

## **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release (the “Agreement”) is between the Center for Environmental Health (“CEH”) and Kernel Investments, Inc. (“Kernel Investments”) (together, the “Parties”).

### **1. INTRODUCTION**

**1.1.** On June 24, 2013, CEH, a non-profit corporation acting in the public interest, provided a “Notice of Violation of Proposition 65” to the California Attorney General, the District Attorneys of every county in California, the City Attorneys of every California city with a population greater than 750,000, and to Kernel Investments regarding the presence of lead and lead compounds (collectively, “Lead”) in footwear manufactured, distributed or sold by Kernel Investments (the “Notice”).

**1.2.** The Notice alleges that Kernel Investments’ footwear contains Lead. The Notice alleges that such footwear exposes people who touch, wear or otherwise handle the footwear to Lead, a chemical known to the State of California to cause cancer and birth defects or other reproductive harm, without first providing clear and reasonable warning to such persons regarding the carcinogenic or reproductive toxicity of Lead. The Notice alleges that such conduct violates Health & Safety Code §25249.6, the warning provision of Proposition 65.

**1.3.** The Parties enter into this Agreement for the purpose of avoiding prolonged and costly litigation regarding footwear manufactured, distributed and/or sold by Kernel Investments. By executing this Agreement, the Parties do not admit any facts or conclusions of law. It is the Parties’ intent that nothing in this Agreement shall be construed as an admission by the Parties of any fact, conclusion of law, issue of law or violation of law, nor

shall compliance with the Agreement constitute or be construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law. Nothing in this Agreement shall prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or any other or future legal proceedings.

## **2. DEFINITIONS**

**2.1.** “Covered Products” means footwear that is Manufactured, distributed, sold or offered for sale by Kernel Investments.

**2.2.** “Lead Limits” means the maximum concentrations of lead and lead compounds by weight specified in Section 3.2.

**2.3.** “Manufactured” and “Manufactures” means to manufacture, produce or assemble.

**2.4.** “Paint or other Surface Coatings” means a fluid, semi-fluid, or other material, with or without a suspension of finely divided coloring matter, which changes to a solid film when a thin layer is applied to a metal, wood, stone, paper, leather, cloth, plastic, or other surface. This term does not include printing inks or those materials which actually become a part of the substrate, such as the pigment in a plastic article, or those materials which are actually bonded to the substrate, such as by electroplating or ceramic glazing.

**2.5.** “Supplier” means a person or entity that Manufactures, imports, distributes or supplies a Covered Product to Kernel Investments.

## **3. INJUNCTIVE RELIEF**

**3.1. Specification Compliance Date.** To the extent it has not already done so, no more than 30 days after execution of this Agreement, Kernel Investments shall provide the

Lead Limits to its Suppliers of Covered Products and shall instruct each Supplier to use reasonable efforts to provide footwear that complies with the Lead Limits on a nationwide basis.

**3.2. Lead Limits.** Upon execution of this Agreement, Kernel Investments shall not purchase, import, Manufacture, or supply to an unaffiliated third party any Covered Product that will be sold or offered for sale to California consumers that exceeds the following Lead Limits:

3.2.1 Paint or other Surface Coatings on Accessible Components:  
90 parts per million (“ppm”).

3.2.2 Polyvinyl chloride (“PVC”) Accessible Components: 200 ppm.

3.2.3 All other Accessible Components other than cubic zirconia (sometimes called cubic zirconium, CZ), crystal, glass or rhinestones: 300 ppm.

#### **4. SETTLEMENT PAYMENTS**

**4.1.** In consideration of the mutual covenants and releases provided in this Agreement, within fourteen (14) days of the Parties’ execution of this Agreement, Kernel Investments shall pay a total of \$40,000 as a settlement payment. This total shall be paid in three separate checks delivered to the address set forth in Section 11.1 and shall be made payable and allocated as follows.

**4.2. Civil Penalty.** Kernel Investments shall pay \$5,250 as a penalty pursuant to Health & Safety Code §25249.7(b), such money to be apportioned by CEH in accordance with Health & Safety Code §25249.12. The penalty check shall be made payable to the Center for Environmental Health.

**4.3. Monetary Payment in Lieu of Civil Penalty.** Kernel Investments shall pay \$7,900 as payment to CEH in lieu of civil penalty pursuant to Health & Safety Code §25249.7(b), and California Code of Regulations, Title 11 §3203(b). CEH will use such funds to continue its work educating and protecting people from exposures to toxic chemicals, including heavy metals. In addition, CEH may use a portion of such funds to monitor compliance with the reformulation requirements of this Agreement. The payment in lieu of penalty check shall be made payable to the Center For Environmental Health.

**4.4. Attorneys' Fees and Costs.** Kernel Investments shall pay \$26,850 to reimburse CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any other costs incurred as a result of investigating, bringing this matter to Kernel Investments's attention, litigating and negotiating a settlement in the public interest. This payment shall be made payable to the Lexington Law Group.

## **5. MODIFICATION OF SETTLEMENT AGREEMENT**

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

## **6. ENFORCEMENT OF SETTLEMENT AGREEMENT**

**6.1.** The Parties agree that any action based on violation of this Agreement shall be brought in the Superior Court of California in Alameda County. For purposes of this Agreement, notwithstanding Section 1.3 above, the Parties agree that the Superior Court of California in Alameda County has subject matter jurisdiction over any disputes arising from this Agreement and personal jurisdiction over each of the Parties, and that venue is proper in the County of Alameda. Should a party to this Agreement prevail on any action to enforce the terms

of this Agreement, it shall be entitled to reasonable attorneys' fees and costs associated with such enforcement.

## **7. APPLICATION OF SETTLEMENT AGREEMENT**

**7.1.** This Agreement shall apply to and be binding upon the Parties hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

## **8. CLAIMS COVERED**

**8.1.** Except as otherwise provided herein, CEH hereby releases and discharges Kernel Investments (dba JC Dossier), its parents, subsidiaries, directors, officers, owners, employees, agents, and all entities to whom it distributes or sells Covered Products including, but not limited to, distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees for any claim for violation of Proposition 65, or any other claim related to failure to warn, about exposures to Lead in the Covered Products that was or could have been asserted based on the facts alleged in the Notice arising from Covered Products manufactured, distributed or sold by Kernel Investments on or before the execution of this Agreement. Compliance with the terms of this Agreement constitutes compliance with Proposition 65 for purposes of exposures to Lead from the Covered Products.

## **9. SPECIFIC PERFORMANCE**

**9.1.** The Parties expressly recognize that Kernel Investments's obligations under this Agreement are unique. In the event that Kernel Investments is found to be in breach of this Agreement for failure to comply with the provisions of Section 3 hereto, the Parties agree that it would be extremely impracticable to measure any resulting damages and that such breach would cause irreparable damage. Accordingly, CEH, in addition to any other available rights or

remedies, may sue in equity for specific performance, and Kernel Investments expressly waives the defense that a remedy in damages will be adequate.

## **10. GOVERNING LAW**

**10.1.** The terms of this Agreement shall be governed by the laws of the State of California.

## **11. PROVISION OF NOTICE**

**11.1.** All notices required pursuant to this Agreement and correspondence shall be sent by first class and electronic mail to the following:

For CEH:

Eric S. Somers  
Lexington Law Group  
503 Divisadero Street  
San Francisco, CA 94117  
esomers@lexlawgroup.com

For Kernel Investments:

Sarah Esmaili  
Arnold & Porter LLP  
Three Embarcadero Center, 7<sup>th</sup> Floor  
San Francisco, CA 94111  
Sarah.Esmaili@aporter.com

## **12. ENTIRE AGREEMENT**

**12.1.** 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, or understandings related thereto, if any, are hereby merged herein and therein. There are no warranties, representations, or other agreements

between the Parties except as expressly set forth herein. No representations, oral or otherwise, express or implied, other than those specifically referred to in this Agreement have been made by any Party hereto. No other agreements not specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto only to the extent that they are expressly incorporated herein. No supplementation, modification, waiver, or termination of this Agreement shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

### **13. NO EFFECT ON OTHER SETTLEMENTS**

**13.1.** Nothing in this Agreement shall preclude CEH from resolving any claim against any entity that is not Kernel Investments on terms that are different than those contained in this Agreement.

### **14. EXECUTION IN COUNTERPARTS**

**14.1.** The stipulations to this Agreement may be executed in counterparts by electronic mail, which taken together shall be deemed to constitute one document.


### **15. AUTHORIZATION**

**15.1.** Each signatory to this Agreement certifies that he or she is fully authorized by the party he or she represents to stipulate to this Agreement and to enter into and execute the Agreement on behalf of the party represented and legally bind that party. The undersigned have read, understand and agree to all of the terms and conditions of this

Agreement. Except as explicitly provided herein, each party is to bear its own fees and costs.

**AGREED TO:**

**CENTER FOR ENVIRONMENTAL HEALTH**



\_\_\_\_\_  
Charlie Pizarro  
Associate Director

Dated: 8/9/13

**KERNEL INVESTMENTS, INC.**

\_\_\_\_\_

Dated: \_\_\_\_\_

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title



Agreement. Except as explicitly provided herein, each party is to bear its own fees and costs.

**AGREED TO:**

**CENTER FOR ENVIRONMENTAL HEALTH**

\_\_\_\_\_  
Charlie Pizarro  
Associate Director

Dated: \_\_\_\_\_

**KERNEL INVESTMENTS, INC.**

  
\_\_\_\_\_  
Jennifer Chau  
Name

Dated: 8/02/2013

President  
\_\_\_\_\_  
Title