

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Parties

This Settlement Agreement is entered into by and between Dennis Johnson (“Johnson”) and Esschert Design USA, LLC (“Esschert”), with Johnson and Esschert each individually referred to as a “Party” and collectively as the “Parties.” Johnson is an individual residing in the State of California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products. Johnson alleges that Esschert is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

### 1.2 General Allegations

Johnson alleges that Esschert manufactures, sells, and/or distributes for sale in California ceramic mugs with exterior designs containing lead. Lead is listed pursuant to Proposition 65 as a chemical known to cause birth defects and other reproductive harm. Johnson alleges that Esschert failed to provide the health hazard warning required by Proposition 65 for exposures to lead.

### 1.3 Product Description

The products covered by this Settlement Agreement are specifically defined as the “Esschert Tea Cup With Saucer Bird Feeders” that are manufactured, sold, and/or distributed for sale in California by Esschert (hereinafter referred to as “Products”).

### 1.4 Notice of Violation

On August 10, 2022, Johnson served Esschert, Tuesday Morning, Inc., and the requisite public enforcement agencies with a 60-Day Notice of Violation, alleging that they violated Proposition 65 when they failed to warn their customers and consumers in California of the health hazards associated with exposures to lead from the Products. No

public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

### **1.5 No Admission**

Esschert denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products that it has sold and distributed in California, including the Products, have been, and are, in compliance with all laws, including Proposition 65. Nothing in this Settlement Agreement shall be construed as an admission by Esschert of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Esschert of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Esschert. This Section shall not, however, diminish or otherwise affect Esschert's obligations, responsibilities, and duties under this Settlement Agreement.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean December 21, 2022.

## **2. INJUNCTIVE RELIEF**

### **2.1 Reformulation Standards**

"Reformulated Products" are defined as those Products that: (a) contain no more than 90 parts per million ("ppm") lead in any decoration, colored artwork, designs and/or marking on the surface of the Products when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3050B or equivalent methodologies utilized by federal or state agencies for the purpose of determining lead content in a solid substance; and (b) yield no more than 1.0 microgram of lead on any surface sampled and analyzed pursuant to the NIOSH 9100 testing protocol.

If the decoration is tested after it is affixed to the Product, the percentage of the lead by weight must be related only to the decorating materials and must not include any quantity attributable to non-decorating material (e.g., ceramic substrate).

## **2.2 Reformulation/Warning Commitment**


As of the Effective Date, Esschert shall not manufacture the Products for ultimate sale in the State of California unless they are Reformulated Products pursuant to Section 2.1 or include a warning pursuant to Section 2.3.

## **2.3 Product Warnings**

As of the Effective Date, all Products manufactured for ultimate sale in California that do not qualify as Reformulated Products, shall be associated with a clear and reasonable warning pursuant to this Section and as authorized by safe harbor warning regulations at 27 Cal. Code Regs. Section 25601 *et seq.* Consistent with the Proposition 65 safe harbor warning regulations, warnings for sales at brick-and-mortar locations shall be permitted on Products, on Product labels, via shelf tags that associate the Product(s) with the warning, or by point-of-sale warnings. Warning for online sales controlled by Esschert shall be made pursuant to Section 2.4. Esschert further agrees that the warning will be prominently placed with such conspicuousness when 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 of purchase or use. For purposes of this Settlement Agreement, a clear and reasonable warning for the Products shall consist of any wording specifically permitted by 27 CCR section 25601 *et seq.* and contain one of the following statements:

 **WARNING:** Reproductive Harm- [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

OR

 **WARNING:** This product can expose you to chemicals including lead, which is known to the State of California to cause birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

## **2.4 Point of Sale and Internet Warnings**

The warning requirements of this Section 2.3 shall also be satisfied if Esschert or its retailers provides warnings to Customers at the point-of-sale. Customers purchasing Products directly from California retail stores may receive the Proposition 65 warning via register display and on customers' printed receipts.

If Esschert sells Products via its own proprietary internet website to customers located in California, the warning requirements of this section shall be satisfied if the foregoing warning appears either: (a) on the same web page on which a Product is displayed and/or described; (b) on the same page as the price for the Product; or (c) on one or more web pages displayed to a California purchaser prior to completion of the checkout process. Alternatively, a symbol consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent to or immediately following the display, description, price, or checkout listing of the Product, if the warning statement appears elsewhere on the same web page in a manner that clearly associates it with the product(s) to which the warning applies.

**2.5** In the event that the Office of Environmental Health Hazard Assessment promulgates one or more regulations requiring or permitting specific safe harbor warning text and/or methods of transmission for lead different than those set forth above, Esschert shall be entitled to use such other specific safe harbor warning text and/or methods of transmission without being deemed in breach of this Settlement Agreement.

## **3. MONETARY SETTLEMENT TERMS**

### **3.1 Civil Penalty Payment**

Pursuant to Health and Safety Code section 25249.7(b)(2), and as consideration for the releases contained in Sections 4.1 through 4.5 below, Esschert agrees to pay \$1,000 in civil penalties within five (5) business days of the Effective Date. The penalty payment will be allocated in accordance with California Health and Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the California Office

of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount paid to Johnson. Esschert will make its payment in two checks, delivered to the address in Section 3.3, as follows: (1) to “OEHHA” in the amount of \$750; and (2) to “Dennis Johnson” in the amount of \$250.

### **3.2 Attorneys’ Fees and Costs**

The Parties acknowledge that Johnson and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to his counsel, thereby leaving the issue to be resolved after the material terms of the agreement had been settled. Shortly after the other settlement terms had been reached, Esschert expressed a desire to resolve Johnson’s fees and costs. The Parties reached an accord on the compensation due to Johnson’s counsel under general contract principles and the private attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work performed in this matter. Under these legal principles, within five (5) business days of the Effective Date, Esschert agrees to pay \$15,000, in the form of a check made payable to “Voorhees & Bailey, LLP,” for all fees and costs incurred investigating, bringing this matter to the attention of Esschert’s management, and negotiating a settlement. The payments set forth in Section 3 are the exclusive payments due between the Parties.

### **3.3 Payment Address**

All payments under this Settlement Agreement shall be delivered to the following address:

Voorhees & Bailey, LLP  
990 Amarillo Avenue  
Palo Alto, CA 94303

## **4. CLAIMS COVERED AND RELEASED**

### **4.1 Johnson’s Release of Proposition 65 Claims**

Johnson acting on his own behalf releases Esschert, its parents, subsidiaries, affiliated entities under common ownership, predecessors, successors, directors, officers,

agents, employees, suppliers, manufacturers, attorneys, and each entity to whom Esschert directly or indirectly distributes or sells the Products, including, but not limited to, downstream distributors, wholesalers, customers, retailers including, but not limited to Tuesday Morning, Inc., franchisees, cooperative members, importers, and licensees (collectively, “Releasees”), from all claims for violations of Proposition 65 for Products manufactured on or before the Effective Date based on unwarned exposures to lead in the Products. This release includes Products in the stream of commerce prior to the Effective Date, as they have been included in the calculation of the civil penalty payment.

#### **4.2 Johnson’s Individual Release of Claims**

Johnson in his individual capacity only and not in his representative capacity, provides a 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 Johnson of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to lead in the Products manufactured, imported, distributed, or sold by Esschert prior to the Effective Date. Nothing in this Section affects Johnson’s right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve the Products.

#### **4.3 Esschert’s Release of Johnson**

Esschert, on its own behalf, and on behalf of its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against Johnson and his attorneys and other representatives, for any and all actions taken, or statements made by Johnson and his attorneys and other representatives, whether in the course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

#### **4.4 General Release**

The Parties acknowledge that the claims released in Sections 4.1, 4.2 and 4.3 above may include unknown claims, and the Parties nevertheless waive California Civil Code section 1542 as to any such unknown claims. California Civil Code section 1542 reads as follows:

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

Johnson, on behalf of himself only, and Esschert, on behalf of itself only, acknowledge and understand the significance and consequences of this specific waiver of California Civil Code section 1542. The Parties expressly waive and relinquish any and all rights and benefits that they may have under, or which may be conferred on them by any other state or federal statute or common law principle of similar effect, to the fullest extent that they may lawfully waive such rights or benefits pertaining to the released matters.

#### **4.5 Public Interest**

The Parties understand that the commitments Esschert has agreed to herein, and actions to be taken by Esschert under this Settlement Agreement, would confer a significant benefit to the general public, as set forth in Code of Civil Procedure § 1021.5. As such, it is the intent of the Parties that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to Esschert's failure to provide a Proposition 65 warning on the Products it has manufactured prior to the Effective Date, such private party action would not confer a significant benefit on the general public as to the Products addressed in this Settlement Agreement, provided that Esschert is in material compliance with this Agreement. The Parties agree that the understandings and intentions expressed in this Section are applicable only to the Notice and the Products at issue and are not to be construed as a general understanding or intention with respect to

other products manufactured, distributed, sold or offered for sale in California by any other entity.

**5. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any provision of this Settlement Agreement is deemed by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

**6. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products or the application of law to the Products as alleged in the Notice of Violation, then Esschert may provide written notice to Johnson of any asserted change in the law and shall have no further injunctive obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

**7. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

If a dispute arises with respect to either Party's compliance with the terms of this Agreement, the Parties shall meet and confer in person, by telephone, and/or in writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be filed in the absence of such a good faith attempt to resolve the dispute beforehand. Any party that fails to meet and confer or otherwise attempt in good faith to resolve any dispute arising under this Agreement prior to seeking judicial enforcement, shall forfeit any attorneys' fees and costs to which that Party may otherwise be entitled.

**8. NOTICE**

Unless specified herein, all correspondence and notice required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (a) personal



delivery; (b) first-class, registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any Party by the other at the following addresses:

**For Esschert:**

Will Wagner  
Arnold & Porter  
Three Embarcadero Center, 10<sup>th</sup> Floor  
San Francisco, CA 94111

**For Johnson:**

Voorhees & Bailey, LLP  
Proposition 65 Coordinator  
990 Amarillo Avenue Palo Alto, CA  
94303

Any Party may, from time to time, specify in writing to the other a change of address to which all notices and other communications shall be sent.

**9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

Johnson and his attorneys agree to comply with the reporting form requirements referenced in California Health and Safety Code section 25249.7(f).

**11. MODIFICATION**

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

**12. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understand, and agreed to all of the terms and conditions of this Settlement Agreement.

**13. ENTIRE AGREEMENT**

This Settlement Agreement contains the sole and entire agreement and

understanding of the Parties with respect to the entire subject matter hereof, and all related prior discussions, negotiations, commitments and understandings. No other agreements, oral or otherwise, exist to bind either of the Parties.

**AGREED TO:**

**AGREED TO:**

Date: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

DENNIS JOHNSON

By: \_\_\_\_\_

ESSCHERT DESIGN USA, LLC

understanding of the Parties with respect to the entire subject matter hereof, and all related prior discussions, negotiations, commitments and understandings. No other agreements, oral or otherwise, exist to bind either of the Parties.

**AGREED TO:**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
DENNIS JOHNSON

**AGREED TO:**

Date: 12/20/22

By:  \_\_\_\_\_  
ESSCHERT DESIGN USA, LLC