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5 Attorneys for Plaintiff
6 SUSAN DAVIA

FILED

APR - 7 2017

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: E. Chris, Deputy **COPY**

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF MARIN
10 UNLIMITED CIVIL JURISDICTION

12 SUSAN DAVIA,
13 Plaintiff,
14 v.
15 FONEGEAR, LLC and DOES 1-150,
16 Defendants.

Case No. CIV 1604011
**JUDGMENT ON PROPOSITION 65
SETTLEMENT**
Action Filed: November 3, 2016
Trial Date: None Assigned

1 In the above-entitled action, Plaintiff Susan Davia and Defendant Fonegear, LLC, having
2 agreed through their respective counsel that a judgment be entered pursuant to the terms of the
3 Settlement Agreement entered into by the parties in resolution of this Proposition 65 action, and
4 following the issuance of an order approving the Parties' Settlement Agreement on this day, IT
5 IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Health & Safety Code §
6 25249.7(f)(4) and Code of Civil Procedure § 664.6, judgment is hereby entered in accordance with
7 the terms of the Settlement Agreement attached hereto as Exhibit A. By stipulation of the
8 parties, the Court will retain jurisdiction to enforce the settlement under Code of Civil Procedure
9 § 664.6.
10

11 **IT IS SO ORDERED.**

12 Dated: APR 7 - 2017
13

PAUL M. HAAKENSON

14 Honorable Paul Haakenson
15 Judge Of The Superior Court
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28

EXHIBIT A

1 Gregory M. Sheffer, Esq., State Bar No. 173124
SHEFFER LAW FIRM
2 81 Throckmorton Ave., Suite 202
Mill Valley, CA 94941
3 Telephone: (415) 388-0911
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4 Attorneys for Plaintiff
5 SUSAN DAVIA

6
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 FOR THE COUNTY OF MARIN
9 UNLIMITED CIVIL JURISDICTION
10

11 SUSAN DAVIA,

12 Plaintiff,

13 v.

14 FONEGEAR, LLC and DOES 1-150,

15 Defendants.
16

Case No. CIV 1604011

**SETTLEMENT AGREEMENT
PURSUANT TO C.C.P. SECTION
664.6 AS TO DEFENDANT
FONEGEAR, LLC**

Action Filed: November 3, 2016
Trial Date: None Assigned

1 **1. INTRODUCTION**

2 **1.1 The Parties**

3 This settlement agreement pursuant to California Code of Civil Procedure Section 664.6
4 ("Agreement" or "Settlement Agreement") is entered into by and between Susan Davia, ("Davia")
5 and Fonegear, LLC ("Fonegear") with Davia and Fonegear collectively referred to as the "Parties."

6 **1.2 Plaintiff**

7 Davia is an individual residing in the State of California who seeks to promote awareness of
8 exposure to toxic chemicals and improve human health by reducing or eliminating hazardous
9 substances contained in consumer products.

10 **1.3 Fonegear, LLC**

11 Fonegear, LLC is a person in the course of doing business for purposes of the Safe Drinking
12 Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 *et seq.*
13 ("Proposition 65"). Fonegear, LLC is alleged to have been responsible for the manufacture or
14 distribution of the products subject to this Agreement.

15 **1.4 General Allegations**

16 Davia alleges that Fonegear participated in the manufacture (or other acquisition),
17 distribution, and/or sale in the State of California, of vinyl-type AV cable products, which products
18 exposed users to diisononyl phthalate ("DINP") without first providing "clear and reasonable
19 warning" under Proposition 65. DINP is listed as a carcinogen pursuant to Proposition 65. DINP
20 shall hereinafter be referred to as the "Listed Chemical." Fonegear denies that the AV cables
21 expose a consumer to DINP from their reasonably anticipated use such that a warning is required.

22 **1.5 Notice of Violation**

23 On March 22, 2016, Davia served Fonegear, LLC, and various public enforcement agencies
24 with a document entitled "60-Day Notice of Violation" that provided public enforcers and the
25 noticed entities with notice of alleged violations of Health & Safety Code § 25249.6 for failing to
26 warn consumers of the presence of DINP, a toxic chemical found in Covered Products sold in
27 California. Fonegear received the March 22, 2016, 60-Day Notice of Violation. The Parties each
28 represent that, as of the date that it executes this Agreement, it is not aware of any public enforcer

1 that is diligently prosecuting a Proposition 65 enforcement action related to DINP in the Covered
2 Products, as identified in the 60-Day Notice.

3 **1.6 Complaint**

4 On November 3, 2016, Davia, allegedly acting in the interest of the general public in
5 California, filed a Complaint in the Superior Court of the State of California for the County of
6 Marin, Case No. CIV 1604011, alleging violations by Fonegear, LLC and Does 1-150 of Health &
7 Safety Code § 25249.6 based, *inter alia*, on the alleged exposures to DINP contained in certain AV
8 cable products.

9 **1.7 No Admission**

10 This Agreement resolves claims that are denied and disputed by Fonegear. The Parties
11 enter into this Agreement as a full and final settlement pursuant to Section 664.6 of any and all
12 claims between the Parties for the purpose of avoiding the cost of prolonged litigation. This
13 Settlement Agreement is the product of negotiation and compromise, and is accepted by the Parties
14 for purposes of settling, compromising, and resolving issues disputed in this action. Fonegear
15 denies the material, factual, and legal allegations contained in the Notice and in the operative
16 Complaint; maintains that the products that Fonegear has imported, distributed, wholesaled, or
17 retailed for sale in California, including the Covered Products, have been and are in compliance
18 with all laws, including but not limited to Proposition 65, and denies that the AV cable products
19 expose a consumer to DINP from their reasonably anticipated use such that a warning is required.
20 Nothing in this Settlement Agreement is or shall be construed as an admission by the Parties of any
21 fact, conclusion of law, issue of law, or violation of law, nor shall compliance with the Settlement
22 Agreement constitute or be construed as an admission by the Parties of any fact, conclusion of law,
23 issue of law, or violation of law. However, notwithstanding the foregoing, this section shall not
24 diminish or otherwise affect the Parties' obligations, responsibilities, and duties under this
25 Agreement.

26 **1.8 Consent to Jurisdiction**

27 For purposes of this Agreement only, the Parties stipulate that the Marin County Superior
28 Court has jurisdiction over the Parties as to the allegations in the 60-Day Notice received from

1 Davia, the allegations in the operative Complaint, and this Agreement, that venue is proper in
2 County of Marin and that the Marin County Superior Court has jurisdiction to approve the
3 Settlement Agreement and to enforce the provisions of the Settlement Agreement. As an express
4 part of this Agreement, pursuant to Code of Civil Procedure Section 664.6, the Marin County
5 Superior Court has jurisdiction over the parties to enforce the Settlement Agreement until
6 performance in full of the terms of the Settlement Agreement.

7 **2. DEFINITIONS**

8 **2.1** The term "Covered Product" shall mean all FUSE brand audio/video cables,
9 including, but not limited to #07676, #7502, #07507 and #07508.

10 **2.2** The term "DEHP Free" shall mean less than or equal to 1,000 parts per million
11 ("ppm") of each DEHP, DINP, DIDP, DnHP and DBP, in any component of any Covered Product,
12 as determined by a minimum of duplicate quality controlled tests by an accredited U.S. laboratory
13 using Environmental Protection Agency ("EPA") testing methodologies 3580A and 8270C or
14 equivalent methodologies utilized by federal or state agencies to determine the presence of, and
15 measure the quantity of, phthalates in a solid substance for regulatory purposes.

16 **2.3** The term "Effective Date" shall mean the date on which the Court approves this
17 Agreement.

18 **2.4** The term "Complaint" shall mean the November 3, 2016, Complaint, Marin County
19 Superior Court Case No. civ 1604011.

20 **3. NON-MONETARY RELIEF**

21 **3.1 Products No Longer in Fonegear's Control**

22 As a material term of this Agreement, Fonegear represents that, promptly after receipt of the
23 60-Day Notice from Davia in this case, Fonegear contacted California customer Bass Pro Shops and
24 Bass Pro Shops removed all Covered Products from sale in California or to California customers. If
25 at any time prior to July 1, 2017, Fonegear becomes aware that any California retail customer
26 maintains any inventory of non-reformulated Covered Product, Fonegear shall send a letter,
27 electronic or otherwise ("Notification Letter") to such customer advising that the Covered Products
28

1 "contain DINP, a chemical known to the State of California to cause cancer," and request that the
2 recipient return, at Fonegear' sole expense, all units of the Covered Product to Fonegear.

3 **3.2 Product Reformulation Commitment**

4 3.2.1 No later than February 1, 2017, Fonegear shall provide the Phthalate Free phthalate
5 concentration standards of Section 2.2 to the a) manufacturer or vendors of the Covered Products,
6 and b) the vinyl components thereof, if known, and instruct each such entity not to incorporate into
7 any of the Covered Products any raw or component materials that do not meet the Phthalate Free
8 concentration standards of Section 2.2. Fonegear shall maintain copies of all vendor
9 correspondence relating to the phthalate concentration standards for a period of two years from the
10 date of any such correspondence. Fonegear shall produce copies of such correspondence within 30
11 days of an informal written request from Davia, provided that Davia may only make one request
12 under this section.

13 3.2.2 After the Effective Date, or February 1, 2017, whichever is later, Fonegear shall
14 provide the Phthalate Free phthalate concentration standards of Section 2.2 to any new
15 manufacturer or vendor of the Covered Products, any vinyl component thereof (if known), and any
16 vendor of raw material used in any vinyl component thereof (if known), and instruct such
17 manufacturer or vendor not to incorporate into the Covered Products any raw or component
18 materials that do not meet the Phthalate Free concentration standards of Section 2.2. Prior to
19 manufacture of any Covered Product, Fonegear shall obtain a written confirmation and
20 accompanying laboratory test result from the new vendor of Covered Product demonstrating
21 compliance with the Phthalate Free phthalate concentration standard. For every Covered Product
22 Fonegear manufactures, causes to be manufactured, orders, causes to be ordered, or otherwise
23 obtains from a new vendor after the Effective Date, Fonegear shall maintain copies of all testing of
24 such products demonstrating compliance with this section and all vendor correspondence relating
25 to the Phthalate Free concentration standards for a period of two years from such testing or
26 correspondence.. Fonegear shall produce copies of such testing and correspondence within 30 days
27 of an informal written request from Davia, provided that Davia may only make one request under
28 this section.

1 3.2.3 After the Effective Date, or February 1, 2017, whichever is later, Fonegear shall not
2 manufacture or cause to be manufactured, order or cause to be ordered, or distribute or cause to be
3 distributed any Covered Product that is not Phthalate Free to any consumer in California.

4 **3.3 Product Warnings for Existing Inventory**

5 As of December 15, 2016, Fonegear shall not sell or ship any Covered Product to a California
6 vendor or retailer, or sell or ship any Covered Product to a vendor or retailer that Fonegear
7 reasonably understands maintains retail outlets in the California, unless such Covered Products are
8 sold or shipped with one of the clear and reasonable warnings set forth hereafter.

9 Each warning shall be prominently placed with such conspicuousness as compared with
10 other words, statements, designs, or devices as to render it likely to be read and understood by an
11 ordinary individual under customary conditions *before* purchase or use. Each warning shall be
12 provided in a manner such that the consumer or user understands to which *specific* Covered
13 Product the warning applies, so as to minimize the risk of consumer confusion.

14 (a) **California Distribution.**

15 (i) **Product Labeling.** For all Covered Products sold to any entity that
16 Fonegear reasonably understands either maintains retail outlets in California or is a distributor for
17 any entity that maintains retail outlets in the California, Fonegear shall affix a warning to the
18 labeling of the Covered Product that states:

19 **WARNING:** This product contains DINP, a chemical
20 known to the State of California to cause
21 cancer.

22 (b) **Catalog and Internet Sales.** For all Covered Products sold or offered for
23 sale by Fonegear via catalog or the Internet to customers located in the United States any such
24 catalog or Internet site offering any Covered Product for sale shall include a warning in the catalog
25 or within the website, identifying the specific Covered Product to which the warning applies, as
26 specified in Sections 3.2(b)(i) and (ii) below.

27 (i) **Mail Order Catalog Warning.** Any warning provided in a mail
28 order catalog must be in the same type size or larger than the Covered Product description text
within the catalog. The following warning shall be provided on the same page and in the same

cancer.

1
2 Alternatively, the designated symbol may appear adjacent to or immediately following the
3 display, description, or price of the Covered Product for which a warning is being given, provided
4 that the following warning statement also appears elsewhere on the same web page, as follows:

5 **WARNING:** Products identified on this page with the
6 following symbol ▼ contain DINP, a
7 chemical known to the State of California to
8 cause cancer.

9 After February 1, 2017, Fonegear shall not distribute or otherwise sell any Covered Product
10 to a California customer or retailer, or sell or ship any Covered Product to a customer or retailer
11 that Fonegear reasonably understands maintains retail outlets in California unless it is Phthalate
12 Free and shall not sell any Covered Product that is not Phthalate Free to a California customer or
13 retailer, or sell or ship any Covered Product that is not Phthalate Free to a customer or retailer that
14 Fonegear reasonably understands maintains retail outlets in California regardless of whether a
15 Proposition 65 warning accompanies the product.

14 **4. MONETARY PAYMENTS**

15 **4.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

16 As a condition of settlement of all the claims referred to in this Agreement, Fonegear shall
17 pay a total of \$6,000 in civil penalties in accordance with California Health & Safety Code §
18 25249.12(c)(1) & (d).

19 **4.2 Augmentation of Penalty Payments**

20 For purposes of the penalty assessment under this Agreement, Davia is relying entirely
21 upon Fonegear for accurate, good faith reporting to Davia of the nature and amounts of relevant
22 sales activity. If within nine (9) months of the Effective Date, Davia discovers and presents to
23 Fonegear evidence that the Covered Products have been distributed by Fonegear in sales volumes
24 materially different than those identified by Fonegear prior to execution of this Agreement, then
25 Fonegear shall be liable for an additional penalty amount of \$10,000.00. Fonegear shall also be
26 liable for any reasonable, additional attorney fees expended by Davia in discovering such
27 additional retailers or sales. Davia agrees to provide Fonegear with a written demand for all such
28 additional penalties and attorney fees under this Section. After service of such demand, Fonegear

1 shall have thirty (30) days to agree to the amount of fees and penalties owing by Fonegear and
2 submit such payment to Davia in accordance with the method of payment of penalties and fees
3 identified in Section 4.1 and 4.4. Should this thirty (30) day period pass without any such
4 resolution between the parties and payment of such additional penalties and fees, Davia shall be
5 entitled to file a formal legal claim for civil penalties pursuant to this Section and shall, if the
6 prevailing party, be entitled to all reasonable attorney fees and costs relating to such claim. If
7 Fonegear is a prevailing party on any claim filed by Davia under this section, then Fonegear shall
8 be entitled to all reasonable attorney fees and costs relating to such claim.

9 **4.3 Reimbursement of Plaintiff's Fees and Costs**

10 The Parties acknowledge that Davia and her counsel offered to resolve this dispute without
11 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
12 issue to be resolved after the material terms of the agreement had been settled. Fonegear then
13 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
14 finalized. The Parties then attempted to (and did) reach an accord on the compensation due to
15 Davia and her counsel under general contract principles and the private attorney general doctrine
16 codified at California Code of Civil Procedure section 1021.5, for all work performed in this matter,
17 except fees that may be incurred on appeal. Under these legal principles, Fonegear shall pay
18 Davia's counsel, on or before the Effective Date, the amount of \$39,000 for fees and costs incurred
19 investigating, litigating and enforcing this matter. Such payment shall be made payable to "Sheffer
20 Law Firm".

21 **4.4 Payment Timing, Payments Held In Trust**

22 Fonegear shall deliver all settlement payment checks required by this Agreement to its
23 counsel within one week of the date that this Agreement is fully executed by the Parties.
24 Fonegear's counsel shall confirm receipt of settlement checks in writing to plaintiff's counsel and,
25 thereafter, hold the checks until such time as the Court approves this settlement contemplated by
26 Section 7.

27 Within five business days of the date a) the Court approves the settlement and b) Davia's
28 counsel informs counsel for Fonegear that the settlement has been approved, Fonegear's counsel

1 shall deliver the settlement checks it has held to plaintiff's counsel as follows:

- 2 1. A civil penalty check payable to "OEHHA" (Memo line "Prop. 65 Penalties, 2016-
3 00225"), in the amount of \$4,500;
- 4 2. A civil penalty check payable to "Susan Davia" (Memo line "Prop. 65 Penalties,
5 2016-00225") in the amount of \$1,500; and
- 6 3. A check payable to "Sheffer Law Firm" (Memo line "Prop. 65 Penalties, 2016-
7 00225") in the amount of \$39,000.

8 All Section 4.1 and Section 4.3 payments shall be delivered to the Sheffer Law Firm at the following
9 address:

10 Sheffer Law Firm
11 Attn: Proposition 65 Controller
12 81 Throckmorton Ave., Suite 202
13 Mill Valley, CA 94941

14 Fonegear shall be liable for payment of interest, at a rate of 10% simple interest, for all amounts due
15 and owing from it under this Section that are not received by Sheffer Law Firm within seven
16 business days of the due date for such payment.

17 Fonegear shall also pay any civil penalties pursuant to Section 4.2, on or before the date
18 agreed upon by the Parties pursuant to Section 4.2, or as ordered by the Court, with a civil penalty
19 check payable to "OEHHA" and "Susan Davia" (Memo line "Prop 65 Penalties, 2016-00225"), in the
20 amounts determined pursuant to Section 4.2.

21 Fonegear shall also pay attorney fees and costs pursuant to Section 4.2, on or before the date
22 agreed upon by the Parties pursuant to Section 4.2, with by a check payable to "Sheffer Law Firm"
(Memo line "2016-00225") in the amount agreed upon by the Parties pursuant to Section 4.2.

23 All Section 4.2 payments shall be delivered to plaintiff's counsel at the following address on
24 or before the date agreed upon by the Parties pursuant to Section 4.2:

25 Sheffer Law Firm
26 Attn: Proposition 65 Controller
27 81 Throckmorton Ave., Suite 202
28 Mill Valley, CA 94941

Fonegear shall also be liable for payment of interest, at a rate of 10% simple interest, for all

1 amounts due and owing from it under Section 4.2 that are not received by Sheffer Law Firm within
2 five business days of the due date for such payment.

3 **4.5 Issuance of 1099 Forms**

4 After this Agreement has been executed, Fonegear shall transmit to its counsel
5 simultaneously with the checks three separate 1099 forms, as follows:

6 (a) The first 1099 shall be issued to the Office of Environmental Health Hazard
7 Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount
8 paid pursuant to Sections 4.1 and 4.2;

9 (b) The second 1099 shall be issued to Davia in the amount paid pursuant to
10 Sections 4.1 and 4.2, whose address and tax identification number shall be
11 furnished upon request; and

12 (c) The third 1099 shall be issued to the Sheffer Law Firm (EIN: 55-08-58910) in
13 the amount paid pursuant to Section 4.2 and Section 4.3.

14 Fonegear's counsel shall transmit the 1099 forms to counsel for plaintiff at the same time that
15 it transmits the checks to counsel for plaintiff.

16 **5. CLAIMS COVERED AND RELEASE**

17 **5.1 Davia's Releases of Settling Defendants**

18 **5.1.1** This Agreement is a full, final, and binding resolution between Davia, acting on her
19 own behalf and in the public interest, and Fonegear and each of its predecessors, directors, officers,
20 employees, contractors, agents, and attorneys ("Defendant Releasees") and each entity to whom
21 Defendant Releasees directly or indirectly distribute or sell the Covered Products ("Downstream
22 Releasees") of any violation of Proposition 65 that has been or could have been asserted against
23 Defendant Releasees and Downstream Releasees based on their failure to warn about alleged
24 exposures to the Listed Chemical contained in the Covered Products sold by Fonegear before the
25 Effective Date.

26 **5.1.2** In further consideration of the promises and agreements herein contained, Davia,
27 acting on her own behalf and in the public interest, releases Defendant Releasees and Downstream
28 Releasees from all claims for violations of Proposition 65 with respect to the Listed Chemical in the

1 Covered Products manufactured, distributed, sold and/or offered for sale by Defendant Releasees
2 and Downstream Releasees before the Effective Date as set forth in the 60-Day Notice of Violation
3 identified in Section 1.5 of this Agreement. Settling Defendant's compliance with this Agreement
4 shall constitute compliance with Proposition 65 with respect failure to warn about the alleged
5 exposures to the Listed Chemical in the Covered Products after the Effective Date.

6 The Parties further understand and agree that this Section 5.1 release shall not extend
7 upstream to any entities that manufactured any Covered Product or any component parts thereof,
8 or any distributors or suppliers who sold any Covered Products or any component parts thereof to
9 Defendants.

10 **5.1.3** Upon court approval of the Agreement, the Parties waive their respective rights to a
11 hearing or trial on the allegations of the Complaint.

12 **5.2 Fonegear's Release of Davia**

13 **5.2.1** Fonegear waives any and all claims against Davia, her attorneys, and other
14 representatives for any and all actions taken or statements made (or those that could have been
15 taken or made) by Davia and her attorneys and other representatives, whether in the course of
16 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
17 and/or with respect to the Covered Products.

18 **5.2.2** Each Party also provides a general release herein which shall be effective as a full
19 and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
20 expenses, attorneys' fees, damages, losses, claims, liabilities and demands of any Party of any
21 nature, character or kind, known or unknown, suspected or unsuspected, arising out of the subject
22 matter of the Action as to Covered Products sold by Fonegear before the Effective Date. Each Party
23 acknowledges that it is familiar with Section 1542 of the California Civil Code, which provides as
24 follows:

25 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES
26 NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
27 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE
28 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Each Party expressly waives and relinquishes any and all rights and benefits that it may

1 have under, or which may be conferred on it by the provisions of Section 1542 of the California
2 Civil Code as well as under any other state or federal statute or common law principle of similar
3 effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the
4 released matters. In furtherance of such intention, the release hereby given shall be and remain in
5 effect as a full and complete release notwithstanding the discovery or existence of any such
6 additional or different claims or facts arising out of the released matters.

7 **6. SEVERABILITY**

8 If, subsequent to court approval of this Agreement, any of the provisions of this Agreement
9 are determined by a court to be unenforceable, so long as all parties agree, the validity of the
10 enforceable provisions remaining shall not be adversely affected, unless the Court finds that any
11 unenforceable provision is not severable from the remainder of the Agreement.

12 **7. COURT APPROVAL**

13 This Agreement is effective upon execution but must also be approved by the Court.
14 Defendant agrees to accept service of notice of entry of any order on Plaintiff's motion to approve
15 the settlement and/or enter judgment by electronic mail delivery to settling Defendant's counsel of
16 record or other electronic mail recipient expressly designated for purposes of this section.

17 If this Agreement is not approved by the Court in its entirety, the Parties shall meet and
18 confer to determine whether to modify the terms of the Agreement and to resubmit it for approval.

19 In meeting and conferring, the Parties agree to undertake any actions reasonably necessary to
20 amend and/or modify this Agreement in order to further the mutual intention of the Parties in
21 entering into this Agreement.

22 The Agreement shall become null and void if, for any reason, it is not approved and entered
23 by the Court, as it is executed, within one year after it has been fully executed by all Parties. If this
24 Agreement is not entered by the Court, and the Parties have exhausted their meet and confer efforts
25 pursuant to this Section 7, upon 15 days written notice, the law firm holding Settling Defendant's
26 funds in trust shall refund any and all payments made into its trust account by Settling Defendant
27 as requested.
28

1 **8. GOVERNING LAW**

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

3 **9. NOTICES**

4 When any Party is entitled to receive any formal notice under this Agreement, except the
5 Notice to counsel contemplated by Section 4.4, the notice shall be sent by certified mail or by
6 overnight mail with a recipient signature required to the following:

7 For Fonegear, LLC, to:

8 Matt Damman, President
9 Fonegear, LLC
10 2139 Austin Ave.,
11 Rochester Hills, MI 48039

12 With a copy to their counsel:

13 Thomas H. Clarke, Jr.
14 Ropers, Majeski, Kohn & Bentley PC
15 1001 Marshall Street, Suite 500
16 Redwood City CA 94063-2052
17 E-Mail: Thomas.Clarke@rmkb.com
18 Fax: 650-780-1701

19 For Davia to:

20 Proposition 65 Coordinator
21 Sheffer Law Firm
22 81 Throckmorton Ave., Suite 202
23 Mill Valley, CA 94941
24 E-Mail: sheffesq@aol.com

25 A courtesy copy may be sent by E-Mail and/or by facsimile to counsel for the parties. However,
26 the provision of a courtesy notice shall not diminish the requirement that notice be given to the
27 Party as noted.

28 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

 Davia agrees to comply with the reporting form requirements referenced, in California
Health & Safety Code §25249.7(f) and to file a motion for approval of this Agreement.

11. MODIFICATION

 This Agreement may only be modified only by a signed, written agreement of Davia and

1 Fonegear.

2 **12. ADDITIONAL POST-EXECUTION ACTIVITIES**

3 The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed motion
4 is required to obtain judicial approval of this Agreement. In furtherance of obtaining such
5 approval, Davia and Fonegear, and their respective counsel, agree to mutually employ reasonable
6 efforts to support the entry of this Agreement as a settlement agreement and obtain approval of the
7 Agreement - sufficient to render an order approving this agreement - by the Court in a timely
8 manner. Any effort by Fonegear to impede judicial approval of this Agreement shall subject such
9 impeding party to liability for attorney fees and costs incurred by plaintiff or her counsel in their
10 efforts to meet or oppose Fonegear's impeding conduct.

11 **13. ENTIRE AGREEMENT**

12 This Settlement contains the sole and entire agreement and understanding of the Parties
13 with respect to the entire subject matter hereof, and any and all prior discussions, negotiations,
14 commitments, and understandings related hereto. No representations, oral or otherwise, express or
15 implied, other than those contained herein have been made by any Party hereto. No other
16 agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind
17 any of the Parties. No supplementation, modification, waiver, or termination of this Agreement
18 shall be binding unless executed in writing by the Party to be bound. No waiver of any of the
19 provisions of this Agreement shall be deemed or shall constitute a waiver of any of the other
20 provisions whether or not similar, nor shall such waiver constitute a continuing waiver

21 **14. ATTORNEY'S FEES**

22 **14.1** Should Davia prevail on any motion, application for order to show cause or other
23 proceeding to enforce a violation of this Agreement, Davia shall be entitled to her reasonable
24 attorney fees and costs incurred as a result of such motion, order or application, consistent with
25 C.C.P. §1021.5. Should a Settling Defendant prevail on any motion, application for order to show
26 cause or other proceeding to enforce a violation of this Consent Judgment, a Settling Defendant
27 shall be entitled to its reasonable attorney fees and costs incurred as a result of such motion, order
28 or application.

1 **14.2** Except as specifically provided in the above paragraph and in Section 4.3, each
2 Party shall bear its own costs and attorney's fees in connection with this action.

3 **14.3** Nothing in this Section 14 shall preclude a Party from seeking an award of
4 sanctions pursuant to law.

5 **15. Neutral Construction**

6 All Parties and their counsel have participated in the preparation of this Agreement and this
7 Agreement is the result of the joint efforts of the Parties. This Agreement was subject to revision
8 and modification by the Parties and has been accepted and approved as to its final form by all
9 Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this Agreement
10 shall not be interpreted against any Party as a result of the manner of the preparation of this
11 Agreement. Each Party to this Agreement agrees that any statute or rule of construction providing
12 that ambiguities are to be resolved against the drafting Party should not be employed in the
13 interpretation of this Agreement and, in this regard, the Parties hereby waive California Civil Code
14 Section 1654.

15 **16. COUNTERPARTS, FACSIMILE SIGNATURES**

16 This Agreement may be executed in counterparts and by facsimile or portable document
17 format (PDF), each of which shall be deemed an original, and all of which, when taken together,
18 shall constitute one and the same document.

19 **17. AUTHORIZATION**

20 The undersigned parties are authorized to execute this Agreement on behalf of their
21 respective Parties and have read, understood, and agree to all of the terms and conditions of this
22 Agreement.



23 **18. OTHER TERMS**

24 **18.1** This Stipulated Settlement Agreement shall apply to and be binding upon Davia,
25 Fonegear, and the successors or assigns of any of them.

26 **18.2** Nothing in this Settlement Agreement shall release, or in any way affect any
27 rights Fonegear might have against any other party, including but not limited to Defendant
28 Releasees and Distributor Releasees.

1 **18.3** Each Party has had an opportunity to fully discuss the terms and conditions with
2 legal counsel.

3 **IT IS SO AGREED**

<p>4 Dated: January <u>11</u>, 2017</p> <p>5 </p> <p>6 Plaintiff Susan Davia</p> <p>7</p> <p>8</p>	<p>9 Dated: January <u>31</u>, 2017</p> <p>10 </p> <p>11 Matt Damman, President</p> <p>12 Fonegear, LLC</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>
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