

**PROPOSITION 65 SETTLEMENT AGREEMENT  
SUSAN DAVIA AG NOTICE 2017-02017**

**1. INTRODUCTION**

**1.1 The Parties**

This Settlement Agreement (“Agreement”) is entered into by and between Plaintiff Susan Davia (“Davia” or “Plaintiff”), and Defendants D.W.L. International Trading LLC and Winco Industries LLC (collectively, “WINCO”), with WINCO and Davia each referred to as a “Party” and collectively referred to as the “Parties.”

**1.2 Plaintiff**

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 Defendants**

For purposes of this Agreement, D.W.L. International Trading LLC and Winco Industries LLC each represents that it employs 10 or more persons and 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 WINCO manufactured, distributed and/or sold, in the State of California, certain types of copper drinkware with brass handles comprised of or made with components that exposed users to Lead without first providing “clear and reasonable warning” under Proposition 65. Lead is listed as a reproductive and developmental toxicant pursuant to Proposition 65 and is referred to hereinafter as the “Listed Chemical” or “Lead.”

**1.5 Notice of Violation**

On August 25, 2017, Davia represents that she served WINCO with a valid and compliant Proposition 65 60-Day Notice of Violation, together with a valid, requisite Certificate of Merit, that provided WINCO and public enforcers with notice of alleged violations of Health & Safety

Code § 25249.6 for failing to warn consumers of the presence of the Lead in brass-handled copper drinkware products sold in California.

WINCO received the August 25, 2017, notice of violation (hereafter, "Notice"). Each Party represents that, as of the date it executes this Agreement, it believes that no public enforcer 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 WINCO. The Parties enter into this Agreement pursuant to a full and final settlement of any and all claims between the Parties for the purpose of avoiding prolonged litigation. WINCO denies the material factual and legal allegations contained in the Notice, maintains that it did not knowingly or intentionally expose California consumers to the Listed Chemical through the reasonably foreseeable use of the Covered Product and otherwise contends that all 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 against interest by WINCO 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 WINCO of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by WINCO. However, notwithstanding the foregoing, this section shall not diminish or otherwise affect WINCO's obligations, responsibilities, and duties under this Agreement.

## **2. DEFINITIONS**

**2.1** The term "Covered Product" means any WINCO copper drinkware with brass handles, including, but not limited to, CMM-20, CMM-20H, CMM-2, CMM-2H.

**2.2** The term "Effective Date" shall mean two weeks after this Agreement is fully executed.

**2.3** The term "Lead Free" Covered Products shall mean Covered Products made with component materials that each contain less than 300 parts per million ("ppm") Lead when

analyzed pursuant to EPA testing methodologies 3050B and 6010B, or equivalent methodologies utilized by Federal or State agencies for the purpose of determining Lead content in a solid substance.

### **3. NON-MONETARY RELIEF**

#### **3.1 Formulation Commitment**

**3.1.1** As of the Effective Date, WINCO shall provide the vendor of any Covered Product the Lead Free concentration standards of Section 2.3 and instruct its vendors not to incorporate any raw or component materials into such product, especially brass materials, that do not meet or exceed the Lead Free concentration standards of Section 2.3.

**3.1.2** After the Effective Date, should WINCO arrange for the manufacture or other production of Covered Product with a new vendor, WINCO shall provide such vendor the Lead Free concentration standards of Section 2.3 and instruct its vendors not to incorporate any raw or component materials into such product, especially brass materials, that do not meet or exceed the Lead Free concentration standards of Section 2.3. For a period of two years following the Effective Date, WINCO shall maintain copies of all testing it obtains of new vendor Covered Products, if any, demonstrating compliance with this Section 3, shall maintain copies of material vendor correspondence relating to the Lead Free standards and shall produce such copies to Davia within thirty (30) days of receipt of written request from Davia.

**3.1.3** As of the Effective Date, WINCO shall not manufacture, cause to be manufactured, order or cause to be ordered any Covered Product that is not Lead Free. For every Lead Free Covered Product WINCO manufactures, causes to be manufactured, orders or causes to be ordered after the execution of this Agreement, for a period of two years following the Effective Date, WINCO shall maintain copies of all testing of such products, if any, demonstrating compliance with this section, and shall provide copies of any such testing to Davia within thirty (30) days of receipt of written request. Davia agrees that such requests shall be reasonable, and will not be made more than once in 2018, and once annually thereafter, absent good cause.



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

**3.2.1** Customer Notification - no later than the Effective Date, WINCO shall send a letter, electronic or otherwise ("Notification Letter") to: (1) its primary contact at Webstaurant.com regarding sales of Covered Products and (2) each customer to which it, after January 1, 2017, supplied any Covered Product without a Proposition 65 warning. The Notification Letter shall advise the recipient that the brass components of each Covered Product contain Lead, a chemical known to the State of California to cause birth defects and other reproductive harm. The Notification letter shall direct recipients that all Covered Product must be labelled with a clear and reasonable Proposition 65 warning before it is sold in the California market. The Notification Letter shall state that Proposition 65 Warning stickers, with the following warning statement, are available free of charge from WINCO upon request.

**WARNING:** the brass handle of this product contains  
Lead, a chemical known to the State of  
California to cause birth defects and  
other reproductive harm.

**3.2.2** Settling Defendant shall maintain records of compliance correspondence, inventory reports or other communication confirming compliance with § 3.2.1 for two (2) years from the Effective Date and shall produce copies of such records upon written request by Davia.

### **3.3 WINCO Warning Obligations**

For any Covered Product manufactured for, ordered by or obtained by WINCO between the Effective Date and June 1, 2018, WINCO shall not sell or ship any such Covered Product unless such Covered Product is Lead Free pursuant to Section 2.3 or is sold or shipped with one of the clear and reasonable warnings set forth hereafter. Each warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions *before* purchase or use. Each warning shall be provided in a manner such that the consumer or user understands to which *specific* Covered Product the warning applies, so as to minimize the risk of consumer confusion.

WINCO shall provide the warning affixed to the packaging or labeling using one of the warning statements below:

“WARNING: This product contains Lead, a chemical known to the State of California to cause cancer, birth defects or other reproductive harm”;

or

“WARNING: This product can expose you to chemicals, including Lead, that are known to the State of California to cause cancer and birth defects or other reproductive harm;

or

“Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).” accompanied by and placed to the right of a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline sized to be no smaller than the word, “WARNING”

After June 1, 2018, WINCO shall not sell any Covered Product that is not Lead Free regardless of whether it is labelled with a Proposition 65 warning statement pursuant to this section.

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

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

As a condition of settlement of all the claims referred to in this Consent to Judgment, WINCO shall pay a total of \$6,500 in civil penalties 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, plaintiff is relying entirely upon defendant and its counsel for accurate, good faith reporting to plaintiff of the nature and amounts of relevant sales activity. If within six (6) months of the Effective Date, plaintiff discovers and presents to WINCO evidence that any type of Covered Product has been

distributed by WINCO in sales volumes materially different (more than 20%) than those identified by such WINCO prior to execution of this Agreement, then such misrepresenting WINCO shall be liable for an additional penalty amount of up to \$10,000 for Covered Product sold prior to execution of this Agreement but not identified by such defendant to plaintiff. WINCO shall also be liable for any reasonable, additional attorney fees expended by plaintiff in discovering applicable additional retailers or sales for such defendant, up to a maximum of \$10,000.

Plaintiff agrees to provide WINCO with a written demand for all such additional penalties and attorney fees under this Section. After service of such demand, WINCO shall have thirty (30) days to agree to the amount of fees and penalties owing (subject to the above caps in any event) and submit such payment to plaintiff in accordance with the method of payment of penalties and 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 civil penalties pursuant to this section and shall be entitled to all reasonable attorney fees and costs relating to such claim.

#### **4.3 Reimbursement of Plaintiff'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. WINCO 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, WINCO shall pay the amount of \$25,000 for fees and costs incurred investigating, litigating and enforcing this matter, including the fees and costs incurred (and yet to be incurred) negotiating, drafting, and executing this Agreement in the public interest.



#### **4.4 Payment Timing**

WINCO shall deliver all settlement payment checks or funds required by Sections 4.1 and 4.3 of this Agreement to plaintiff within ten (10) business days of the date that this Agreement is fully executed by the Parties. WINCO shall deliver the settlement payments or checks to plaintiff's counsel as follows:

1. a civil penalty check in the amount of \$4,875 payable to "OEHHA" (EIN: 68-0284486, Memo line "Prop 65 Penalties, 2017-02017");
2. a civil penalty check in the amount of \$1,625 payable to "Susan Davia" (Tax ID to be supplied, Memo line "Prop 65 Penalties, 2017-02017"); and
3. An attorney fee and cost reimbursement check, pursuant to Section 4.3, in the amount of \$25,000 payable to "Sheffer Law Firm" (EIN 55-08-58910, Memo line "2017-02017")

WINCO shall deliver all payments required by Sections 4.2 of this Agreement to Davia and the Sheffer Law firm in the amounts and on the date agreed to by counsel under Section 4.2 or as ordered by the Court.

All penalty and fee/cost payments shall be delivered to the Sheffer Law Firm at the following address:

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

WINCO 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.

#### **5. CLAIMS COVERED AND RELEASE**

##### **5.1 Davia's Releases of WINCO**

**5.1.1** Plaintiff, on behalf of herself, her attorneys, successors, and/or assignees releases WINCO and each of its attorneys, parents, subsidiaries, affiliated companies, successors, licensors and assigns, as well as its distributors and retailers (including Webstaurant.com and

Clark Associates, Inc.), and their respective attorneys, parents, subsidiaries, affiliated companies, successors, licensors and assigns (“Defendant Releasees”) from any and all claims for violation of Proposition 65 that have or could have been asserted against Defendant Releasees regarding the failure to warn about exposure to any Listed Chemical arising in connection with any Covered Product distributed or otherwise sold by WINCO prior to the Effective Date. WINCO’s compliance with this Agreement shall constitute compliance with Proposition 65 with respect to the Listed Chemical in the Covered Products as set forth in the Notice.

**5.2 WINCO’s Release of Davia**

**5.2.1** WINCO waives any and all claims against Davia, 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, whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the Covered Products.

**5.3 General Release**

**5.3.1** Each Party also provides, for the benefit of the other Party and Defendant Releasees, a general release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of any Party of any nature, character or kind, known or unknown, suspected or unsuspected, arising out of distribution of the Covered Products prior to the Effective Date. Each Party 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.

Each Party expressly waives and relinquishes any and all rights and benefits that 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. 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, subsequent to execution of this Agreement, any of the provisions of this Agreement is determined by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected if all parties so agree, 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. For purposes of this Agreement only, the Parties also stipulate that that venue is proper in County of Marin, and that the Marin County Superior Court has jurisdiction to enter and enforce the provisions of this Agreement as if it were entered pursuant to C.C.P. §664.6.

**8. NOTICES**

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

For WINCO Corporation:

Current President/CEO  
D.W.L. International Trading LLC  
Winco Industries LLC  
65 Industrial Road  
Lodi, NJ 07644

With copy to their counsel at:

Shelley Hurwitz, Esq.  
Holland & Knight LLP  
400 South Hope Street, 8th Floor  
Los Angeles, CA 90071  
Email: [shelley.hurwitz@hklaw.com](mailto:shelley.hurwitz@hklaw.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: (1) by written agreement of the Parties; or (2) upon written agreement of the parties, a successful motion of any party and approval of a modified Agreement by the Court.

**11. ENTIRE AGREEMENT**

This Settlement 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** Should any Party prevail on any motion, application for order to show cause or other proceeding to enforce a violation of this Agreement, such Party shall be entitled to its reasonable attorney fees and costs incurred as a result of such motion, order or application, if

allowed, under C.C.P. §1021.5. However, nothing in this Section shall preclude a Party from seeking an award of sanctions pursuant to law.

**13. NEUTRAL CONSTRUCTION**

All 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: May <u>11</u> 2018</p>  <p>Plaintiff Susan Davia</p>	<p>Dated: May <u>18</u> 2018</p>  <p>DWL Industries Co. WINCO Industries Co.</p>
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