

**PROPOSITION 65 SETTLEMENT AGREEMENT**  
**(Susan Davia AG Notice 2016-00937)**

**1. INTRODUCTION**

**1.1 The Parties**

This settlement agreement ("Agreement" or "Settlement Agreement") is entered into by and between Susan Davia, ("Davia") and Kohl's Corporation, Kohl's Department Stores, Inc. and Kohl's Illinois, Inc. (collectively, "Kohl's" or "Defendant"), with Davia and Kohl's collectively referred to as the "Parties."

**1.2 Davia**

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

**1.3 Kohl's**

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

**1.4 General Allegations**

Davia alleges that Kohl's participated in the manufacture, distribution and/or sale, in the State of California, of PVC bedding product display and storage cases made with materials that exposed users to di(2-ethylhexyl)phthalate (DEHP) without first providing a "clear and reasonable warning" under Proposition 65. DEHP is listed as a carcinogen and reproductive toxin pursuant to Proposition 65. DEHP shall be referred to hereinafter as the "Listed Chemical".

**1.5 Notice of Violation**

On August 25, 2016, Davia served Kohl's and various public enforcement agencies with a document entitled "60-Day Notice of Violation" that provided public enforcers and the noticed entities with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn consumers of the

presence of the toxic Listed Chemical found in the Covered Products (as defined below) sold in California (AG Notice 2016-00940). The August 25, 2016, 60-Day Notice of Violation shall be referred to herein as "Notice."

Kohl's received the Notice. Kohl's represents that, as of the date it executes this Agreement, it is not aware of any public enforcer that is diligently prosecuting a Proposition 65 enforcement action related to the Listed Chemical in the Covered Products, as identified in the Notice.

#### **1.6 No Admission**

This Agreement resolves claims that are denied and disputed by Kohl's. The Parties enter into this Agreement pursuant to a full, final and binding settlement of any and all claims between the Parties for the purpose of avoiding prolonged litigation. Kohl's denies the material factual and legal allegations contained in the Notices, maintains that it did not knowingly or intentionally expose California consumers to the Listed Chemical through the reasonably foreseeable use of the Covered Products and otherwise contends that, all Covered Products it has manufactured, distributed and/or sold in California have been and are in compliance with all applicable laws. Nothing in this Agreement shall be construed as an admission by Kohl's of any fact, finding, issue of law, or violation of law, nor shall compliance with this Agreement constitute or be construed as an admission by Kohl's of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Kohl's. However, notwithstanding the foregoing, this section shall not diminish or otherwise affect Kohl's' obligations, responsibilities, and duties under this Agreement.

#### **1.7 Consent to Jurisdiction**

For purposes of this Agreement only, the Parties stipulate that the Marin County Superior Court has jurisdiction over Kohl's as to the allegations in the 60-Day Notice received from Davia, and this Agreement, that venue is proper in County of Marin, and that the Marin County Superior Court has jurisdiction to enforce the provisions of this Agreement. The Parties further stipulate that this Agreement shall be considered a written settlement pursuant to Code of Civil Procedure Section 664.6 and the Marin County Superior Court shall have jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

## **2. DEFINITIONS**

**2.1** The term "Exceptional Covered Product" means any Covered Product that Kohl's determines, either through its own investigation or discovery or through the investigation of a citizen enforcer of Proposition 65 who shares the results of the investigation with Kohl's, after Kohl's has already taken ownership of such Covered Product, does not meet the Phthalate Free standard of Section 2.3 despite Kohl's good faith compliance with the formulation commitments of Section 3.1, and that Kohl's determines is commercially impractical to return to the vendor. For purposes of Exceptional Covered Products, "commercially impractical" means the Covered Product is seasonal and cannot be replaced with a Phthalate Free Covered Product in a timely manner to meet seasonal needs or such other circumstance as will result in commercial or competitive harm to Kohl's despite their good faith efforts to meet the Phthalate Free Standard.

**2.2** The term "Product" or "Covered Product" shall mean the vinyl/PVC product packaging/storage cases for all The Big One Supersoft Plush Throws and Blankets and all Home Classics Quilts (all sizes and patterns).

**2.3** The term "Phthalate Free" Covered Products shall mean that each vinyl component of each Covered Product contains less than or equal to 1,000 parts per million ("ppm") of di(2-ethylhexyl phthalate) ("DEHP"), dibutyl phthalate ("DBP"), diisononyl phthalate ("DINP"), diisodecyl phthalate ("DIDP"), di-n-hexyl phthalate ("DnHP") and butyl benzyl phthalate ("BBP") as determined test results using Environmental Protection Agency ("EPA") testing methodologies 3580A and 8270C.

**2.4** "Effective Date" shall mean May 1, 2019.

**2.5** "California Customer" shall mean any customer located in California or with a ship to address in California

## **3. INJUNCTIVE-TYPE RELIEF**

### **3.1 Vendor Product Reformulation**

**3.1.1** No later than the Effective Date, Kohl's shall provide the Phthalate Free phthalate concentration standards of Section 2.3 to its current vendors of the Covered Products and remind such entities not to incorporate any raw or component materials that do not meet the Phthalate Free

concentration standards of Section 2.3 into any Covered Product. Kohl's shall use reasonable efforts to maintain copies of all such vendor correspondence relating to the Phthalate Free concentration standards for two (2) years after the Effective Date and shall produce such copies to Davia within fifteen (15) days of receipt of reasonable request made in writing from Davia so long as any such request is not made more than once in any 6-month period.

**3.1.2** After the Effective Date, Kohl's shall provide the Phthalate Free phthalate concentration standards of Section 2.3 to any New Vendors of any Covered Product and instruct such entities not to incorporate any raw or component materials that do not meet the Phthalate Free concentration standards of Section 2.3 into any Covered Product. "New Vendors" means vendors of Covered Products from whom Kohl's was not obtaining Covered Products as of the Effective Date. Prior to its initial purchase and acquisition of any Covered Product from any New Vendor, Kohl's shall request a written confirmation and accompanying laboratory test result, if any, from the New Vendor demonstrating compliance with the Phthalate Free phthalate concentration standard in all materials comprising the Covered Product. For two (2) years after the Effective Date, for every Covered Product Kohl's manufactures, causes to be manufactured, orders, causes to be ordered or otherwise obtains from a New Vendor after the Effective Date, Kohl's use reasonable efforts to maintain copies of all testing of such products provided to Kohl's demonstrating compliance with this section, shall use reasonable efforts to maintain copies of all such vendor correspondence relating to the Phthalate Free concentration standards and shall produce such copies to Davia within fifteen (15) days of receipt of reasonable request made in writing from Davia so long as any such request is not made more than once in any 6-month period.

**3.1.3** As of the Effective Date, Kohl's shall not manufacture or cause to be manufactured, order or cause to be ordered any Covered Product that is not Phthalate Free unless such product is demonstrated to be an Exceptional Covered Product. For every Covered Product Kohl's manufactures, causes to be manufactured, orders or causes to be ordered after the Effective Date, Kohl's shall use reasonable efforts to maintain copies of all testing of such products demonstrating compliance with this section, shall maintain copies of all vendor correspondence received by Kohl's, if any, relating to any

such testing, and shall produce such copies to Davia within fifteen (15) days of receipt of reasonable request made in writing from Davia so long as any such request is not made more than once in any 6-month period.

### **3.2 Previously Obtained Covered Products.**

#### **3.2.1 Covered Product Packaging Label.**

As of the Effective Date, for all Covered Product ordered or obtained by Kohl's prior to the Effective Date that Kohl's cannot confirm is Phthalate Free, Kohl's shall provide clear and reasonable Proposition 65 warnings for such Covered Product sold by Kohl's to a California Customer. Kohl's shall affix one of the following warning labels to the Covered Product, which label shall be considered a clear and reasonable warning for purpose of this Agreement.

For Covered Products to which a warning was applied prior to August 30, 2018:


**WARNING:** This packaging contains DEHP, a chemical known to the State of California to cause cancer and birth defects or other reproductive harm. *This packaging is not intended as a storage container. Please discard packaging after purchase.*

or


**WARNING:** This Packaging Contains Chemicals Known To The State Of California To Cause Cancer, And Birth Defects Or Other Reproductive Harm. *This packaging is not intended as a storage container. Please discard packaging after purchase.*

or

For warnings applied to Covered Products after August 30, 2018:

 **WARNING** This packaging can expose you to chemicals, including DEHP, that are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov). [*This packaging is not intended as a storage container. Please discard packaging after purchase.*]

or

 **WARNING** This packaging can expose you to chemicals that are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov). [*This packaging is not intended as a storage container. Please discard packaging after purchase.*]

The bracketed language is optional. The label shall be prominently affixed, either on the front, exterior

surface of the clear packaging or where other health and safety warnings are located, 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.

#### **4. MONETARY PAYMENTS**

##### **4.1 Civil Penalty**

As a condition of settlement of all the claims referred to in this Settlement Agreement, Kohl's shall cause to be paid a total of \$4,000 in civil penalties in accordance with California Health & Safety Code § 25249.12(c)(1) & (d).

##### **4.2 Kohl's Sales Representation**

Kohl's hereby represents and warrants that it has provided Davia with complete and accurate California sales information as to the nature and amounts of relevant sales activity, which information is contained in an electronic mail message from Kohl's counsel to Davia's counsel on July 2, 2019. Such representation is a material basis of Plaintiff's willingness to enter into this Agreement on the terms set forth herein.

##### **4.3 Reimbursement of Davia's Fees and Costs**

The Parties acknowledge that Davia and her 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. Kohl's then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on the compensation due to Davia and her counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure section 1021.5, for all work performed in this matter, except fees that may be incurred on appeal. Under these legal principles, Kohl's shall cause to be paid to Davia's counsel the amount of \$27,000 for fees and costs incurred investigating, litigating and enforcing this matter. Such payment shall be made payable to "Sheffer Law Firm".

##### **4.4 Payment Procedures**

Kohl's shall satisfy its obligation to pay civil penalties pursuant to Section 4.1 by delivery of a

civil penalty check payable to "OEHHA" (EIN: 68-0284486, Memo line "Prop 65 Penalties, 2016-00940"), in the amount of \$3,000 and a civil penalty check payable to "Susan Davia" (Tax ID to be supplied, Memo line "Prop 65 Penalties, 2016-00940") in the amount of \$1,000. Davia shall be responsible for delivering to the California Office of Environmental Health Hazard Assessment the civil penalty check payable to OEHHA.

Kohl's shall satisfy its obligation to pay attorney fees and costs pursuant to Section 4.3 by delivery of a check payable to "Sheffer Law Firm" (EIN 55-08-58910, Memo line "2016-00940") in the amount of \$27,000.

Kohl's shall satisfy its obligation to pay any civil penalties pursuant to Section 4.2 by civil penalty checks payable to "OEHHA" and "Susan Davia" (Memo line "Prop 65 Penalties, 2016-00940"), in the amounts agreed to pursuant to Section 4.2 or as ordered by the Court.

Kohl's shall satisfy its obligation to pay any attorney fees or costs pursuant to Section 4.2 by a check payable to "Sheffer Law Firm" (EIN 55-08-58910, Memo line "2016-00940"), in the amounts agreed to pursuant to Section 4.2 or as ordered by the Court.

All Section 4.1 and Section 4.3 civil penalty and attorney fee/cost payments shall be delivered to plaintiff's counsel within five (5) business days after execution of this Agreement, at the following address:

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

All Section 4.2 civil penalty and attorney fee/cost payments shall be delivered to plaintiff's counsel at the following address on or before the date agreed upon pursuant to that section or ordered by the Court:

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

#### **4.5 Issuance of 1099 Forms**

After this Agreement has been executed and the settlement funds have been transmitted to Davia's counsel, Kohl's shall cause three separate 1099 forms to be issued, as follows:

- (a) The first 1099 shall be issued to the Office of Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount paid pursuant to Sections 4.1 and 4.2;
- (b) The second 1099 shall be issued to Davia in the amount paid pursuant to Sections 4.1 and 4.2, whose address and tax identification number shall be furnished upon request; and
- (c) The third 1099 shall be issued to the Sheffer Law Firm (EIN: 55-08-58910) in the amount paid pursuant to Section 4.3 and 4.2.

### **5. RELEASES**

#### **5.1 DAVIA'S RELEASE OF KOHL'S**

5.1.1 This settlement agreement is a full, final and binding resolution between Davia, and Kohl's of any violation of Proposition 65 that was or could have been asserted by Davia on behalf of herself, her representatives or attorneys, against Kohl's, its directors, officers, employees, attorneys ("Releasees"), and each entity to whom Kohl's directly or indirectly distributes or sells Covered Products, including, but not limited, to Retailers, downstream distributors and retailers ("Downstream Releasees"), based on their alleged failure to warn about alleged exposures to the Listed Chemical contained in the Covered Products that were sold by Kohl's into California before the Effective Date. As to Davia only, Kohl's's compliance with the terms of this settlement shall be deemed compliance with Proposition 65 as to exposures to DINP, DIDP, DEHP, DBP, BBP and DnHP in the Covered Products.

5.1.2 Davia also provides a general release herein which shall be effective as a full and final accord and satisfaction, as a bar to all claims, actions and causes of action, of any nature, character or kind, known or unknown, suspected or unsuspected, arising out of the subject matter of the Notice as to Covered Products sold by Kohl's or Releasees into California prior to the Effective Date. Davia

acknowledges that she is familiar with section 1542 of the California civil code, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Davia, in her individual capacity expressly waives and relinquishes any and all rights and benefits that she may have under, or which may be conferred on her by the provisions of Section 1542 of the California Civil Code as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that he may lawfully waive such rights or benefits pertaining to the released matters. In furtherance of such intention, the release hereby given shall be and remain in effect as a full and complete release notwithstanding the discovery or existence of any such additional or different claims or facts arising out of the released matters.

This Section 5 release shall not release any obligations created by or set forth in this Agreement.

The Parties further understand and agree that this Section 5 release shall not extend upstream to any entities, other than Kohl's, that manufactured the Covered Products or any component parts thereof, or any distributors or suppliers who sold the Covered Products or any component parts thereof to Kohl's.

## **5.2 KOHL'S RELEASE OF DAVIA**

Kohl's, on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against Davia and her attorneys and other representatives, for malicious prosecution or any other actions taken by Davia and her attorneys and other representatives through the execution of this Agreement in the course of investigating claims in this matter, seeking to enforce Proposition 65 against it in this matter, or with respect to the Covered Products that were the subject of the Notices. Kohl's acknowledges that it is familiar with Section 1542 of the California Civil Code, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR

HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Kohl's expressly waives and relinquishes any and all rights and benefits which it may have under, or which may be conferred on it by the provisions of Section 1542 of the California Civil Code as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters identified in this Section 5.2. In furtherance of such intention, the release hereby given shall be and remain in effect as a full and complete release notwithstanding the discovery or existence of any such additional or different claims or facts arising out of the released matters.

## **6. SEVERABILITY**

If any of the provisions of this Agreement are found by a court to be unenforceable, the validity of the enforceable provisions remaining, after express agreement of the Parties, shall not be adversely affected, unless the Court finds that any unenforceable provision is not severable from the remainder of the Agreement.

## **7. GOVERNING LAW**

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

## **8. NOTICES**

When any Party is entitled to receive any notice under this Agreement, the notice shall be sent by FedEx (or other tracked delivery service) or electronic mail to the following:

For The Kohl's Corporation:

Michael F. Tuchalski  
Kohl's Department Stores, Inc.  
Litigation Counsel  
N56 W17000 Ridgewood Dr.  
Menomonee Falls, WI 53051  
[michael.tuchalski@kohls.com](mailto:michael.tuchalski@kohls.com)

For Davia to:

Proposition 65 Coordinator  
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.

**9. 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).

**10. MODIFICATION**

This Agreement may be modified only by written agreement of the Parties or court order.

**11. ENTIRE AGREEMENT**

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. No supplementation, modification, waiver, or termination of this Agreement shall be binding unless executed in writing by the Party to be bound. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any of the other provisions whether or not similar, nor shall such waiver constitute a continuing waiver

**12. ATTORNEY'S FEES**

**12.1** The prevailing party on any motion, application for order to show cause or other proceeding to enforce a violation of this Agreement, shall be entitled to an award of her/its reasonable attorney fees and costs incurred as a result of such motion, order or application, consistent with C.C.P. § 1021.5.

**12.2** Except as otherwise specifically provided herein, each Party shall bear its own costs and attorney's fees in connection with the Notices.

### 13. NEUTRAL CONSTRUCTION

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

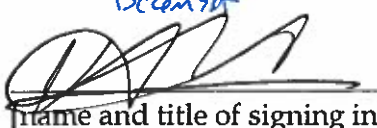
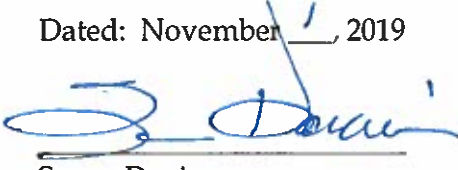
### 14. COUNTERPARTS, FACSIMILE SIGNATURES

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

### 15. AUTHORIZATION

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

**IT IS SO AGREED**

<p>Dated: <del>November</del> <u>16</u>, 2019 <i>December</i></p> <p> [name and title of signing individual] Kohl's Corporation Kohl's Department Stores, Inc. Kohl's Illinois, Inc. VP PRODUCT DEVELOPMENT</p>	<p>Dated: November <u>1</u>, 2019</p> <p> Susan Davia</p>
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