

**PROPOSITION 65 SETTLEMENT AGREEMENT
SUSAN DAVIA AG NOTICE 2020-00639**

1. INTRODUCTION

1.1 The Parties

This Settlement Agreement (“Agreement”) is entered into by and between Susan Davia, (“Davia”) and Cost Plus, Inc. (“Cost Plus”), with Davia and Cost Plus 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 Cost Plus

For purposes of this Agreement only, Cost Plus represents that it 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 Cost Plus manufactured, distributed and/or sold, in the State of California, Copper Gooseneck Spout Kettle products made with brass 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 March 12, 2020, Davia represents that she served Cost Plus with a valid and compliant Proposition 65 60-Day Notice of Violation, together with a valid, requisite Certificate of Merit, that provided Cost Plus 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 and on the Copper Gooseneck Spout Kettle sold in California (hereafter, “Notice”).

Cost Plus received the Notice. Each Party 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 Cost Plus. 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. Cost Plus denies the material factual and legal allegations contained in the Notice and Action, 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 Cost Plus of any fact, finding, issue of law, or violation of law. Cost Plus's compliance with this Agreement shall not constitute or be construed as an admission by Cost Plus of any fact, finding, conclusion, issue of law, or violation of law, all such being specifically denied by Cost Plus. Notwithstanding the foregoing, this section shall not diminish or otherwise affect Cost Plus's obligations, responsibilities, and duties under this Agreement.

2. DEFINITIONS

2.1 The term "Covered Product" means the Copper Gooseneck Spout Kettle sold by Cost Plus World Market, including, but not limited to, item 25494204.

2.2 The term "Effective Date" shall mean March 25, 2021.

2.3 The term "Lead Free," as it pertains to any Covered Product, shall mean that each and every brass component of the Covered Product contains less than 100 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. INJUNCTIVE-TYPE RELIEF

3.1 Product Reformulation Commitment

3.1.1 On or before the Effective Date, Cost Plus shall provide the vendor of any Covered Product the Lead Free concentration standards of Section 2.3 and instruct such vendor

to meet the Lead Free concentration standards of Section 2.3 for any Covered Product sold by Cost Plus.


3.1.2 After the Effective Date, should Cost Plus arrange for the manufacture, production or other distribution of any Covered Product with a new vendor, Cost Plus shall provide such vendor the Lead Free concentration standards of Section 2.3 and instruct such vendor to meet the Lead Free concentration standards of Section 2.3 for any Covered Product Cost Plus makes available for sale to a California Customer. For a period of two (2) years following the Effective Date, Cost Plus 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, Cost Plus 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 Cost Plus manufactures, causes to be manufactured, orders or causes to be ordered after the Effective Date, Cost Plus shall maintain, for two years after the Effective Date, copies of all testing it obtains 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 2020, and twice annually thereafter, absent good cause.

3.3 Cost Plus Warning Obligations

Commencing ninety (90) days after the Effective Date, for any Covered Product manufactured or ordered by or for Cost Plus before the Effective Date, Cost Plus shall not sell such Covered Product unless such Covered Product is Lead Free pursuant to Section 2.3 or is sold 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, to minimize the risk of consumer confusion.


(a) **Covered Product Labels.** All non-Lead Free Covered Products sold or otherwise distributed shall have a warning label attached to the Covered Product. The warning label shall be no smaller than the largest type size used for other consumer information on the product and in no case smaller than 8-point type, and shall contain the following statement:


 **WARNING:** This product can expose you to chemicals, including Lead, which 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 [Please wash hands after use and before consuming food or beverages]

 **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov

The bracketed language is optional.

(b) **Mail Order Catalog Warning.** Cost Plus represents as a material term of this Agreement that they do not issue, or cause to be issued, any mail order catalog. Based upon this representation, Cost Plus shall have no catalog warning obligation.

(c) **Internet Website Warning.** After the Effective Date, a warning must be given on an e-commerce or other website owned or operated by or for Cost Plus in conjunction with the sale, or offer of sale, of any Covered Product. A warning will satisfy this requirement if it appears either: (a) on the same web page on which a Covered Product is displayed, or through a hyperlink on the product display page labeled “ WARNING” ; (b) on the same web page as the order form for a Covered Product; (c) on the same page as the price for any Covered Product; or (d) on one or more web pages displayed to a purchaser during the checkout process. One of the following warning statements, or one that otherwise complies with 27 CCR § 25603, shall be used and shall appear in any of the above instances adjacent to or immediately following the display, description, or price of the Covered Product for which it is given in the same type size or larger than the Covered Product description text:

 **WARNING:** This product can expose you to chemicals, including Lead, which 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. [Please wash hands after use and before consuming food or beverages]

The bracketed language is optional.

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, Cost Plus shall pay a total of \$3,500 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 Davia of the California sales data. If within six (6) months of the Effective Date, plaintiff discovers and presents to Cost Plus evidence that any type of Covered Product has been distributed by Cost Plus in sales volumes materially different (greater than 25%) than those identified by such Cost Plus prior to execution of this Agreement, then Cost Plus shall be liable for an additional penalty amount of up to \$10,000 for Covered Products sold prior to execution of this Agreement but not identified by such defendant to plaintiff. Cost Plus shall also be liable for any reasonable, additional attorney fees expended by plaintiff in discovering applicable additional retailers or sales for such defendant.

Plaintiff agrees to provide Cost Plus with a written demand for all such additional penalties and attorney fees under this Section. After service of such demand, Cost Plus 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 Section 4.4. 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 breach of this contract and shall be entitled to all reasonable attorney fees and costs relating to such claim.

4.3 Reimbursement of Plaintiff's Fees and Costs

Under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure section 1021.5, Cost Plus shall pay the amount of \$21,500 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 (except fees that may be incurred on appeal, if any).

4.4 Payment Timing

Cost Plus shall deliver all settlement payment checks or funds required by Sections 4.1 and 4.3 of this Agreement to plaintiff within twenty (20) business days of the date that this Agreement is fully executed by the Parties. Cost Plus shall deliver the settlement payments or checks to plaintiff's counsel as follows:

1. a civil penalty check in the amount of \$2,625 payable to "OEHHA" (EIN: 68-0284486, Memo line "Prop 65 Penalties, 2018-02197");
2. a civil penalty check in the amount of \$875 payable to "Susan Davia" (Tax ID to be supplied, Memo line "Prop 65 Penalties, 2018-02197"); and
3. An attorney fee and cost reimbursement check, pursuant to Section 4.3, in the amount of \$21,500 payable to "Sheffer Law Firm" (EIN 55-08-58910, Memo line "2018-02197")

Cost Plus 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
232 E. Blithedale Ave., Suite 210
Mill Valley, CA 94941

Cost Plus 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 timely transmitted to Sheffer Law Firm in a manner intended to result in receipt 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 Cost Plus

5.1.1 This Settlement Agreement is a full, final, and binding resolution between Plaintiff, on behalf of herself and her successors and/or assignees, and Cost Plus, the vendor of

the Covered Product, its former parent corporation, Bed Bath & Beyond Inc., and its current parent corporation, Kingswood Capital Management (“Releasees”) and all entities to whom Releasees directly or indirectly provide, distribute, or sell the Covered Products, (“Downstream Releasees”), of any claim for violation of Proposition 65 against Releasees and/or Downstream Releasees regarding their failure to provide a clear and reasonable warning of the Listed Chemical in or on the Covered Products manufactured, shipped, and/or otherwise distributed by Cost Plus prior to the Effective Date, even if sold by Downstream Releasees after the Effective Date. The Parties agree that compliance with the terms of this Settlement Agreement by Defendant shall be deemed to be compliance with Proposition 65 by Releasees and Downstream Releasees with respect to any exposures to the Listed Chemical in the Covered Products manufactured, distributed, or sold by Defendant after the Effective Date.

5.2 Cost Plus’ Release of Davia

5.2.1 Cost Plus 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, 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 Cost Plus’ sale 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 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.

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, 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 venue is proper in County of Marin, and that the Marin County Superior Court has jurisdiction to enforce the provisions of this Agreement, as if it were entered pursuant to C.C.P. § 664.6, and to consider any dispute arising out of this Agreement.

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 Cost Plus:

Jonathan E. Schwefel, CEO
Cost Plus, Inc.
1201 Marina Village Parkway
Alameda, CA 94501

With copy to their counsel at:

Merrit Jones, Esq.
Bryan Cave Leighton Paisner LLP
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111-4070
Merrit.Jones@bclplaw.com

For Davia to:

Proposition 65 Coordinator
Sheffer Law Firm
232 E. Blithedale Ave., Suite 210
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 only be modified by written agreement of the Parties or upon written agreement of the Parties along with a successful motion of any party and approval of the 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 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.

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.

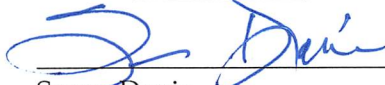
14. COUNTERPARTS, FACSIMILE SIGNATURES

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 individuals are authorized to execute this Agreement on behalf of their respective Party and have read, understood, and agree to all of the terms and conditions of this Agreement.

IT IS SO AGREED

<p>Dated: <u>3-16</u>, 2021</p> <p> Susan Davia</p>	<p>Dated: _____, 2021</p> <p>_____ By: _____ Its: _____ Cost Plus, Inc.</p>
--	---

reasonable attorney fees and costs incurred as a result of such motion, order or application, if allowed, under C.C.P. §1021.5.

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 individuals are authorized to execute this Agreement on behalf of their respective Party and have read, understood, and agree to all of the terms and conditions of this Agreement.

IT IS SO AGREED

<p>Dated: _____, 2021</p> <p>_____ Susan Davia</p>	<p>Dated: <u>3-25</u>, 2021</p> <p> By: <u>Jane Baughman</u> Its: <u>President</u> Cost Plus, Inc.</p>
--	--