thereafter, a clear and reasonable exposure warning as set forth in this §§ 2.1 and 2.2 must be provided for all Products that Chigger manufactures, imports, distributes, sells, or offers for sale in California that are not a Reformulated Product. There shall be no obligation for such an exposure warning to be provided for Products that entered the stream of commerce prior to the Effective Date. The warning shall consist of either the **Warning** or **Alternative Warning** described in §§ 2.1(a) or (b), respectively:

(a) **Warning.** The “Warning” shall consist of the statement:

**⚠ WARNING:** This product can expose you to chemicals including carbon monoxide, which are known to the State of California to cause birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

(b) **Alternative Warning:** Chigger may, but is not required to, use the alternative short-form warning as set forth in this § 2.1(b) (“**Alternative Warning**”) as follows:

**⚠ WARNING:** Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).



**2.2** A **Warning** or **Alternative Warning** provided pursuant to § 2.1 must have the term **“WARNING:”** printed in all capital letters and in bold font. The warning symbol to the left of the word **“WARNING:”** must be a black exclamation point in a yellow equilateral triangle with a black outline, except that if the label for the Products does not use the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller than the height of the word **“WARNING:”**. The warning shall be affixed to or printed on the Products’ packaging or labeling and displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.

**2.3 Compliance with Warning Regulations.** Chigger shall be deemed to be in compliance with this Settlement Agreement by either adhering to §§ 2.1 and 2.2 of this Settlement Agreement or by complying with warning requirements adopted by the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”).

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

In settlement of all the claims referred to in this Settlement Agreement, Chigger shall pay \$500.00 as a Civil Penalty in accordance with this Section. The Civil Penalty payment shall be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with 75% of the funds remitted to OEHHA and the remaining 25% of the penalty remitted to Ferreiro. The Civil Penalty payment(s) shall be delivered to the addresses identified in § 3.2, below. For all amounts due and owing that are not received within the payment times set forth below,

**3.1 Civil Penalty.** Within ten (10) days of the Effective Date, Chigger shall issue two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$325.00; and to (b) “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount of \$125.00. The Civil Penalty payment(s) shall be delivered to the addresses identified in § 3.2, below.

**3.2 Payment Procedures.**

(a) **Issuance of Payments.** Payments shall be delivered as follows:

(i) All payments owed to Ferreiro, pursuant to § 3.1 shall be delivered to the following payment address:

Evan J. Smith, Esquire  
Brodsky & Smith, LLC  
Two Bala Plaza, Suite 510  
Bala Cynwyd, PA 19004

(ii) All payments owed to OEHHA (EIN: 68-0284486), pursuant to § 3.1 shall be delivered directly to OEHHA (Memo Line "Prop 65 Penalties") at the following addresses:

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

Mike Gyurics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
1001 I Street  
Sacramento, CA 95814

(b) **Copy of Payments to OEHHA.** Chigger agrees to provide Ferreiro's counsel with a copy of the checks payable to OEHHA, simultaneous with its penalty payments to Ferreiro, to be delivered to the address provided in Section 3.2(a)(i), as proof of payment to OEHHA.

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

The Parties acknowledge that Ferreiro and his counsel offered to reach preliminary agreement on the material terms of this dispute before reaching terms on the amount of fees and costs to be reimbursed to them. The Parties thereafter reached an accord on the compensation due to Ferreiro and his counsel under general contract principles and the private attorney general doctrine and principles codified at California Code of Civil Procedure § 1021.5, for all work



performed through the mutual execution of this agreement. Under these legal principles, Chigger shall reimburse Ferreiro's counsel \$4,500 for fees and costs incurred as a result of investigating and bringing this matter to Chigger's attention, and negotiating a settlement in the public interest. In addition to the Civil Penalty payment, within ten (10) days of the Effective Date, Chigger shall issue a check payable to "Brodsky & Smith, LLC" in the amount of \$2,000.00 for delivery to the address identified in § 3.2(a)(i), above. Within forty-five (45) days of the Effective Date, Chigger shall issue a check payable to "Brodsky & Smith, LLC" in the amount of \$2,500.00 for delivery to the address identified in § 3.2(a)(i), above. For all amounts due and owing that are not received within the payment times set forth herein, Chigger shall pay a late fee equal to \$100/day to be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d).

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

### **5.1 Release of Chigger and Upstream and Downstream Customers and Entities.**

This Settlement Agreement is a full, final and binding resolution between Ferreiro, acting on his own behalf, and Chigger, of any violation of Proposition 65 that was or could have been asserted by Ferreiro or on behalf of his past and current agents, representatives, attorneys, successors, and/or assigns ("Releasers") for failure to provide warnings for alleged exposures to carbon monoxide contained in or released from the Products, and Releasers hereby release any such claims against Chigger and its parents, subsidiaries, affiliated entities, shareholders, marketplaces, directors, officers, agents, employees, attorneys, successors and assignees, and each entity to whom supplies and also as to entities to whom Chigger directly or indirectly distributes or sells the Products, including but not limited to, downstream distributors, wholesalers, customers, retailers, including but not limited to Ace, and its respective subsidiaries, affiliates and parents, and licensees (collectively, the "Releasees"), from all claims for violations of Proposition 65 through the Effective Date based on their failure to warn about alleged exposure to carbon monoxide as contained in or released from the Products.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to §§ 3 and 4 above, Ferreiro, on behalf of himself, his past and

current agents, representatives, attorneys, successors and/or assignees, hereby covenants not to sue and waives any right to institute, 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 obligations, expenses (including without limitation all attorneys' fees, expert fees, and investigation fees, and costs), damages, losses, liabilities and demands against any of the Releasees of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of the alleged or actual exposure to chemicals contained in or released from the Products.

**5.2 Chigger's Release of Ferreiro.** Chigger, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Ferreiro, his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Ferreiro and/or his attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter or with respect to the Products.

**5.3 California Civil Code § 1542.** It is possible that other claims not known to the Parties arising out of the facts alleged in the Notice and relating to the Products will develop or be discovered. Ferreiro on behalf of himself only, on one hand, and Chigger, on the other hand, acknowledge that this Agreement is expressly intended to cover and include all such claims up through the Effective Date, including all rights of action therefor. The Parties acknowledge that the claims released in §§ 5.1 and 5.2, above, may include unknown claims, and nevertheless waive California Civil Code § 1542 as to any such unknown claims. California Civil Code § 1542 reads 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.



Ferreiro and Chigger each acknowledge and understand the significance and consequences of this specific waiver of California Civil Code § 1542.

**5.4. Public Benefit.** It is Chigger's understanding that the commitments it has agreed to herein, and actions to be taken by Chigger under this Settlement Agreement, would confer a significant benefit to the general public, as set forth in Code of Civil Procedure § 1021.5 and Cal. Admin. Code tit. 11, § 3201. As such, it is the intent of the Parties that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to the failure to provide a warning concerning exposure to carbon monoxide in association with the Products, such private party action would not confer a significant benefit on the general public, provided that Chigger is in material compliance with this Settlement Agreement.

**6. 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 but only to the extent the deletion of the provision deemed unenforceable does not materially affect, or otherwise result in the effect of the Settlement Agreement being contrary to the intent of the Parties in entering into this Settlement Agreement.

**7. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the law 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 or limited by reason of law generally, or as to the Products, Chigger shall provide written notice to Ferreiro 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, a Product is 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 personally delivered or sent by: (i) first-class

(registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any party by the other party to the following addresses:

For Chigger:

Garth Ward  
Lewis Brisbois LLP  
7001 B Street, Suite 1900  
San Diego, CA 92101

For Ferreiro:

Evan J. Smith  
Brodsky & Smith, LLC  
Two Bala Plaza, Suite 510  
Bala Cynwyd, PA 19004

Either 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.

9. **COUNTERPARTS: 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.

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

Ferreiro agrees to comply with the reporting requirements referenced in Health & Safety Code § 25249.7(f).

11. **MODIFICATION**

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

12. **ENTIRE AGREEMENT**

This Settlement Agreement contains the sole and entire agreement of the Parties and any and all prior negotiations and understandings related hereto shall be deemed to have been merged within it. No representations or terms of agreement other than those contained herein exist or have been made by any Party with respect to the other Party or the subject matter hereof.

13. **AUTHORIZATION**



The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained of this Settlement Agreement.

**AGREED TO:**

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Date: July 2, 20

Date: 7/6/2020

By: Anthony Ferrero  
Anthony Ferrero

By: Member  
Chigger Creek Products, LLC