

## SETTLEMENT AGREEMENT

### 1. INTRODUCTION

#### 1.1 Parties

This Settlement Agreement is entered into by and between Anthony Ferreiro ("Ferreiro"), an individual, and Kole Imports ("Kole"), a California corporation. Together, Ferreiro and Kole 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.

#### 1.2 General Allegations

Ferreiro alleges that Kole has imported, manufactured, fabricated, assembled, distributed and/or sold in the State of California safety goggles including, but not limited to, *Item No. MM028, UPC. No. 731015008315* ("Covered Products") without the requisite Proposition 65 warning that the Covered Products contain the chemical Di(2-ethylhexyl) phthalate (DEHP). On January 1, 1988, the State of California listed DEHP as a chemical known to the State to cause cancer. On October 24, 2003, the State of California listed DEHP as a chemical known to cause reproductive toxicity.

#### 1.3 Notice of Violation(s)

On June 16, 2016, Ferreiro sent to Kole and various public enforcement agencies a document entitled "Notice of Violation of California Health & Safety Code § 25249.5, *et seq.*" (the "Notice"). The Notice provided Kole and such others, including public enforcers, with notice that alleged that Kole was in violation of California Health & Safety Code § 25249.5, for failing to warn consumers and customers that the Covered Products exposed users in California to DEHP. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

#### **1.4 No Admission**

Kole, its affiliates and subsidiaries, parents, directors, officers, agents, employees, attorneys, representatives, shareholders, successors, and assigns and each entity to whom Kole directly or indirectly distributes or sells the Covered Products, including, but not limited to, downstream distributors, wholesalers, customers, retailers, marketplace retailers, franchisees, cooperative members and licensees (collectively, the "Releasees") deny the material factual and legal allegations contained in the Notice and maintain that, to the best of their knowledge, all products that are or have been sold and distributed in California, including the Covered Products, have been and are in compliance with all laws. Nothing in this Settlement Agreement is or shall be construed as an admission by Releasees of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Releasees of any fact, finding, conclusion of law, issue of law, or violation of law, such being specifically denied by Releasees. However, this section shall not diminish or otherwise affect the obligations, responsibilities, and duties under this Settlement Agreement. Notwithstanding the allegations in the Notices, Releasees maintain that they have not knowingly imported, or caused to be imported, the Covered Products for sale in California in violation of Proposition 65.

#### **1.5 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean December 16, 2016, or the date this Settlement Agreement is signed by all parties, whichever date is later

## **2. INJUNCTIVE RELIEF**

### **2.1 Reformulation of Covered Products**

Commencing on the Effective Date, and continuing thereafter, Kole shall only ship, sell, or offer for sale in California, reformulated Covered Products pursuant to Section 2.2 or Covered Products that are labeled with a clear and reasonable warning

pursuant to Section 2.3. For purposes of this Settlement Agreement, a "Reformulated Covered Product" is Covered Product that meets the standard set forth in Section 2.2 below.

## **2.2 Reformulation Standard**

"Reformulated Covered Products" shall mean Covered Products that contain less than or equal to 1,000 parts per million ("ppm") of DEHP when analyzed pursuant to CPSC-CH-C1001-09.3 Standard Operating Procedure for Determination of Phthalates method.

## **2.3 Clear and Reasonable Warnings**

Commencing on the Effective Date, Kole shall, for all Covered Products it sells or distributes and which are intended for sale in California that are not Reformulated Covered Products, or which Kole has reason to believe will be shipped or sold in California, provide clear and reasonable warnings as set forth in subsections 2.3(a) below. The warning shall be prominently placed with such conspicuousness as 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 before purchase or use. Each warning shall be provided in a manner such that the consumer or user is reasonably likely to understand to which specific Covered Product the warning applies, so as to minimize the risk of consumer confusion.

In the event that the Office of Environmental Health Hazard Assessment promulgates one or more regulations requiring or permitting warning text and/or methods of transmission different than those set forth above, Kole shall be entitled to use, at its discretion, such other warning text and/or method of transmission without being deemed in breach of this Agreement.

### **(a) Product Warnings.**

Kole shall affix a warning to the packaging, labeling or directly on each Covered Product sold in California by Kole that states, as appropriate:

**[PROPOSITION 65] WARNING:**

This product contains a chemical known to the State of California to cause cancer, birth defects or other reproductive harm.

The bracketed text may, but is not required to, be used.

or

**[PROPOSITION 65] WARNING:**

This product contains chemicals known to the State of California to cause cancer, birth defects or other reproductive harm.

The bracketed text may, but is not required to, be used.

**2.4 Sell-Through Period**

Notwithstanding anything else in this Settlement Agreement, Covered Products that were manufactured prior to the Effective Date shall be subject to the release of liability pursuant to Section 5 of this Settlement Agreement, without regard to when such Covered Products were, or are in the future, distributed or sold to customers. As a result, the obligations of Releasees, as set forth in this Settlement Agreement, including but not limited to Kole's obligations under Section 2, do not apply to these products manufactured or imported prior to the Effective Date.

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

In settlement of all the claims referred to in this Settlement Agreement, Kole shall pay a total of \$1,250.00 in civil penalties in accordance with this Section. Each penalty payment will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Ferreiro. Each penalty payment shall be delivered to the addresses listed in Section 3.2 below.

**3.1 Civil Penalty**

Within ten (10) days of the Effective Date, Kole shall issue two separate checks for the initial civil penalty payment to (a) "OEHHA" in the amount of \$937.50; and (b)

"Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$312.50. All penalty payments shall be delivered to the addresses listed in Section 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 Section 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 OEHHHA (EIN: 68-0284486), pursuant to Section 3.1 shall be delivered directly to OEHHHA (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 OEHHHA.** Kole agrees to provide Ferreiro's counsel with a copy of the checks payable to OEHHHA, 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 OEHHHA.

**(C) Tax Documentation.** Kole agrees to provide a completed IRS 1099 for its payments to each of the following payees under this Settlement Agreement:

(i) "Anthony Ferreiro" whose address and tax identification number shall be provided after this Settlement Agreement is fully executed by the Parties;

(ii) "Brodsky & Smith, LLC" (EIN: 23-2971061) at the address provided in Section 3.2(a)(i); and

(iii) "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA 95814.

**4. REIMBURSEMENT OF FEES AND COSTS**

The Parties acknowledge that Ferreiro 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 fee issue to be resolved after the material terms of the agreement had been settled. Ferreiro then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The Parties 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, Kole shall reimburse Ferreiro's counsel for fees and costs incurred as a result of investigating and bringing this matter to Kole's attention, and negotiating a settlement in the public interest. Within thirty (30) days of the Effective Date, Kole shall issue a check payable to "Brodsky & Smith, LLC" in the amount of \$12,000.00 for delivery to the following address:

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

5. RELEASE OF ALL CLAIMS

**5.1 Release of Kole, and Downstream Customers and Entities**

Ferreiro acting on his own behalf, releases Kole, its affiliates and subsidiaries, parents, directors, officers, agents, employees, attorneys, representatives, shareholders, successors, and assigns and each entity to whom Kole directly or indirectly distributes or sells the Covered Products, including but not limited to, downstream distributors, wholesalers, customers, retailers, marketplace retailers, franchisees, cooperative members 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 exposures to the chemical DEHP that is contained in the Covered Products, and was distributed, sold and/or offered for sale by Kole to customers and consumers in the State of California. This settlement is a full, final and binding resolution of all claims that were or could have been asserted against Kole and/or the Releasees for failure to provide warnings for alleged exposures to DEHP contained in the Covered Products.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Section(s) 3 and 4 above, Ferreiro, on behalf of himself, his past and current agents, representatives, attorneys, successors and/or assignees, provides a release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Kole and/or 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 the chemical DEHP in the Covered Products.

**5.2 Kole's Release of Ferreiro**

Kole, 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 Covered Products.

### **5.3 California Civil Code Section 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 Covered Products will develop or be discovered. Ferreiro on behalf of himself only, on one hand, and Releasees, 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 Sections 5.1 and 5.2 above may include unknown claims, and nevertheless waive 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.**

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

### **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.

### **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 by reason of law generally, or as to the



Covered Products, Kole 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, the Covered Products are 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 Kole:

Jennifer Taggart  
Demetriou, Del Guercio, Springer & Francis, LLP  
915 Wilshire Blvd., Suite 2000  
Los Angeles, CA 90017

For Ferreiro:

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

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.

**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 section 25249.7(f).

**11. MODIFICATION**

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

**12. 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:**

**AGREED TO:**

Date: 12/22/2016

Date: 1-3-17

By: Anthony Ferreiro  
Anthony Ferreiro

By: Robert Kole  
Robert Kole, Co-President  
Kole Imports