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SUSAN DAVIA
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7

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

12 SUSAN DAVIA,

13 Plaintiff,

14 v.

15 ESSLINGER & CO., INC. AND DOES 1-150,

16 Esslinger.

Case No. CIV2102990

SETTLEMENT AGREEMENT

Action Filed: August 13, 2021
Trial Date: None Assigned

1 **1. INTRODUCTION**

2 **1.1 The Parties**

3 This settlement agreement ("Agreement" or "Settlement Agreement") is entered into
4 by and between plaintiff Susan Davia ("Davia") and defendant Esslinger & Co., Inc.
5 (hereafter, "Esslinger"), with Davia and Esslinger each referred to as a "Party" and
6 collectively referred to as the "Parties."

7 **1.2 Davia**

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

11 **1.3 Esslinger**

12 Esslinger is a Minnesota corporation with no employees or facilities outside of Minnesota
13 and none in California. For the sole purpose of this agreement and the resolution of the subject
14 claims, and without admitting any liability, which Esslinger expressly denies, the Parties have
15 agreed to treat Esslinger as a person in the course of doing business for purposes of the Safe
16 Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 *et*
17 *seq.* ("Proposition 65").

18 **1.4 General Allegations**

19 Davia alleges that Esslinger participated in the manufacture, distribution and/or sale, in the
20 State of California, of brass pin vise sets, brass caliper and brass craft gauge products made with
21 components that expose users to lead and lead compounds without first providing "clear and
22 reasonable warning" under Proposition 65. Davia also alleges that Esslinger participated in the
23 manufacture, distribution and/or sale, in the State of California, of cases for brass pin vise sets
24 made with vinyl components that expose users to di(2-ethylhexyl)phthalate ("DEHP") without first
25 providing "clear and reasonable warning" under Proposition 65. Pursuant to Proposition 65,
26 DEHP is listed as a developmental toxin and carcinogen. Lead and lead compounds and DEHP
27 shall be collectively referred to hereinafter as the "Listed Chemical."
28

1 **1.5 Notice of Violation**

2 On March 19, 2021, Davia mailed to Esslinger and various public enforcement agencies a
3 document entitled “60-Day Notice of Violation” that provided public enforcers and the noticed
4 entities with notice of alleged violations of Health & Safety Code § 25249.6 for purportedly failing
5 to warn consumers of the presence of Lead and DEHP found in the Anchor brass pin vise sets with
6 vinyl case Covered Products (defined hereafter) sold in California (AG Notice 2021-00685).

7 On March 19, 2021, Davia mailed to Esslinger and various public enforcement agencies
8 another document entitled “60-Day Notice of Violation” that provided public enforcers and the
9 noticed entities with notice of alleged violations of Health & Safety Code § 25249.6 for purportedly
10 failing to warn consumers of the presence of the Lead found in the brass craft gauge Covered
11 Products (defined hereafter) sold in California (AG Notice 2021-00686).

12 On March 19, 2021, Davia mailed to Esslinger and various public enforcement agencies
13 another document entitled “60-Day Notice of Violation” that provided public enforcers and the
14 noticed entities with notice of alleged violations of Health & Safety Code § 25249.6 for purportedly
15 failing to warn consumers of the presence of the Lead, DEHP, and diisononyl phthalate (DINP)
16 found in the brass craft caliper/gauge with vinyl case Covered Products (defined hereafter) sold in
17 California. (AG Notice 2021-00684).

18 On March 19, 2021, Davia mailed to Esslinger and various public enforcement agencies
19 another document entitled “60-Day Notice of Violation” that provided public enforcers and the
20 noticed entities with notice of alleged violations of Health & Safety Code § 25249.6 for purportedly
21 failing to warn consumers of the presence of the Lead and lead compounds found in the Eurotool
22 brass craft gauge Covered Products (defined hereafter) sold in California. (AG Notice 2021-00682).
23 Esslinger was released from liability for these noticed claims by Davia’s settlement with Eurotool.

24 On April 16, 2021, Davia mailed to Esslinger and various public enforcement agencies
25 another document entitled “60-Day Notice of Violation” that provided public enforcers and the
26 noticed entities with notice of alleged violations of Health & Safety Code § 25249.6 for purportedly
27 failing to warn consumers of the presence of the Lead and lead compounds found in the Liberty
28

1 Sliding Brass Gauge & Caliper Covered Products (defined hereafter) sold in California. (AG Notice
2 2021-00886).

3 All 60-day notices referenced above are hereinafter referred to collectively as “Notices”.
4 Esslinger received the Notices. Esslinger represents that, as of the date it executes this Agreement,
5 it is not aware of any public enforcer that is diligently prosecuting a Proposition 65 enforcement
6 action related to the Listed Chemicals in the Covered Products, as identified in the Notices.

7 **1.6 Complaints**

8 On August 13, 2021, Davia filed a Complaint in the Superior Court of the State of California
9 for the County of Marin, Case No. CIV2102990, alleging violations by Esslinger of Health and
10 Safety Code § 25249.6 based on the alleged exposures to Lead in the Covered Products and DEHP
11 in the pin vise set case Covered Products (the “Action”).

12 On June 25, 2021, Davia filed a Complaint in the Superior Court of the State of California
13 for the County of Marin, Case No. CIV210515, alleging violations by Esslinger of Health and Safety
14 Code § 25249.6 based on the alleged exposures to Lead, DEHP, and DINP in the Covered Products,
15 which Esslinger contends asserts allegations that are either duplicative of or overlapping with those
16 asserted in the Complaint in this Action. The Complaints in Case Nos. CIV2102990 and CIV210515
17 are hereinafter referred to collectively as the “Complaints”.

18 **1.7 No Admission**

19 This Agreement resolves claims that are denied and disputed by Esslinger. The Parties
20 enter into this Agreement as a full, final and binding settlement of any and all claims between the
21 Parties for the purpose of avoiding prolonged litigation. Esslinger denies the material factual and
22 legal allegations contained in the Notices and Complaints, maintains that it did not knowingly or
23 intentionally expose California consumers to any Listed Chemical through the reasonably
24 foreseeable use of the Covered Products (defined hereafter) and further contends that all Covered
25 Products it has distributed and/or sold in California have been and are in compliance with all
26 applicable laws. Moreover, Esslinger contends that it is a “retail seller” within the meaning of 27
27 CCR 25600.2(e) and denies that it had any role in the manufacture, import, or distribution of the
28 Covered Products and, as such, has asserted that it is entitled to the protections afforded to retail

1 sellers by 27 CCR 25600.2(e). Because Davia disputed this contention and denial, and continued to
2 pursue enforcement against Esslinger, and because Esslinger contends the cost to Esslinger of
3 litigating its defenses to Davia's claims exceed the cost of settlement, Esslinger has agreed to resolve
4 Davia's claims as set forth in this Agreement. Nothing in this Agreement shall be construed as an
5 admission by Esslinger of any fact, finding, issue of law, or violation of law, nor shall compliance
6 with this Agreement constitute or be construed as an admission by Esslinger of any fact, finding,
7 conclusion, issue of law, or violation of law, all of which are specifically denied by Esslinger.
8 However, notwithstanding the foregoing, this section shall not diminish or otherwise affect
9 Esslinger's obligations, responsibilities, and duties under this Agreement.

10 **1.8 Consent to Jurisdiction**

11 For purposes of this Agreement only, and pursuant to California Code of Civil Procedure
12 section 664.6, the Parties stipulate that the Marin County Superior Court has jurisdiction over
13 Esslinger as to this Agreement, that venue for any action to enforce this Agreement is proper in
14 County of Marin, and that the Marin County Superior Court shall have jurisdiction to enforce the
15 provisions of this Agreement until performance in full of the terms of the Agreement.

16 **2. DEFINITIONS**

17 **2.1** The term "Covered Product" shall mean all brass products and brass products with
18 vinyl cases sold by Esslinger, including but not limited to Anchor Pin Vise Brass Set of 6 (7cm -
19 12cm), Brass Depth Gauge (790524091768), Grobet USA Brass Caliper 100m (35.0204 A) and Liberty
20 brand brass sliding gauges, all sizes, with and without plates, including, but not limited to, 60mm
21 (15.01), 80mm (15.02) and 100mm (15.03).

22 **2.2** The term "Lead Free" Covered Products shall mean any brass component of any
23 Covered Product that contains less than 100 parts per million ("ppm") Lead when analyzed
24 pursuant to EPA testing methodologies 3050B and 6010B, or equivalent methodologies utilized by
25 Federal or State agencies for the purpose of determining Lead content in a solid substance.

26 **2.3** The term "Phthalate Free" Phthalate Covered Products shall mean any accessible
27 component of any Phthalate Covered Product contains less than or equal to 1,000 parts per million
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1 (“ppm”) of DEHP, DINP, DBP, di-isodecyl phthalate (“DIDP”), di-n-hexyl phthalate (“DnHP”) and
2 butyl benzyl phthalate (“BBP”) as determined by a minimum of duplicate quality controlled test
3 results using Environmental Protection Agency (“EPA”) testing methodologies 3580A and 8270C or
4 equivalent methodologies utilized by federal or state agencies to determine the presence and
5 measure the quantity of phthalates in solid substances.

6 **2.4** “California Customer” means any customer with a billing or ship to address in
7 California or any retail customer that Esslinger reasonably understands sells to customers located in
8 California.

9 **2.5** “Effective Date” shall mean February 1, 2023.

10 **3. INJUNCTIVE-TYPE RELIEF**

11 **3.1 Product Reformulation Commitment**

12 **3.1.1** No later than the Effective Date, Esslinger shall provide the Lead Free and Phthalate
13 Free concentration standards of Section 2.2 to any then-current vendor of any Covered Product and
14 advise such entities of Esslinger’s preference that they supply Lead Free and Phthalate Free
15 Covered Products to Esslinger, to the extent practicable. Esslinger shall maintain copies of all
16 vendor correspondence generated pursuant to this Section for one year after the Effective Date and
17 shall promptly produce to Davia copies of such records upon written request.

18 **3.1.2** After the Effective Date, Esslinger shall provide the Lead Free and Phthalate Free
19 concentration standards of Section 2.2 to any New Vendor of any Covered Product and advise such
20 entities of Esslinger’s preference that they supply Lead Free Covered Products to Esslinger, to the
21 extent practicable. “New Vendor” means any vendor of Covered Products from whom Esslinger
22 was not obtaining Covered Products as of the Effective Date. Esslinger shall maintain copies of all
23 vendor correspondence generated pursuant to this Section for one year after the Effective Date and
24 shall promptly produce to Davia copies of such records upon written request.

25 **3.1.3** As of December 1, 2022, Esslinger shall not sell any Covered Product to any
26 California Customer unless (1) such Covered Product meets the Lead Free and Phthalate Free
27 Concentration Standards of Section 2.2 of this Agreement or (2) is labelled, either by Esslinger or its
28 supplier, with a warning compliant with Section 3.3 of this Agreement. For two years after the

Effective Date, for every Covered Product Esslinger purchases or otherwise obtains after December 1, 2022 and intends to sell without a warning compliant with Section 3.3 of this Agreement, Esslinger shall maintain copies of any testing of such products demonstrating compliance with this section, shall maintain copies of all vendor correspondence relating to the Lead Free concentration standards of Section 2.2 and shall produce such copies to Davia within fifteen (15) business days of receipt of reasonable request made in writing from Davia.


3.2 Previously Distributed Covered Products.

3.3 Customer Notification

In such case as Esslinger has sold or sells, before the Effective Date, Covered Products to another entity that it reasonably understands is a retailer of those Covered Products, then, no later than the Effective Date, Esslinger shall send a letter, electronic or otherwise ("Notification Letter") to such entity or entities to which Esslinger, after August 13, 2020, supplied any Covered Product and that Esslinger reasonably understands either maintains an ecommerce retail website or maintains retail outlets in California. The Notification Letter, if any, shall advise the recipient that Covered Products "contain a chemical known to the State of California to cause birth defect or other reproductive harm". The Notification letter shall inform the recipient to apply a Proposition 65 warning label consistent with Section 3.3 of this Agreement. The Notification Letter, if any, shall request a response from the recipient within 15 days, confirming that the letter was received. Esslinger shall maintain records of all correspondence generated pursuant to this Section, if any, for one year after the Effective Date and shall promptly produce copies of such records upon Davia's written request.


3.4 Covered Product Labels

After the Effective Date, prior to selling to any California Customer any Covered Product that is not confirmed to be Lead Free and/or Phthalate Free, as applicable, Esslinger shall affix a label to the Covered Product or its immediate packaging that states:
For Covered Products that are Phthalate Free, but are not Lead Free:


 **WARNING:** The brass materials of 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. For more information go to www.P65Warnings.ca.gov;


For Covered Products that are Lead Free, but are not Phthalate Free:

 **WARNING:** The vinyl materials of this product can expose you to chemicals, including [name one or more phthalate chemical]], 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;

Or, for any Covered Product that is not Lead Free or Phthalate Free:

 **WARNING:** This product can expose you to chemicals, including Lead and [list phthalate], 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;

or

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

The label shall be prominently affixed 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.

3.5 Internet Website Warning

A warning must be given on any e-commerce or other website owned or operated by or for Esslinger in conjunction with the advertisement, marketing, sale or offer of sale of any Covered Product that is not confirmed to be Lead Free and/or Phthalate Free, as applicable. A warning will satisfy this requirement if it appears either: (a) on the same web page on which a Covered Product is displayed; (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 warning statements set forth in Section 3.3 shall

1 be used and shall appear in any of the above instances adjacent to or immediately following the
2 display, description, or price of the Covered Product for which it is given in the same type size or
3 larger than the Covered Product description text.

4 **4. MONETARY PAYMENTS**

5 **4.1 Civil Penalty**

6 As a condition of settlement of all the claims referred to in this Settlement
7 Agreement, Esslinger shall cause to be paid a total of \$2,000 in civil penalties in accordance with
8 California Health & Safety Code § 25249.12(c)(1) & (d).

9 **4.2 Augmentation of Penalty Payments**

10 For purposes of the penalty assessment under this Agreement, Davia is relying upon
11 Esslinger and their counsel for accurate, good faith reporting to Davia of the nature and amounts of
12 sales activity of the Covered Products during the relevant period. If within nine (9) months of the
13 Effective Date, Davia discovers and presents to Esslinger evidence that Esslinger materially
14 misrepresented its quantity of sales of Covered Products to California Customers during the
15 relevant period, and Esslinger does not provide Davia with evidence to dispute this claim, then
16 Esslinger shall be liable for an additional penalty amount of \$10,000.00. Esslinger shall also pay
17 reasonable, additional attorney fees expended by Davia in discovering such additional sales and
18 reporting them to Esslinger in accordance with this section. Davia agrees to provide Esslinger with
19 a written demand for such additional penalties and attorney fees under this Section. After service
20 of such demand, Esslinger shall have 45 days to either present evidence to counter this claim or
21 agree to the amount demanded or negotiated with Davia, to be paid in accordance with the method
22 of payment of penalties and fees identified in Section 4.4. Should the parties dispute whether Davia
23 has provided appropriate evidence to support her claim, then the parties shall have the issue
24 decided by a mutually agreed upon Mediator, each side to bear its own costs of the mediation.
25 Should mediation not be successful in resolving the matter then, within thirty (30) days of the
26 mediation, Davia shall be entitled to file a request for this Court to enforce the Agreement.

27 **4.3 Reimbursement of Davia's Fees and Costs**

28 The Parties acknowledge that Davia and her counsel offered to resolve this dispute without

1 reaching terms on any reimbursement of plaintiff's fees or costs until all other terms of the
2 settlement were reached. The Parties then reached an accord on the amounts to be paid by
3 Esslinger to Davia and her counsel under the principles of California Code of Civil Procedure
4 section 1021.5 and 11 C.C.R. § 3201. Under these principles, Esslinger shall pay Davia's counsel the
5 amount of \$30,000 for fees and costs incurred investigating and negotiating a resolution of this
6 matter.

7 **4.4 Payment Procedures**

8 Esslinger shall satisfy its obligation to pay civil penalties pursuant to Section 4.1 by delivery
9 to plaintiff's counsel of a civil penalty check payable to "OEHHA" (Memo line "Prop 65 Penalties,
10 2021-00684, 2021-00685, 2021-00686, 2021-00886"), in the amount of \$1,500; and a civil penalty check
11 payable to "Susan Davia" (Memo line "Prop 65 Penalties, 2021-00684, 2021-00685, 2021-00686, 2021-
12 00886") in the amount of \$500.

13 Esslinger shall satisfy its obligation to pay attorney fees and costs pursuant to section 4.3 by
14 delivery to plaintiff's counsel of an attorney fee and cost reimbursement check payable to "Sheffer
15 Law Firm" (Memo line "2021-00684, 2021-00685, 2021-00686, 2021-00886") in the amount of \$30,000.

16 All Section 4.1 and Section 4.3 civil penalty and attorney fee/cost payments shall be
17 delivered to plaintiff's counsel at the following address within 30 days after execution of this
18 Agreement:

19 Sheffer Law Firm
20 Attn: Proposition 65 Controller
21 232 E. Blithedale Avenue, Suite 210
22 Mill Valley, CA 94941

23 Plaintiff shall hold the physical checks, without depositing them, until such time as this Settlement
24 Agreement has been approved by the Court.

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

28 Sheffer Law Firm
 Attn: Proposition 65 Controller
 232 E. Blithedale Avenue, Suite 210
 Mill Valley, CA 94941

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

4 **4.5 Issuance of 1099 Forms**

5 After this Agreement has been executed and funds have been transmitted to Davia's counsel
6 at the address set forth in Section 4.4., Esslinger shall cause three separate 1099 forms to be issued,
7 as follows:

8 (a) The first 1099 shall be issued to the Office of Environmental Health Hazard Assessment,
9 P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount paid pursuant to Sections
10 4.1 and 4.2 (if any);

11 (b) The second 1099 shall be issued to Davia in the amount paid pursuant to Sections 4.1 and 4.2
12 (if any), whose address and tax identification number shall be provided to Esslinger upon request;
13 and

14 (c) The third 1099 shall be issued to the Sheffer Law Firm (EIN: 55-08-58910) in the amount paid
15 pursuant to Section 4.3 and 4.2 (if any).

16 **5. RELEASES**

17 **5.1 DAVIA'S RELEASE OF DEFENDANTS**

18 5.1.1 This Agreement is a full, final and binding resolution between Davia and
19 Esslinger of any violation of Proposition 65 that was or could have been asserted by Davia on behalf
20 of herself, her representatives or attorneys ("Releasers"), against Esslinger, and each of its owners,
21 directors, officers, employees, attorneys, agents, parents and each entity to whom Esslinger directly
22 or indirectly distributes or sells Covered Products ("Releasees"), based on their alleged failure to
23 warn about alleged exposures to the Listed Chemical contained in the Covered Products that were
24 sold by Esslinger before the Effective Date.

25 5.1.2 Davia, individually, also provides a general release and waiver which shall be
26 effective as a full and final accord and satisfaction, and as a bar to all claims, actions and causes of
27 action, of any nature, character or kind, known or unknown, suspected or unsuspected, arising out
28 of the subject matter of the Notices, the Complaints, and the Covered Products to the extent sold or

1 distributed by Esslinger prior to the Effective Date, and for all actions taken and statements made
2 (or that could have been taken or made) by Esslinger and its attorneys and other representatives in
3 connection with negotiating this Agreement. Davia acknowledges that she is familiar with section
4 1542 of the California Civil Code, which provides as follows:

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

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

16 Each of the Releasees is an intended beneficiary of the releases in his, her or its favor set
17 forth in this Agreement and on that basis may enforce such releases to the extent that he, she or it is
18 benefitted by them.

19 Promptly upon approval of this Agreement by the Court, Davia shall voluntarily seek
20 dismissal of Esslinger from this Action, and the action captioned *Susan Davia v. Grobet File Company*
21 *of America, LLC, et al.*, Marin County Superior Court Case No. CIV2102515, with prejudice.

22 This Section 5 release shall not release any obligations created by or set forth in this
23 Agreement. The Parties further understand and agree that this Section 5 release shall not extend
24 upstream to any entities, other than Esslinger, that manufactured any Covered Product or any
25 component parts thereof, or any distributors or suppliers who sold Covered Products or any
26 component parts thereof to Esslinger.

1 **5.2 DEFENDANTS RELEASE OF DAVIA**

2 Esslinger, on behalf of itself and its agents, representatives, attorneys, successors, and/or
3 assignees, hereby waives any and all claims against Davia and her attorneys and other
4 representatives, for any and all actions taken or statements made (or those that could have been
5 taken or made) by Davia and her attorneys and other representatives arising out of the subject
6 matter of the Notice and the Covered Products, whether in the course of investigating claims in this
7 matter, otherwise seeking to enforce Proposition 65 against Esslinger and Releasees in this matter,
8 or negotiating this Agreement. Esslinger acknowledges that it is familiar with Section 1542 of the
9 California Civil Code, which provides as follows:

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

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

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

25 **6. COURT APPROVAL**

26 This Agreement is effective upon execution but must also be approved by the Court. If the
27 Court does not approve this Agreement in its entirety, the Parties shall meet and confer to
28 determine whether to modify the terms of the Agreement and to resubmit it for approval. In

1 meeting and conferring, the Parties agree to negotiate in good faith to reach agreement on any
2 actions reasonably necessary to amend and/or modify this Agreement in order to further the
3 mutual intention of the Parties in entering into this Agreement. The Agreement shall become null
4 and void if, for any reason, it is not approved and entered by the Court, as it is executed, within one
5 year after it has been fully executed by all Parties. The Parties agree that, upon Court approval, a
6 Court judgment shall be entered on the terms of this Agreement.

7 **7. SEVERABILITY**

8 If any of the provisions of this Agreement are found by a court to be unenforceable, the validity of
9 other provisions of this Agreement, upon express consent of all Parties, shall not be affected and
10 shall remain in full force and effect.

11 **8. GOVERNING LAW**

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

13 **9. NOTICES**

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

16 **For Esslinger:**

17 Bill Esslinger
18 Esslinger & Co., Inc.
19 1165 Medallion Drive
20 Saint Paul MN 55120

21 **For Esslinger's Counsel:**

22 Kamran Javandel, Esq.
23 Allen Matkins Leck Gamble Mallory & Natsis LLP
24 Three Embarcadero Center, 12th Floor
San Francisco, CA 94111-4074
kjavandel@allenmatkins.com

25 **For Davia:**

26 Proposition 65 Coordinator
27 Sheffer Law Firm
28 232 E. Blithedale Avenue, 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.

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

Davia agrees to comply with the reporting form requirements of California Health & Safety Code §25249.7(f).

11. MODIFICATION

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

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 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 or relied on by any Party hereto (other than the sales figures provided to Davia). 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

In any dispute concerning any matter related to this Agreement, the prevailing Party shall be entitled to recover its costs and expenses, including attorneys' fees and costs. Except as otherwise specifically provided herein, each Party shall bear its own costs and attorney's fees in connection with the Notice and the Complaints. Nothing in this Section shall preclude a Party from seeking an award of sanctions pursuant to law.

14. ENFORCEMENT

Prior to bringing any motion, order to show cause, or other proceeding to enforce

1 Proposition 65 or any terms of this Agreement relating to the alleged sale in California of any
2 Covered Product without a warning and which is alleged to not be Lead Free or Phthalate Free, in
3 actual or alleged violation of this Agreement, Davia shall provide a Notice of Violation (“NOV”) to
4 Esslinger. The NOV shall include, for each Covered Product alleged to be violation of this
5 Agreement: the date of alleged violations(s), place of sale, date and proof of purchase (if relevant),
6 and any test data obtained by Davia regarding each such Covered Product. Davia shall take no
7 further action regarding any alleged violation nor seek any monetary recovery for herself, her
8 agents or her counsel if, within 30 days of receiving such NOV, Esslinger demonstrates (1) that the
9 Covered Product was manufactured distributed, sold or offered for sale by Esslinger before
10 December 1, 2022; or (2) that Esslinger, following service of the NOV, directed the retailer or
11 distributor of the Covered Product to take corrective action by placing an appropriate warning on
12 the Covered Product(s) compliant with Section 3.3 of this Agreement following service of the NOV;
13 or (3) that the Covered Products are Lead Free or Phthalate Free, as applicable.

14 **15. NEUTRAL CONSTRUCTION**

15 Both Parties and their counsel have participated in the preparation of this Agreement and
16 this Agreement is the result of the joint efforts of the Parties. This Agreement was subject to
17 revision and modification by the Parties and has been accepted and approved as to its final form by
18 each of the Parties. Accordingly, any uncertainty or ambiguity existing in this Agreement shall not
19 be interpreted against any Party as a result of the manner of the preparation of this Agreement.
20 Each Party to this Agreement agrees that any statute or rule of construction providing that
21 ambiguities are to be resolved against the drafting Party should not be employed in the
22 interpretation of this Agreement and, in this regard, the Parties hereby waive California Civil Code
23 Section 1654. The Parties further agree that the section headings are for convenience only and shall
24 not affect interpretation of this Agreement.

25 **16. COUNTERPARTS, FACSIMILE SIGNATURES**

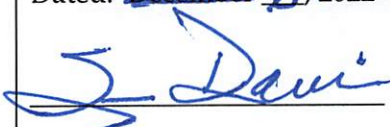
26 This Agreement may be executed in counterparts and by facsimile or portable document
27 format (PDF), each of which shall be deemed an original, and all of which, when taken together,
28 shall constitute one and the same document. Signatures by scanned and e-mailed image or

1 facsimile transmission shall have the same force and effect as original signatures and as an
2 electronic record executed and adopted by a Party with the intent to sign the electronic record
3 pursuant to Civil Code §§ 1633.1 *et seq.*

4 **17. AUTHORIZATION**

5 Each of the persons signing this agreement represents and warrants that he or she is
6 authorized and has the capacity to execute this Agreement on behalf of the respective Party and has
7 read, understood, and agrees to all the terms and conditions of this Agreement on behalf of such
8 Party.

9 **IT IS SO AGREED**


<p>11 Dated: December __, 2022</p> <p>12</p> <p>13 _____</p> <p>14 Bill Esslinger Esslinger & Co., Inc.</p>	<p>11 Dated: December ^{Jan} 6, 2023</p> <p>12</p> <p>13 </p> <p>14 Susan Davia</p>
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1 facsimile transmission shall have the same force and effect as original signatures and as an
2 electronic record executed and adopted by a Party with the intent to sign the electronic record
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7 read, understood, and agrees to all the terms and conditions of this Agreement on behalf of such
8 Party.

9 **IT IS SO AGREED**

<p>11 Dated: December <u>29</u>, 2022</p> <p>12 </p> <p>13</p> <p>14 Bill Esslinger Esslinger & Co., Inc.</p>	<p>Dated: December __, 2022</p> <p>_____</p> <p>Susan Davia</p>
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