

**SETTLEMENT AGREEMENT BETWEEN  
ENVIRONMENTAL RESEARCH CENTER AND WOODBOLT DISTRIBUTION, LLC**

This Settlement Agreement (“Agreement”) confirms and documents the settlement of a dispute between Environmental Research Center (“ERC”) and Woodbolt Distribution, LLC (“Woodbolt”) as follows:

**1. INTRODUCTION**

**1.1** On June 1, 2011, ERC, a non-profit corporation, as a private enforcer, and in the public interest, issued a 60-Day Notice of Violation (“Notice”) pursuant to the provisions of Cal. Health & Safety Code Section 25249.5 et seq. (“Proposition 65”) concerning Woodbolt Distribution, Ltd. In the Notice, ERC claims that the products manufactured and distributed by Woodbolt Distribution, Ltd., as more fully described in Section 1.3, contain lead, a chemical listed under Proposition 65 as a carcinogen and reproductive toxin, and that such products expose consumers at a level requiring a Proposition 65 warning. ERC and Woodbolt shall sometimes be referred to individually as a “Party” or collectively as the “Parties.”

**1.2** ERC is a California non-profit corporation dedicated to, among other causes, helping safeguard the public from health hazards by bringing about a reduction in the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees and encouraging corporate responsibility. ERC has diligently prosecuted this matter and is settling this case in the public interest.

**1.3** Woodbolt is a business entity that employs ten or more persons. Woodbolt arranges the manufacture, distribution and/or sale of Cellucor N0 (also referred to as N-Zero) Extreme, Cellucor D4 Thermal Shock, Cellucor M5 Extreme, and Cellucor D4 Extreme (collectively, the “Covered Products”).

**1.4** ERC served the Notice on the California Attorney General, other public enforcers and Woodbolt. More than 60 days have passed since this Notice was mailed and no public enforcement entity has filed a complaint against Woodbolt with regard to the Covered Products or the alleged violations.

**1.5** ERC alleges that Woodbolt exposes persons in California to lead from the Covered Products without first providing clear and reasonable warnings, in violation of Cal. Health & Safety Code Section 25249.6. Woodbolt denies all material allegations contained in the Notice and specifically denies that the Covered Products require a Proposition 65 warning.

**1.6** Woodbolt denies and disputes the claims asserted in the Notice. Furthermore, Woodbolt contends that any lead present in the Covered Products is the result of naturally occurring levels, as provided for in California Code of Regulations, Title 27, Section 25501(a). Furthermore, Woodbolt maintains that all of its products satisfy applicable federal standards and requirements.

**1.7** The Parties have entered into this Agreement in order to settle, compromise and resolve disputed claims and thus avoid prolonged and costly litigation. Nothing in this Agreement shall constitute or be construed as an admission by any of the Parties, or by any of

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their respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, franchisors, franchisees, licensors, licensees, customers, distributors, wholesalers, or retailers, of any fact, conclusion of law, issue of law, violation of law, fault, wrongdoing, or liability, including without limitation, any admission concerning any alleged violation of Proposition 65, nor shall this Agreement be offered or admitted as evidence in any administrative or judicial proceeding or litigation in any court, agency, or forum, except with respect to an action seeking to enforce the terms of this Agreement.

**1.8** Except as expressly set forth herein, nothing in this Agreement shall prejudice, waive or impair any right, remedy, argument, or defense the Parties may have in any other or future legal proceeding unrelated to these proceedings.

**1.9** The Effective Date of this Agreement shall be one hundred fifty (150) days following the date it is fully executed by all Parties.

## **2. INJUNCTIVE RELIEF, WARNINGS AND TESTING**

**2.1** Any Covered Products manufactured after the Effective Date that Woodbolt thereafter sells in California, markets or distributes for sale in California, or offers for sale to a third party for retail sale to California must either (1) qualify as a "Reformulated Covered Product" under Section 2.3 or (2) meet the warning requirements set out in Section 2.2.

### **2.2 Warnings**

If Woodbolt provides a warning pursuant to Section 2.1, Woodbolt shall provide the following warning:

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

The term "cancer and" shall be included in the warning only if the maximum daily dose recommended on the label contains more than 15 micrograms of lead as determined pursuant to Section 2.4.

The warning shall be securely affixed to or printed upon the container or label of the Covered Product. The warning shall be displayed with such conspicuousness, as compared with other words, statements, or design of the label or container, as applicable, to render the warning likely to be read and understood by an ordinary individual under customary conditions of purchase or use. The warning appearing on the label or container shall be at least the same size as the largest of any other health or safety warnings correspondingly appearing on the label or container, as applicable, of such product, and the word "warning" shall be in all capital letters and in bold print.

### **2.3 Reformulated Covered Products**

A Reformulated Covered Product is one for which the maximum recommended daily serving on the label contains no more than 0.5 micrograms of lead per day as determined by the quality control methodology described in Section 2.5.2.

### **2.4 Calculation for Determining Microgram Per Day Level**

For purposes of this Agreement, daily lead exposures levels shall be measured in micrograms, and shall be calculated using the following formula: micrograms of lead per gram of product, multiplied by grams of product per serving of the product (using the largest serving size appearing on the product label), multiplied by servings of the product per day (using the largest number of servings in a recommended dosage appearing on the product label), which equals micrograms of lead exposure per day.

### **2.5 Testing**

**2.5.1** Once a year, on or before the anniversary of the Effective Date of the Agreement, Woodbolt shall test, or cause to be tested, at least five (5) randomly selected samples of each Covered Product (in the form intended for sale to California, and manufactured after the date of the prior year's random test, as applicable) for lead content. Provided however that this annual testing requirement does not apply to a Covered Product for which Woodbolt has provided the warning specified in Section 2.2 since the Effective Date or during the preceding year.

**2.5.2** All testing pursuant to this Agreement shall be performed using a laboratory method that complies with the performance and quality control factors appropriate for the method used (including limit of detection, limit of quantification, accuracy, and precision) and that meets the following criteria: Closed-vessel, microwave-assisted acid digestion employing high-purity reagents, followed by Inductively Coupled Plasma-Mass Spectrometry (ICP-MS) or any other testing method agreed upon in writing by the Parties.

**2.5.3** All testing pursuant to this Agreement shall be performed by a laboratory that is approved by, accredited by, or registered with the United States Food & Drug Administration for the analysis of heavy metals. Nothing in this Agreement shall limit Woodbolt's ability to conduct, or require that others conduct, additional testing of the Covered Products, including the raw materials used in their manufacture.

**2.5.4** Upon written request by ERC, Woodbolt shall provide to ERC any test results and documentation of testing undertaken by Woodbolt pursuant to Section 2.5 within ten working days of receipt by Woodbolt of ERC's request. Woodbolt shall retain all test results and documentation for a period of four years from the date of the test.

**2.5.5** If tests conducted pursuant to this Section 2.5 demonstrate that no warning is required for a Covered Product during each of three consecutive years, then the testing requirements of this Section 2.5 are no longer required as to that Covered Product. However, if after the three-year period, Woodbolt changes ingredient suppliers for any of the

Covered Products and/or reformulates any of the Covered Products, Woodbolt shall test that Covered Product at least once after such change is made.

### **3. SETTLEMENT PAYMENT**

**3.1** In full satisfaction of all potential civil penalties, payment in lieu of civil penalties, attorneys' fees and costs (which includes, but is not limited to filing fees and costs of attorneys, experts and investigators and testing nutritional health supplements), Woodbolt shall make a total payment of \$65,000 (sixty-five thousand dollars) within fifteen (15) days of execution of this Agreement by all Parties. Said payment shall be for the following:

**3.1.1** \$9,451.50 shall be payable as civil penalties pursuant to Health & Safety Code Section 25249.7(b)(1). Of this amount, \$7,088.63 shall be payable to the Office of Environmental Health Hazard Assessment ("OEHHHA") and \$2,362.87 shall be payable to Environmental Research Center. Cal. Health & Safety Code Section 25249.12(c)(1) & (d). Woodbolt shall send both civil penalty payments to ERC's counsel who shall be responsible to forward the civil penalty payment to OEHHHA along with a copy of the transmittal to Woodbolt.

**3.1.2** \$28,354.50 payable to Environmental Research Center in lieu of further civil penalties, for activities such as (1) investigating, researching and testing consumer products that may contain Proposition 65 listed chemicals; (2) awarding a grant to a California non-profit foundation/entity dedicated to public health as set forth in the Addendum; (3) funding the ERC Eco Scholarship Fund for high school students in California interested in pursuing an education in the field of environmental sciences; (4) funding ERC's Voluntary Compliance Program to work with companies not subject to Proposition 65 to reformulate their products to reduce potential consumer exposures; (5) funding ERC's RxY Program to assist various medical personnel to provide testing assistance to independent distributors of various products; (6) funding ERC's Got Lead? Program to assist consumers in testing products for lead; (7) funding the ERC Cancer Scholarship Fund to provide scholarships to college students in California who have previously been diagnosed with a form of cancer; (8) aiding various cancer research centers and organizations in their ongoing efforts to assist families and children in cancer treatment facilities; (9) Operation Education Mini-Grants program, which awards California public school teachers mini-grants for environmental lesson plans or special projects; (10) maintaining, supporting and increasing ERC's Database of lead-free and Proposition 65 compliant products; (11) increasing ERC's tracking and cataloging of contamination-free sources for specific ingredients used in the types of products ERC test, and sharing this information with companies to try and reduce lead levels in their products; (12) post-settlement monitoring of past consent judgments; and (13) the continuing enforcement of Proposition 65. In deciding the grantee proposals or distributions, ERC takes into consideration several factors including: (a) the nexus between the alleged harm in the underlying cases(s), and the grant program work; (b) the potential for toxics reduction, prevention, remediation or education benefits to California residents from the proposal; (c) the budget requirements of the proposed grantee and the alternate funding sources available to it for its projects; and (d) ERC's assessment of the grantee's chances for success in its program work.

**3.1.3** \$15,629.00 payable to ERC as reimbursement to ERC for reasonable investigation costs associated with the enforcement of Proposition 65 and other costs

incurred as a result of investigating, bringing this matter to Woodbolt's attention, litigating and negotiating this settlement in the public interest.

**3.1.4** \$9,065.00 payable to William Wraith as reimbursement of ERC's attorneys' fees and \$2,500.00 payable to Karen Evans as reimbursement of ERC's attorneys' fees.

**3.2** Woodbolt's payments shall be mailed or delivered to the Law Office of William Wraith.

#### **4. MODIFICATION OF AGREEMENT**

**4.1** This Agreement may be modified only upon written agreement of the Parties. ERC is entitled to reasonable attorney's fees and costs for any modification of the Agreement initiated or requested by Woodbolt.

#### **5. ENFORCEMENT OF AGREEMENT**

**5.1** Each Party reserves the right to enforce the terms of this Agreement notwithstanding the release of Claims in Section 6.

**5.2** In the event that ERC alleges that any Covered Product fails to qualify as a Reformulated Covered Product (and for which ERC alleges that no warning has been provided pursuant to Section 2.2), then ERC shall inform Woodbolt in a reasonably prompt manner of its test results, including information sufficient to permit Woodbolt to identify the Covered Products at issue. Woodbolt shall, within thirty (30) days following such notice, provide ERC with testing information demonstrating Woodbolt's compliance with Sections 2.3 and 2.5, if warranted. The Parties shall first attempt to resolve the matter prior to ERC taking any legal action pursuant to Section 12.

#### **6. APPLICATION OF AGREEMENT**

**6.1** This Agreement shall apply to, be binding upon and benefit the Parties, and respective subsidiaries and divisions and the successors and assigns of any of them.

#### **7. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

**7.1** This Agreement is a full, final, and binding resolution between ERC, on behalf of itself, and Woodbolt, of any alleged violation of Proposition 65 or its implementing regulations for failure to provide Proposition 65 warnings of exposure to lead from the handling, use or consumption of the Covered Products. ERC, on behalf of itself, its agents, officers, representatives, attorneys, successors and/or assignees, hereby releases and discharges: (a) Woodbolt and its parent companies, subsidiaries, affiliates, divisions, and Woodbolt Distribution, Ltd.; (b) each of their respective licensors, licensees, franchisors, franchisees, joint venturers, partners, vendors, manufacturers, packagers, contractors, and finished product and ingredient suppliers; (c) each of the distributors, wholesalers, retailers, users, packagers, customers (excluding private label customers) and all other entities in the distribution chain down to the consumer of any Covered Product of the persons and entities described in (a) and (b)

above; and (d) each of the respective officers, directors, shareholders, employees, and agents of the persons and entities described in (a) through (c), above (the persons and entities identified in (a), (b), (c), and (d), above, including the predecessors, successors and assigns of any of them, are collectively referred to as the "Released Parties"), from any and all claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees (including but not limited to investigation fees, attorney's fees and expert fees), costs and expenses (collectively, "Claims") as to any alleged violation of Proposition 65 arising from or related to the failure to provide Proposition 65 warnings regarding lead for Covered Products manufactured prior to the Effective Date.

7.2 ERC also, on behalf of itself, its agents, representatives, attorneys, successors and/or assignees, and in its individual capacity only (and not on behalf of the public), hereby releases and discharges the Released Parties from any and all known and unknown Claims for alleged violations of Proposition 65, or for any other statutory or common law, arising from or relating to alleged exposures to lead in the Covered Products as set forth in the Notice. It is possible that other Claims not known to the Parties arising out of the facts alleged in the Notice and relating to the Covered Products will develop or be discovered. ERC, on behalf of itself only, acknowledges that this Agreement is expressly intended to cover and include all such Claims, including all rights of action therefor. ERC has full knowledge of the contents of California Civil Code section 1542. ERC, on behalf of itself only, acknowledges that the Claims released in Sections 7.1 and 7.2 may include unknown Claims, and nevertheless waives California Civil Code section 1542 as to any such unknown Claims. California Civil Code section 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."

ERC, on behalf of itself only, acknowledges and understands the significance and consequences of this specific waiver of California Civil Code section 1542.

7.3 Compliance with the terms of this Agreement shall be deemed to constitute compliance by any Released Party with Proposition 65 regarding alleged exposures to lead in the Covered Products.

7.4 ERC, on one hand, and Woodbolt, on the other hand, release and waive all Claims they may have against each other for any statements of actions made or undertaken by them in connection with the Notice. Provided however, nothing in this Section 7 shall affect or limit any Party's right to seek to enforce the terms of this Agreement.

## **8. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

8.1 In the event that any of the provisions of this Agreement are held by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.

**9. GOVERNING LAW**

**9.1** The terms and conditions of this Agreement shall be governed by and construed in accordance with the laws of the state of California.

**10. PROVISION OF NOTICES**

**10.1** All notices required to be given to either Party to this Agreement by the other shall be in writing and sent to the following agents listed below by (a) first-class mail, (b) overnight courier, or (c) personal delivery:

**FOR ENVIRONMENTAL RESEARCH CENTER:**

Chris Heptinstall, Executive Director  
Environmental Research Center  
3111 Camino del Rio North, Suite 400  
San Diego, CA 92108

William Wraith  
Wraith Law  
16485 Laguna Canyon Road, Suite 250  
Irvine, CA 92618  
Telephone: (949) 251-9977  
Facsimile: (949) 251-9978

Karen Evans  
Coordinating Counsel  
Environmental Research Center  
4218 Biona Place  
San Diego, CA 92116  
Telephone: (619) 640-8100

**FOR WOODBOLT:**

Doss Cunningham  
Chief Executive Officer  
Woodbolt Distribution, LLC  
1005 S. Shepherd, Suite 617  
Houston, TX 77019

With a copy to:

Arnold & Porter LLP  
Trenton Norris  
Sarah Esmaili  
Three Embarcadero Center 7th Floor  
San Francisco, CA 94111  
Telephone: (415) 471-3100  
Facsimile: (415) 471-3400

## **11. DRAFTING**

**11.1** The terms of this Agreement have been reviewed by the respective counsel for the Parties to this Agreement prior to its signing, and each Party has had an opportunity to fully discuss the terms with counsel. The Parties agree that, in any subsequent interpretation and construction of this Agreement entered thereon, the terms and provisions shall not be construed against either Party.

## **12. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

**12.1** In the event a dispute arises with respect to either Party's compliance with the terms of this Agreement, the Parties shall meet either in person or by telephone and endeavor to resolve the dispute in an amicable manner. No action or motion may be filed in the absence of such a good faith attempt to resolve the dispute beforehand. In the event an action or motion is filed, however, the prevailing Party may seek to recover costs and reasonable attorneys' fees. As used in the preceding sentence, the term "prevailing Party" means a Party who is successful in obtaining relief more favorable to it than the relief that the other Party was amenable to providing during the Parties' good faith attempt to resolve the dispute that is the subject of such enforcement action.

## **13. ENTIRE AGREEMENT, AUTHORIZATION**

**13.1** This 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.

**13.2** Each signatory to this Agreement certifies that he or she is fully authorized by the Party he or she represents to stipulate to the Agreement.



13.3 This Agreement may be executed in counterparts, which taken together shall be deemed to constitute the same document. A facsimile or pdf signature shall be as valid as the original.

AGREED:

Dated: July 31<sup>st</sup>, 2012

WOODBOLT DISTRIBUTION, LLC

By:   
Doss Cunningham  
Chief Executive Officer

Dated: 7/31, 2012


ENVIRONMENTAL RESEARCH CENTER

By:   
Chris Hoffmann  
Executive Director

APPROVED AS TO FORM:


Dated: July 31, 2012

ARNOLD & PORTER LLP

By:   
Sarah Esmaili  
Attorney for Woodbolt Distribution, LLC

Dated: 7/31, 2012

LAW OFFICE OF WILLIAM WRAITH

By:   
William Wraith  
Attorney for Environmental Research Center

## **Addendum**

The grant to a third party California non-profit organization referenced in Section 3.1.2 shall be made to the following:

St. Jude Children's Research Hospital at [www.StJude.org](http://www.StJude.org)

The mission of St. Jude Children's Research Hospital is to advance cures, and means of prevention, for pediatric catastrophic diseases through research and treatment. ERC shall ensure that all funds will be disbursed and used in accordance with Proposition 65's statutory purposes and ERC's mission statement, articles of incorporation, and by laws within six months of receipt.