

**PROPOSITION 65 SETTLEMENT AGREEMENT  
(Susan Davia AG Notice 2017-00257)**

**1. INTRODUCTION**

**1.1 The Parties**

This settlement agreement (“Agreement” or “Settlement Agreement”) is entered into by and between Susan Davia, (“Davia”) and Future Textiles, Inc. (“Future Textiles”), with Davia and Future Textiles each referred to as a “Party” and 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 Future Textiles, Inc.**

Future Textiles is alleged to have been responsible for the manufacture and distribution of the products subject to this Agreement. Future Textiles 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 Future Textiles 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 DEHP without first providing “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 Notices of Violation**

On February 28, 2017, Davia served Future Textiles 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 DEHP, a toxic chemical found in the Covered Products sold in California (AG Notice 2017-

00257). The February 28, 2017, 60-Day Notice of Violation shall be referred to herein as "Notice."

Future Textiles received the Notice. Future Textiles 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 DEHP in the Covered Products, as identified in the 60-Day Notice.

#### **1.6 No Admission**

This Agreement resolves claims that are denied and disputed by Future Textiles. 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. Future Textiles denies the material factual and legal allegations contained in the Notices, maintains that it did not knowingly or intentionally expose California consumers to DEHP 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 Future Textiles 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 Future Textiles of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Future Textiles. However, notwithstanding the foregoing, this section shall not diminish or otherwise affect Future Textiles' 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 Future Textiles as to the allegations in the 60-Day Notices 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 stipulate that this Agreement shall be interpreted as a written settlement agreement pursuant to Code of Civil Procedure Section 664.6 and that 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 “Product” or “Covered Product” shall mean all Brookstone branded Temperature Regulating Mattress Pads of all sizes, including 818983011650.

**2.2** The term “Phthalate Free” Covered Products shall mean that each component of the packaging for 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.

**2.3** “California Customer” shall mean any customer that is located in California or that Future Textiles reasonably understands maintains a retail store in California.

**2.4** “Effective Date” shall mean September 1, 2017.

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

As of the Effective Date, Future Textiles shall not sell Covered Product directly into California, to any California Customers or to any downstream customers that Future Textiles reasonably believes sells Covered Product to California Customers.

## **4. MONETARY PAYMENTS**

### **4.1 Civil Penalty**

As a condition of settlement of all the claims referred to in this Consent to Judgment, Future Textiles shall pay a civil penalty in the amount of \$4,000 in accordance with California Health & Safety Code § 25249.12(c)(1) & (d).

### **4.2 Augmentation of Penalty Payments**

For purposes of the penalty assessment under this Agreement, Davia is relying entirely upon Future Textiles and its counsel for accurate, good faith reporting to Davia of the nature and amounts of relevant sales activity. If within nine (9) months of the Effective Date, Davia discovers and presents to Future Textiles evidence that the Covered Products have been distributed by Future Textiles in sales

volumes materially different than those identified by Future Textiles prior to execution of this Agreement, then Future Textiles shall be liable for an additional penalty amount of \$10,000.00. Future Textiles shall also be liable, in accordance with the requirements of Code of Civil Procedure section 1021.5 for any reasonable, additional attorney fees expended by Davia in discovering such additional retailers or sales. Davia agrees to provide Future Textiles with a written demand for all such additional penalties and attorney fees under this Section. After service of such demand, Future Textiles shall have thirty (30) days to agree to the amount of fees and penalties owing by Future Textiles and submit such payment to Davia in accordance with the method of payment of penalties and fees identified in Section 4.1 and 4.4. Should this thirty (30) day period pass without any such resolution between the parties and payment of such additional penalties and fees, Davia shall be entitled to file a formal legal claim for additional civil penalties pursuant to this Section and shall be entitled to all reasonable attorney fees and costs, in accordance with the requirements of Code of Civil Procedure section 1021.5, relating to such claim.

#### **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. Future Textiles 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, Future Textiles pay Davia's counsel the amount of \$22,250 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**

Future Textiles shall satisfy its obligation to pay civil penalties pursuant to Section 4.1 by delivery to Davia of a civil penalty check payable to "OEHHA" (EIN: 68-0284486, Memo line "Prop 65 Penalties, 2016-00941"), 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, 2016-00941") 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.

Future Textiles shall satisfy its obligation to pay attorney fees and costs pursuant to Section 4.3 by delivery to Davia of a check payable to "Sheffer Law Firm" (EIN 55-08-58910, Memo line "2016-00941") in the amount of \$22,250.

Future Textiles shall satisfy its obligation to pay any civil penalties pursuant to Section 4.2 by delivery to Davia of civil penalty checks payable to "OEHHA" and "Susan Davia" (Memo line "Prop 65 Penalties, 2016-00941"), in the amounts agreed to pursuant to Section 4.2 or as ordered by the Court.

Future Textiles shall satisfy its obligation to pay any attorney fees or costs pursuant to Section 4.2 by delivery to Davia of a check payable to "Sheffer Law Firm" (EIN 55-08-58910, Memo line "2016-00941"), 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

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

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

After this Agreement has been executed and the settlement funds have been transmitted to Davia's counsel, Future Textiles 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 FUTURE TEXTILES**

5.1.1 This settlement agreement is a full, final and binding resolution between Davia, and Future Textiles of any violation of Proposition 65 that was or could have been asserted by Davia on behalf of herself, her representatives or attorneys, against Future Textiles, its directors, officers, employees, attorneys ("Releasees"), and each entity to whom Future Textiles directly or indirectly distributes or sells Covered Products, including, but not limited to, downstream distributors and retailers ("Downstream Releasees"), based on their alleged failure to warn about alleged exposures to DEHP contained in the Covered Products that were sold by Future Textiles into California before the Effective Date.

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 Future Textiles 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 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.

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 Future Textiles, 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 Future Textiles.

## **5.2 FUTURE TEXTILES' RELEASE OF DAVIA**

Future Textiles, 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 any and all actions taken or statements made (or those that could have been taken or made) by Davia and her attorneys and other representatives through the execution of this Agreement whether in the course of investigating claims in this matter, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Covered Products that were the subject of the Notices. Future Textiles 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 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.

Future Textiles 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. POST EXECUTION CONVERSION TO CONSENT JUDGMENT**

Within twelve months of the execution of this Settlement Agreement Future Textiles may ask Davia, in writing, to file a complaint, incorporate the terms of this Settlement Agreement into a proposed consent judgment, and to seek the court's approval of the consent judgment pursuant to Health and Safety Code section 25249.7, or as may be otherwise allowed by law. If so requested, Davia agrees to reasonably cooperate with Future Textiles and to use her best efforts, and that of her counsel, to support the entry of a consent judgment by a superior court in California. Pursuant to Code of Civil Procedure sections 1021 and 1021.5, Future Textiles will reimburse Davia and her counsel for their reasonable fees and costs incurred in filing the complaint, converting the Settlement Agreement into a proposed consent judgment and seeking judicial approval of the consent judgment, in an amount not to exceed \$12,000.00, exclusive of fees and cost that may be incurred on appeal. Future Textiles will remit payment to the Sheffer Law Firm, at the address set forth in Section 9 below. Such additional fees shall be paid by Future



Textiles, within ten days after its receipt of any invoice from Davia for work performed under this paragraph. Future Textiles understands no motion to approve any proposed consent judgment will be filed absent payment for the work performed under this paragraph. All payments owed to Davia, pursuant to Section 6 shall be delivered to the following payment address:

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

Any failure by Future Textiles to timely pay Davia invoices under this Section shall result in the assessment of ten percent (10%) interest on any outstanding balance.

#### **7. 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.

#### **8. GOVERNING LAW**

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

#### **9. 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 Future Textiles America, Inc.:

Henry Wang, President  
Future Textiles, Inc.  
178 Ridge Road, Suite A  
Dayton, NJ 08810

With a copy to their counsel:

Todd O. Maiden, Esq.  
Reed Smith, LLP

101 Second Street, Suite 1800  
San Francisco, CA 94105  
tmaiden@reedsmith.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.

**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).

**11. MODIFICATION**

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

**12. 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

**13. ATTORNEY'S FEES**

**13.1** Should either Party prevail on any motion, application for order to show cause or other proceeding to enforce a violation of this Agreement, that Party shall be entitled to reasonable attorney fees and costs incurred as a result of such motion, order or application, consistent with C.C.P. § 1021.5.

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

13.3 Nothing in this Section shall preclude a Party from seeking an award of sanctions pursuant to law.

**14. 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.


**15. 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.

**16. 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: December <u>11</u>, 2017</p> <p> _____ Henry Wang, President Future Textiles, Inc.</p>	<p>Dated: December ____, 2017</p> <p>_____ Susan Davia</p>
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13.2 Except as otherwise specifically provided herein, each Party shall bear its own costs and attorney's fees in connection with the Notices.

13.3 Nothing in this Section shall preclude a Party from seeking an award of sanctions pursuant to law.

**14. 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.


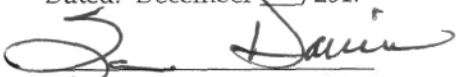
**15. COUNTERPARTS, FACSIMILE SIGNATURES**

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.

**16. 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: December <u>1</u>, 2017</p> <p></p> <p>Henry Wang, President Future Textiles, Inc.</p>	<p>Dated: December <u>4</u>, 2017</p> <p></p> <p>Susan Davia</p>
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