

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 Russell Brimer and Spectra Merchandising International, Inc.**

This Settlement Agreement is entered into by and between Russell Brimer (“Brimer”) and Spectra Merchandising International, Inc. (“Spectra Merchandising”), with Brimer and Spectra Merchandising 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 Spectra Merchandising 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 Spectra Merchandising has manufactured, imported, distributed, sold, and/or offered for sale in the State of California earphones with vinyl/PVC cords containing di (2-ethylhexyl) phthalate (“DEHP”), without the requisite Proposition 65 health hazard warnings. DEHP is 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 belts including, but not limited to, the *CD Player With Bass Boost CD-60A (0 77283 93604 3*, manufactured, imported, distributed, shipped, sold and/or offered for sale or shipment by Spectra Merchandising in the State of California, hereinafter “Products.”

### **1.4 Notice of Violation**

On December 21, 2012, Brimer served Spectra Merchandising and various public enforcement agencies with a document entitled “60-Day Notice of Violation” (“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 DEHP. 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**

Spectra Merchandising 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 Spectra Merchandising 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 Spectra Merchandising of any fact, finding, conclusion, issue of law, or violation of law. However, this section shall not diminish or otherwise affect Spectra Merchandising'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 May 3,, 2013.

**2. INJUNCTIVE RELIEF: REFORMULATION**

**2.1 Reformulated Products**

Commencing on the Effective Date and continuing thereafter, Spectra Merchandising agrees that the Products it manufactures, imports, distributes, ships, sells or offers to ship for sale in California, will be "Reformulated Products." For purposes of this Settlement Agreement, Reformulated Products comply with the following content limits: DEHP in concentration less than 1,000 parts per million ("ppm") DEHP by weight in any Accessible Component (i.e. any component that may be touched or handled during a reasonably foreseeable use) when analyzed pursuant to EPA testing methodologies

3580A and 8270C, or equivalent methodologies utilized by state or federal agencies for the purpose of determining DEHP content in a solid substance.

**3. PAYMENT OF PENALTIES**

**3.1 Initial Civil Penalty**

In settlement of all the claims referred to in this Settlement Agreement, Spectra Merchandising shall pay an initial civil penalty in the amount of \$8,000.00. 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. Spectra Merchandising shall issue two separate checks for the penalty payment: (a) one check made payable to OEHHA in the amount of \$6,000.00, representing 75% of the total penalty; and (b) one check to "The Chanler Group in Trust for Russell Brimer" in the amount of \$2,000.00, representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments. The checks and 1099s shall be delivered to the addresses listed in Section 3.3 below.

**3.2 Final Civil Penalty**

Pursuant to Health & Safety Code § 25249.7(b), on July 1, 2013, Spectra Merchandising shall pay a final civil penalty in the amount \$20,000.00. The final civil penalty shall be waived in its entirety, if, on or before June 15, 2013, an officer of Spectra Merchandising certifies to Brimer's counsel, in writing, that all Products sold or offered for sale by Spectra Merchandising in California after June 15, 2013, are Reformulated Products, and that Spectra Merchandising 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 75% of the penalty payment earmarked for OEHHA, and the remaining 25% of the penalty earmarked for Brimer. Spectra

Merchandising shall issue two separate checks for the final penalty payment: (a) one check made payable to OEHHA in the amount of \$15,000.00, representing 75% of the total penalty; and (b) one check to “The Chanler Group in Trust for Russell Brimer” in the amount of \$5,000.00, representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments. The checks and 1099s shall be delivered to the addresses listed in Section 3.3 below.

### **3.3 Payment Procedures**

#### **3.3.1. Issuance of Payments.** Payments shall be delivered as follows:

- (a) All payments owed to Brimer, pursuant to Sections 3.1 through 3.2, shall be delivered to the following payment address:

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

- (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to Sections 3.1 through 3.2, shall be delivered directly to OEHHA (Memo line “Prop 65 Penalties”) at the following addresses:

For United States Postal Service Delivery:

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

With a copy of the checks payable to OEHHA mailed to The Chanler Group at the address set forth above in 3.3.1(a), as proof of payment to OEHHA.

**3.3.2 Issuance of 1099 Forms.** After each penalty payment, Spectra Merchandising shall issue separate 1099 forms for each payment to Brimer, whose address and tax identification number shall be furnished upon request after this Settlement Agreement has been fully executed by the Parties, and OEHHA at the addresses listed in Section 3.3.1 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 issue to be resolved after the material terms of the agreement had been settled. Spectra Merchandising 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. Spectra Merchandising shall reimburse Brimer and his counsel \$30,000.00 for fees and costs incurred as a result of investigating, bringing this matter to its attention, and negotiating a settlement. Spectra Merchandising 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 the Effective Date 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 Spectra Merchandising**

This Settlement Agreement is a full, final and binding resolution between Brimer and Spectra Merchandising, 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, assignees against Spectra Merchandising, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom Spectra Merchandising 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 DEHP contained in the Products that were manufactured, distributed, shipped, sold and/or offered for sale or shipment by Spectra Merchandising 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 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 DEHP in the Products manufactured, distributed, shipped, sold and/or offered for sale or shipment by Spectra Merchandising prior to the Effective Date (collectively "claims"), against Spectra Merchandising and Releasees.

### **5.2 Spectra Merchandising's Release of Brimer**

Spectra Merchandising 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.

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

Within twelve months of the execution of this Settlement Agreement, Spectra Merchandising may ask Brimer, in writing, to file a complaint, incorporate the terms of this Settlement Agreement into a consent judgment, and seek the court's approval of the consent judgment pursuant to Health and Safety Code § 25249.7, or as may otherwise be allowed by law. If so requested, Brimer agrees to reasonably cooperate with Spectra Merchandising, and the Parties and their respective counsel agree to mutually employ 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, Spectra Merchandising 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 \$15,000.00 exclusive of fees and costs that may be incurred on appeal. Spectra Merchandising will remit payment to The Chanler Group, at the address set forth in Section 4 above. Such additional fees shall be paid by Spectra Merchandising within ten days (10) 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 Spectra Merchandising 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 Spectra Merchandising 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 Spectra Merchandising:

Barbara R. Adams, Esq.  
Adams, Nye & Becht, LLP  
222 Kearny Street, 7<sup>th</sup> Floor  
San Francisco, CA 94108-4521

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 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. 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**

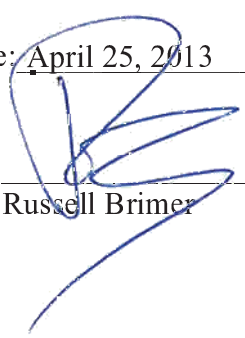
The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained herein.

AGREED TO:

AGREED TO:

Date: April 25, 2013 \_\_\_\_\_

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

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

By: \_\_\_\_\_  
Patricia Schoenberg, President  
Spectra Merchandising Internat'l, Inc.

To Spectra Merchandising:

Barbara R. Adams, Esq.  
Adams, Nye & Becht, LLP  
222 Kearny Street, 7<sup>th</sup> Floor  
San Francisco, CA 94108-4521

To Brimer:

Proposition 65 Coordinator  
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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.

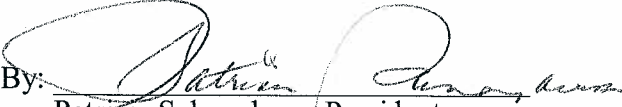
AGREED TO:

AGREED TO:

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

Date: 4/26/13

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

By:   
Patricia Schoenberg, President  
Spectra Merchandising Internat'l, Inc.