

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Parties

This Settlement Agreement is entered by and between Russell Brimer (“Brimer”) and Blooming Import, Inc. (“Blooming”) with Brimer and Blooming each individually referred to as a “Party” and collectively as the “Parties.” Brimer is an individual residing in the State of California who states that he seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products. Blooming 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 and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

### 1.2 General Allegations

Brimer alleges that Blooming sells and distributes for sale in California packaged, dried Oolong teas containing lead in levels requiring a warning under Proposition 65 and that Blooming failed to provide a warning. Lead is listed pursuant to Proposition 65 as a chemical known to cause birth defects or other reproductive harm.

### 1.3 Product Description

For purposes of this Settlement Agreement, “Products” are defined as dried tea sold by Blooming in California, including but not limited to, the packaged, dried Oolong tea identified in Brimer’s Notice (the *Oolong Tea, UPC #7 34765 17573 3*), without regard to whether the Products are sold in individual units, cases, containers, or in bulk quantities.

### 1.4 Notice of Violation

On January 27, 2017, Brimer served Blooming, the California Attorney General and all other requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”). The Notice alleges that Blooming violated Proposition 65 by failing to warn its customers and consumers in California of the health hazards associated with exposures

to lead from the Products. No public enforcer has commenced and is diligently prosecuting an action to enforce the allegations made in the Notice.

### **1.5 No Admission**

Blooming denies all factual and legal allegations contained in the Notice and those set forth in Sections 1.1 and 1.2 of this Settlement Agreement, and maintains that all of the products that it has sold and 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 Blooming of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Blooming of any fact, finding, conclusion, issue of law, or violation of law, the same being specifically denied by Blooming. This Section shall not, however, diminish or otherwise affect Blooming'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 the date on which this agreement is fully executed by the Parties.

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

**2.1** Commencing on the Effective Date and continuing thereafter, Blooming shall only ship, sell, or offer for sale in California: (i) Reformulated Products pursuant to Section 2.2 or (ii) non-Reformulated Products that bear a clear and reasonable warning pursuant to Section 2.4.

**2.2** "Reformulated Products" are defined as those Products that:

**2.2.1** yield an infusion test result of "no reportable amount" of lead when a certified laboratory evaluates the Product using a validated preparation method and analyzes the sample according to United States Environmental Protection Agency ("EPA") testing methodology 6020 using inductively coupled plasma mass spectrometry (ICP-MS). The sample shall be prepared by placing one prepackaged tea bag or, for loose leaf teas, two grams of dried tea leaves, in 1 cup (8 fluid ounces or 237 milliliters

(mL)) of boiling ultra-pure water (with the heat source immediately removed upon introduction of the tea to the water) and allowed to steep for precisely five minutes, and after five minutes decanting a representative sample of the resulting infusion for analysis. Method blanks of all equipment to be used shall be prepared prior to testing to establish baseline lead contributions from water heating vessel (e.g., tea kettle), equipment used to hold (e.g., meshball) and stir the tea infusion, and any tea cup or other vessel in which the tea steeps. For purposes of this Settlement Agreement, “no reportable amount” is defined as an amount of lead that does not exceed a reporting limit of 1.0 micrograms per liter ( $\mu\text{g/L}$ ); or

**2.2.2** yield a content test result of “no reportable amount” of lead when a certified laboratory evaluates a representative sample of the dried tea Product using a validated preparation method and analyzes the sample according to EPA testing methodology 6020 using ICP-MS. For purposes of this Settlement Agreement, “no reportable amount” is defined as an amount of lead that does not exceed 0.25 milligrams per kilogram (mg/kg).

### **2.3 Modification of Reformulation Standards**

The reformulation standards set forth in Section 2.2, above, shall not be modified unless the conditions and procedures set forth in Sections 2.3.1 or 2.3.2, below, are satisfied.

#### **2.3.1 Alternative Standards Adopted by The State of California.**

Blooming may utilize any lead reformulation standard or level for the Products that is, after the Effective Date: (i) adopted by The State of California, either by statute or regulation; or (ii) agreed to by the California Attorney General, on behalf of the People of the State of California, in a consent judgment entered by a Superior Court of the State of California.

**2.3.2 Alternative Standards Adopted by Brimer.** Blooming may utilize any lead reformulation standard or level for the Products that is, after the Effective Date, agreed to by Brimer in a consent judgment entered by the California Superior Court.

#### **2.4 Clear and Reasonable Warnings**

Commencing on the Effective Date and continuing thereafter, those Products sold, offered for sale, or distributed for sale in California by Blooming that are not Reformulated Products, shall be accompanied by a clear and reasonable warning, in accordance with Title 27, Article 6 of the California Code of Regulations (“Proposition 65 Warning Regulations”) or this Section. Any warning used by Blooming shall be prominently placed in relation to the Product with such conspicuousness when 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. For purposes of this Settlement Agreement, a clear and reasonable warning for the Products satisfying the above criteria includes, but is not limited to, a warning containing the following statement:

**WARNING.** Consuming this product can expose you to chemicals including lead, which is known to the State of California to cause birth defects or other reproductive harm. For more information, go to [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food).

### **3. MONETARY SETTLEMENT TERMS**

#### **3.1 Civil Penalty Payment**

Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, including the Products, Blooming agrees to pay civil penalties in the amount of \$2,500 within five days of the Effective Date. The penalty payment will be allocated in accordance with California Health and Safety Code section 25249.12(c)(1) and (d), with 75% of the

penalty amount remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount paid to Brimer. Blooming shall issue its payment in two checks for the following amounts made payable to (a) “OEHHA” in the amount of \$1,875; and (b) “Russell Brimer, Client Trust Account” in the amount of \$625. Brimer’s counsel shall be responsible for delivering OEHHA’s portion of any civil penalty payment made under this Settlement Agreement.

### **3.2 Attorneys’ Fees and Costs**

The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without reaching terms on the fees and costs to be reimbursed, leaving the issue to be resolved after the material terms of the Parties’ agreement had been settled. Shortly after finalizing the other settlement terms, the Parties negotiated Blooming’s reimbursement of Brimer’s fees and costs under the private attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work performed through the execution and reporting of this Agreement. Within five days of the Effective Date, Blooming agrees to pay \$17,000 in a single check made payable to “The Chanler Group.” Blooming’s payment under this Section shall cover all amounts incurred investigating, bringing this matter to the attention of Blooming’s management, and negotiating a settlement that Brimer contends provides a public benefit.

### **3.3 Payment Address**

All payments under this Settlement Agreement shall be delivered to:

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

## **4. CLAIMS COVERED AND RELEASED**

### **4.1 Brimer’s Release of Blooming**

This Settlement Agreement is a full, final, and binding resolution between Brimer, in his individual capacity and not on behalf of the public in California, and Blooming 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 assignees, against Blooming, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom Blooming directly or indirectly distributes or sells Products, including, but not limited to, its downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees (“Releasees”), based on the alleged or actual failure to warn about exposures to lead in Products sold or distributed for sale by Blooming in California before the Effective Date, as alleged in the Notice. Brimer agrees on behalf of himself, his past and current agents, representatives, attorneys, successors, and assignees that compliance with this Settlement Agreement constitutes compliance with Proposition 65 with respect to the alleged or actual failure to warn about exposures to lead in Products sold by Blooming after the Effective Date.

In further consideration of the promises and agreements herein contained, Brimer, as an individual and not on behalf of the public of California, on behalf of himself, his past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all rights he may have to institute or participate in, directly or indirectly, any form of legal action, and releases all claims that he may have against Blooming 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, expenses, investigation fees, expert fees, and attorneys’ fees arising under Proposition 65 with respect to lead in Products distributed, sold or offered for sale by Blooming before the Effective Date, as alleged in the Notice.

The Parties agree and understand that the releases provided under this Section 4.1 shall not extend upstream to any entity that produced the Products, or any component portions thereof, or that supplied the Products, or any component parts thereof to Blooming, except to the extent such products are/were imported, sold, or distributed for sale by Blooming.

#### **4.2 Blooming's Release of Brimer**

Blooming waives any and all claims against Brimer and his attorneys and other representatives, for any and all actions taken or statements made by Brimer and his attorneys and other representatives, whether in the course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

#### **4.3 Mutual Waiver of Civil Code Section 1542**

The Parties, each on his/its own behalf and on behalf of his/its past and current agents, representatives, attorneys, successors, and assignees, and not in any representative capacity or on behalf of the public in California, each provide a general release which shall be effective as a full and final accord and satisfaction, as a bar to all Claims of any nature, character or kind, known or unknown, suspected or unsuspected, or arising under Proposition 65 with respect to the Products. The Parties each acknowledges his/its familiarity with Section 1542 of the California Civil Code, which provides:

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.

The Parties each expressly waive and relinquish any and all rights and benefits which he/it may have under, or which may have been conferred on either of them by the provisions of Civil Code § 1542, to the fullest extent that they may each lawfully waive such rights pertaining to the released matters.

#### **5. 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.

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

**7. NOTICE**

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

For Blooming:

Moon Lee, President  
Blooming Import Inc.  
45 Bowne Street  
Brooklyn, NY 11231

With a copy to:

Matthew Kaplan, Esq.  
Tucker Ellis LLP  
515 South Flower Street, 42<sup>nd</sup> Fl  
Los Angeles, CA 90071

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 a change of address to which all notices and other communications shall be sent.

**8. 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. The exchange of this Agreement and of signature pages by facsimile transmission or electronic mail attachment shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement. Signatures by scanned and e-mailed image or facsimile transmission shall have the same force and effect as original signatures as an electronic record executed and adopted by a Party with the intent to sign the electronic record pursuant to Civil Code §§ 1633.1-1633.17.

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

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

**10. MODIFICATION**

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

**11. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understand, and agreed to all of the terms and conditions of this Settlement Agreement.

**AGREED TO:**

Date: 6/17/2017

By:   
RUSSELL BRIMER

**AGREED TO:**

6-16-2017

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

By:   
Moon Lee, President  
BLOOMING IMPORT, INC.