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7 Attorneys for Plaintiff
8 SUSAN DAVIA

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

12 SUSAN DAVIA,

13 Plaintiff,

14 v.

15 DESTACO, A.K.A. DE-STA-CO, A DIVISION
16 OF DOVER ENERGY, INC. and DOES 1-150,

17 Defendants.

Case No. CIV 1604012

**CONSENT TO JUDGMENT AS TO
DEFENDANT DESTACO**

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

1 **1. INTRODUCTION**

2 **1.1 The Parties**

3 This Consent to Judgment Settlement Agreement (“Agreement”) is entered into by and
4 between Plaintiff Susan Davia, (“Davia” or “Plaintiff”) and Defendant DESTACO, a.k.a DE-STA-
5 CO, a division of Dover Energy, Inc. (“DESTACO”) with Davia and DESTACO collectively referred
6 to as the “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

12 DESTACO is a person in the course of doing business for purposes of the Safe Drinking
13 Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 *et seq.*
14 (“Proposition 65”).

15 **1.4 General Allegations**

16 Davia alleges that DESTACO manufactured, distributed and/or sold, in the State of
17 California, certain types of vinyl-coated toggle and other clamps made with made with components
18 that exposed users to di-isodecyl phthalate (“DIDP”) and diisononyl phthalate (“DINP”) without
19 first providing “clear and reasonable warning” under Proposition 65.

20 DIDP is listed as a reproductive and developmental toxicant pursuant to Proposition 65.
21 DINP is listed as a carcinogen pursuant to Proposition 65. DIDP and DINP shall hereafter be
22 collectively referred to as “Listed Chemical.”

23 **1.5 Notices of Violation**

24 On May 5, 2016, plaintiff served Jackson’s Hardware, Inc. with a Proposition 65 60-day
25 Notice of Violation, together with a Certificate of Merit, that provided public enforcers and these
26 entities with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn
consumers of the presence of the DIDP and DINP in and on their vinyl-coated toggle clamps sold
in Jackson’s Hardware California retail outlet (AG Notice 2016-00406).

1 On August 25, 2016, plaintiff served Jackson’s DESTACO and W.W. Grainger, Inc. with a
2 Proposition 65 60-day Notice of Violation, together with a Certificate of Merit, that provided public
3 enforcers and these entities with notice of alleged violations of Health & Safety Code § 25249.6 for
4 failing to warn consumers of the presence of the DIDP and DINP in and on DESTACO vinyl-coated
5 toggle clamps sold by W.W. Grainger, Inc. to California customers (AG Notice 2016-00927).

6 DESTACO received the August 25, 2016, Notice of Violation (hereafter “Notice”). The
7 Parties represent that, as of the date each executes this Agreement, they believe that no public
8 enforcer is diligently prosecuting a Proposition 65 enforcement action related to the Listed
9 Chemical in the Covered Products, as identified in the Notice.

10 **1.6 Complaint**

11 On November 3, 2016, Davia, acting in the interest of the general public in California, filed a
12 Complaint in the Superior Court of the State of California for the County of Marin, Case No. CIV
13 1604012, alleging violations by DESTACO and Does 1-150 of Health & Safety Code § 25249.6 based,
14 *inter alia*, on the alleged exposures to DIDP and DINP contained in certain vinyl-coated toggle
15 clamp products.

16 **1.7 No Admission**

17 This Agreement resolves claims that are denied and disputed by DESTACO. The Parties
18 enter into this Agreement pursuant to a full and final settlement of any and all claims between the
19 Parties for the purpose of avoiding prolonged litigation. DESTACO denies the material factual and
20 legal allegations contained in the Notice and Action, maintains that it did not knowingly or
21 intentionally expose California consumers to the Listed Chemical through the reasonably
22 foreseeable use of the Covered Product and otherwise contends that all Noticed products it has
23 manufactured, distributed and/or sold in California have been and are in compliance with all
24 applicable laws. Nothing in this Agreement shall be construed as an admission by DESTACO of
25 any fact, finding, issue of law, or violation of law, nor shall compliance with this Agreement
26 constitute or be construed as an admission by DESTACO of any fact, finding, conclusion, issue of
law, or violation of law, such being specifically denied by DESTACO. However, notwithstanding
the foregoing, this section shall not diminish or otherwise affect DESTACO’s obligations,

1 responsibilities, and duties under this Agreement.

2 **1.8** Consent to Jurisdiction

3 For purposes of this Agreement only, the Parties stipulate that this Court has jurisdiction
4 over DESTACO as to the allegations contained in the Complaint, that venue is proper in County of
5 Marin, and that this Court has jurisdiction to enter and enforce the provisions of this Agreement.
6 As an express part of this Agreement, pursuant to C.C.P. §664.6 the Court in which this action was
7 filed shall retain jurisdiction over the parties to enforce the settlement.

8 **2.** DEFINITIONS

9 **2.1** The term “Complaint” shall mean the November 3, 2016, Complaint, Marin County
10 Superior Court Case No. CIV 1604012.

11 **2.2** The term “Covered Product” means any vinyl-coated toggle or other clamp
12 manufactured, distributed, and/or offered for sale by or through DESTACO including, but not
13 limited to, horizontal hold-down clamps (such as Series 205/206/213/215/217/225/227/235/
14 245/305/307/309/2013/2017/2027/5305/5310), vertical hold-down clamps (such as Series 201/
15 202/207/210/229/247/267/317/518/527/528/533/535/548/578/2002/2007/2010/5105/5110/
16 5905/5910/5915/91090), pull-action latch clamps (such as Series 301/311/323/324/3051/330/
17 331/334/341/344/351/371/374/375/381/3011), squeeze action clamps (such as Series 325/345/
18 424/431/435/441/462/463/482/484/486) and straight line action clamps (such as Series 601/
19 602/603/604/605/606/607/608/609/610/614/615/620/624/630/640/5130/5131/5133/5150/
20 6004/6015)

21 **2.3** The term “Phthalate Free” shall mean less than or equal to 1,000 parts per million
22 (“ppm”) of DEHP, DBP, DINP, DIDP, DnHP and BBP, in any component of any Covered Product,
23 determined by two quality controlled tests by an accredited U.S. laboratory using Environmental
24 Protection Agency (“EPA”) testing methodologies 3580A and 8270C.

25 **2.4** “Manufactured” and “manufactures” have the meaning defined in Section 3(a)(10)
26 of the Consumer Product Safety Act (“CPSA”) [15 U.S.C. § 2052(a)(10)], as amended from time to
time.

1 **3.** NON-MONETARY RELIEF

2 **3.1** Formulation Commitment

3 **3.1.1** No later than the November 1, 2016, DESTACO shall provide the Phthalate Free
4 phthalate concentration standards of Section 2.3 to its then-current vendors of any Covered
5 Product and instruct such vendor not to incorporate any raw or component materials that do not
6 meet or exceed the Phthalate Free concentration standards of Section 2.3 into any Covered Product.

7 **3.1.2** After November 1, 2016, DESTACO shall provide the Phthalate Free phthalate
8 concentration standards of Section 2.3 to any new vendors of any Covered Product and instruct
9 such vendor not to incorporate any raw or component materials that do not meet or exceed the
10 Phthalate Free concentration standards of Section 2.3 into any Covered Product.

11 **3.1.3** After December 1, 2016, DESTACO shall not manufacture or cause to be
12 manufactured, order or cause to be ordered, any Covered Product that is not Phthalate Free as
13 demonstrated by product test reports described in Section 2.3.

14 **3.1.4** For every Covered Product ordered, caused to be ordered, manufactured or caused
15 to be manufactured by DESTACO for distribution or sale after December 1, 2016, DESTACO shall
16 maintain copies of all testing of such products demonstrating compliance with this section, shall
17 maintain copies of all vendor correspondence relating to the Phthalate Free concentration
18 standards and shall produce such copies to Davia within fifteen (15) days of receipt of written
19 request from Davia.

20 **3.2** Interim Warning Provisions

21 After execution of this Agreement, for each shipment that contains any non-reformulated
22 Covered Product to a customer at a California address, DESTACO shall include on the packing slip
23 for such shipment a written notice (Packing Slip Notification) that states: "Notification To
24 California Customers: This shipment contains toggle or other clamp products manufactured before
25 December 1, 2016. Toggle or other clamp products that contain vinyl-coated components
26 manufactured prior to December 1, 2016, contain DINP and/or DIDP, chemicals known to the State
of California to cause cancer or birth defects or other reproductive harm. Vinyl-coated components

1 manufactured after December 1, 2016 have been reformulated to reduce the level of DINP, DIDP,
2 DEHP, DBP, DnHP, and BBP to less than 1000 parts per million.”

3 **4. MONETARY PAYMENTS**

4 **4.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

5 As a condition of settlement of all the claims referred to in this Consent to Judgment,
6 DESTACO shall pay a total of \$11,000 in civil penalties in accordance with California Health &
7 Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of
8 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty
9 remitted to Davia.

10 **4.2 Augmentation of Penalty Payments**

11 For purposes of the penalty assessment under this Agreement, plaintiff is relying entirely
12 upon defendant and its counsel for accurate, good faith reporting to plaintiff of the nature and
13 amounts of relevant sales activity. If within nine (9) months of the Effective Date, plaintiff
14 discovers and presents to DESTACO evidence that the amount of Products shipped by DESTACO
15 to customers with California addresses during the period from July 1, 2015, to June 30, 2016, is more
16 than 25% greater than the amount identified by DESTACO prior to execution of this Agreement,
17 then DESTACO shall be liable for an additional penalty amount of up to \$5,000. DESTACO shall
18 also be liable for any reasonable, additional attorney fees expended by plaintiff, up to \$5,000, in
19 discovering the mistake in the calculation of the amount of products shipped to customers with
20 California addresses from July 1, 2015, to June 30, 2016. Plaintiff agrees to provide DESTACO with
21 a written demand for all such additional penalties and attorney fees under this Section, along with
22 a detailed identification of the evidence supporting additional sales and the method of calculation
23 of the additional penalty. After service of such demand, DESTACO shall have thirty (30) days to
24 dispute or explain the alleged additional sales or agree to the amount of fees and penalties owing
25 and submit such payment to plaintiff in accordance with the method of payment of penalties and
26 fees identified in Sections 4.4 and 4.5. Should this thirty (30) day period pass without any such
resolution between the parties and payment of such additional penalties and fees, plaintiff shall be
entitled to file a formal legal claim for additional civil penalties under this Section.

1 **4.3** Reimbursement of Plaintiff’s Fees and Costs

2 The Parties acknowledge that Davia and her counsel offered to resolve this dispute without
3 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
4 issue to be resolved after the material terms of the agreement had been settled. DESTACO then
5 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
6 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due
7 to Davia and her counsel under general contract principles and the private attorney general
8 doctrine codified at California Code of Civil Procedure section 1021.5, for all work performed in
9 this matter, except fees that may be incurred on appeal. Under these legal principles, DESTACO
10 shall pay the amount of \$39,000 for fees and costs incurred investigating, litigating and enforcing
11 this matter, including the fees and costs incurred (and yet to be incurred) negotiating, drafting,
and obtaining the Court’s approval of this Agreement in the public interest.

12 **4.4** Payment Procedures

13 DESTACO shall deliver all settlement payment funds required by this Consent Judgment
14 within five business days of the date the Court approves the settlement. DESTACO shall deliver
15 the settlement payments to plaintiff’s counsel as follows:

- 16 1. a civil penalty check in the amount of \$8,250 payable to “OEHHA” (EIN: 68-
17 0284486, Memo line “Prop 65 Penalties, 2016-00927”);
- 18 2. a civil penalty check in the amount of \$2,750 payable to “Susan Davia” (Tax ID to
19 be supplied on request, Memo line “Prop 65 Penalties, 2016-00927 and”); and
- 20 3. an attorney fee and cost reimbursement check, pursuant to Section 4.3, in the
21 amount of \$39,000 payable to “Sheffer Law Firm” (EIN 55-08-58910, Memo line
22 “2016-00927”).

23 All Section 4.2 civil penalty or fee/cost payments shall be paid by the date agreed upon
pursuant to that section or as ordered by the Court.

24 All Section 4.1, 4.2 and 4.3 payments shall be delivered to the Sheffer Law Firm at the
25 following address:

26 Sheffer Law Firm
 Attn: Proposition 65 Controller

1 81 Throckmorton Ave., Suite 202
2 Mill Valley, CA 94941

3 DESTACO shall be liable for payment of interest, at a rate of 10% simple interest, for all
4 amounts due and owing from it under this Section that are not received by Sheffer Law Firm
5 within two business days of the due date for such payment.

6 **5. CLAIMS COVERED AND RELEASE**

7 **5.1 Davia's Release of DESTACO**

8 **5.1.1** This Agreement is a full, final, and binding resolution between Davia, on behalf of
9 herself and in the interest of the general public, and DESTACO, its parent company, subsidiaries
10 and each of its attorneys, successors and assigns ("Defendant Releasees") and each entity to whom
11 it directly or indirectly distributes or sells the Covered Products, including, but not limited to, its
12 downstream distributors, wholesalers, customers, retailers, franchiser, cooperative members,
13 licensors and licensees ("Downstream Releasees") of any violation of Proposition 65 that was
14 asserted against Defendant Releasees regarding the failure to warn about exposure to any Listed
15 Chemical contained in the Covered Products.

16 **5.1.2** Davia, on behalf of herself and in the interest of the general public, hereby waives,
17 and releases all Defendant Releasees from all claims for violation of Proposition 65 through the
18 Effective Date based upon exposures from Covered Products to the Listed Chemical as set forth in
19 plaintiff's August 25, 2016, 60-Day Notice to DESTACO.

20 **5.1.3** The Parties understand and agree that this Section 5.1 release only extends
21 upstream to any entities that manufactured any Covered Product or any component parts thereof,
22 or any distributors or suppliers who sold any Covered Products or any component parts thereof to
23 Defendants and that such upstream release shall be limited to only the manufacture, distribution or
24 supply of Covered Products for or to DESTACO and not for any other product besides Covered
25 Products.

26 **5.1.4** Upon court approval of the Agreement, the Parties waive their respective rights to a
hearing or trial on the allegations of the Complaint.

5.2 DESTACO's Release of Davia

1 **5.2.1** DESTACO waives any and all claims against Davia, her attorneys, and other
2 representatives for any and all actions taken or statements made (or those that could have been
3 taken or made) by Davia and her attorneys and other representatives, whether in the course of
4 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
5 and/or with respect to the Covered Products.

6 **5.2.2** The Parties also provide each other with a general release herein which shall be
7 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
8 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of any
9 nature, character or kind, known or unknown, suspected or unsuspected, arising out of the subject
10 matter of the Action. The Parties acknowledge that each is familiar with Section 1542 of the
11 California Civil Code, which provides as follows:

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

17 The Parties expressly waive and relinquish any and all rights and benefits that each may
18 have under, or which may be conferred on it by the provisions of Section 1542 of the California
19 Civil Code as well as under any other state or federal statute or common law principle of similar
20 effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the
21 released matters. In furtherance of such intention, the release hereby given shall be and remain in
22 effect as a full and complete release notwithstanding the discovery or existence of any such
23 additional or different claims or facts arising out of the released matters.

24 **6. SEVERABILITY**

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

7. COURT APPROVAL

This Agreement is effective upon execution but must also be approved by the Court. If this

1 Agreement is not approved by the Court in its entirety, the Parties shall meet and confer to
2 determine whether to modify the terms of the Agreement and to resubmit it for approval. In
3 meeting and conferring, the Parties agree to undertake any actions reasonably necessary to amend
4 and/or modify this Agreement in order to further the mutual intention of the Parties in entering
5 into this Agreement.

6 The Agreement shall become null and void if, for any reason, it is not approved and entered
7 by the Court, as it is executed, within one year after it has been fully executed by all Parties.

8 **8. GOVERNING LAW**

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

10 **9. NOTICES**

11 When any Party is entitled to receive any notice under this Agreement, the notice shall be
12 sent by certified mail and electronic mail to the following:

13 For DESTACO, to:

14 Byron Paul, President
15 DESTACO
16 Corporate Headquarters
17 691 North Squirrel Road, Suite 250
18 Auburn Hills, Michigan 48326

19 With copy to their counsel at:

20 Patrick J. Cafferty, Jr.
21 Munger, Tolles & Olson, LLP
22 560 Mission Street, 27th Floor
23 San Francisco, CA 94105

24 For Davia to:

25 Proposition 65 Coordinator
26 Sheffer Law Firm
81 Throckmorton Ave., Suite 202
Mill Valley, CA 94941

Any Party may modify the person and address to whom the notice is to be sent by sending each other Party notice by certified mail and/or other verifiable form of written communication.

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

Davia agrees to comply with the reporting form requirements referenced, in California

1 Health & Safety Code §25249.7(f) and to file a motion for approval of this Agreement.

2 **11. MODIFICATION**

3 This Agreement may be modified only: (1) by written agreement of the Parties; or (2) upon
4 a successful motion of any party and approval of a modified Agreement by the Court.

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

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

14 **13. ENTIRE AGREEMENT**

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

24 **14. ATTORNEY'S FEES**

25 **14.1** Should Davia or DESTACO prevail on any motion, application for order to show
26 cause or other proceeding to enforce a violation of this Agreement, such prevailing party shall be
entitled to their reasonable attorney fees and costs incurred as a result of such motion, order or
application, consistent with C.C.P. §1021.5.

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
Section 1654.

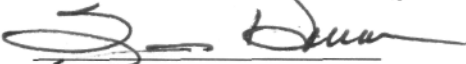
14 **16.** COUNTERPARTS, FACSIMILE SIGNATURES

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

18 **17.** AUTHORIZATION

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

22 **IT IS SO AGREED**

<p>23 Dated: November __, 2016</p> <p>24</p> <p>25 _____ Byron Paul, President DESTACO</p>	<p>23 Dated: November <u>30</u>, 2016</p> <p>24</p> <p>25  Plaintiff Susan Davia</p>
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2 Party shall bear its own costs and attorney's fees in connection with this action.

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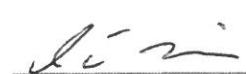

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20 behalf of their respective Parties and have read, understood, and agree to all of the terms and
21 conditions of this Agreement.

22 **IT IS SO AGREED**

<p>23 <i>December 2, 2016</i> Dated: November, 2016</p> <p>24  25 Byron Paul, President <i>IAN NILSSON,</i> 26 BESTACO Assistant Secretary & <i>Assistant Treasurer</i></p>	<p>Dated: November <i>30</i>, 2016</p> <p> Plaintiff Susan Davia</p>
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