

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into among the United States of America, acting through the United States Department of Justice and on behalf of its agency, U.S. Customs and Border Protection (“CBP” or “Customs”) (collectively the “United States”); Defendant Yogibo, LLC (“Yogibo” or “Defendant”); and David Kohlenberger (“Relator”) (hereinafter collectively referred to as “the Parties”), through their authorized representatives.

RECITALS

A. This matter concerns duties on Yogibo’s imports to the United States from China. Yogibo is a New Hampshire company that sells furniture to various customers and retailers nationwide.

B. Duties on imports are based generally on the value of the imported goods. *See* 19 U.S.C. § 1503; Official Harmonized Tariff Schedule of the United States (2018) (codified at 19 U.S.C. § 1202), *available at* <https://www.usitc.gov/tata/hts/index.htm>. The liability to pay duties arises immediately and automatically upon the importation of goods into the United States. 19 C.F.R. §§ 141.1(a)-(b)(1).

C. Section 402 of the Tariff Act of 1930, 19 U.S.C. § 1401a, requires that the dutiable amount of merchandise imported into the United States shall be calculated on the “price actually paid or payable for the merchandise when sold for exportation to the United States, plus . . . the value . . . of any assist.” 19 U.S.C. § 1401a(b)(1)(C). The term “assist” includes “[e]ngineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise.” 19 U.S.C. § 1401a(h)(1)(A)(iv). While

international shipping is not part of the “price actually paid or payable,” foreign inland freight and other inland charges incident to the international shipment of merchandise are included in the “price actually paid or payable.” *See* 19 CFR 152.103(a)(5)(ii).

D. Customs regulations require an importer to present a commercial invoice to Customs at the time of entry. 19 C.F.R. § 142.3; *see also* 19 C.F.R. § 141.81. The regulations further specify that a commercial invoice must set forth “[t]he purchase price of each item in the currency of the purchase.” 19 C.F.R. § 141.86(a)(5); *see also* 19 C.F.R. § 141.83(c).

E. On January 3, 2022, Relator filed a qui tam action in the United States District Court for the District of Massachusetts captioned *United States ex rel. David Kohlenberger v. Yogibo, LLC*, pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. § 3730(b) (the “Civil Action”). Relator alleges that Yogibo knowingly misrepresented the value of its merchandise for import manufactured by Yiwu Leadershow Home Textile Co., Ltd. (“Leadershow”), a company in China, in commercial invoices to avoid paying full duties on those imports.

F. Yogibo admits, acknowledges, and accepts responsibility for the following facts: Between February 18, 2016, and December 23, 2022, Yogibo imported products manufactured by Leadershow. Many of these imports entered the United States at the Port of Boston, Massachusetts. For each import, Leadershow provided Yogibo with two invoices—a commercial invoice listing one price for the goods being imported, and a second invoice (the “QC Invoice”) that included a separate and additional charge for “FOB, Project Management and QC costs.” “FOB, Project Management and QC costs” included charges for inland freight from Leadershow to a Chinese port, design services,

and quality control testing. The QC Invoice reflected an additional charge for the “FOB, Project Management and QC costs” of, on average, 17.5% of the value of the imports on the respective commercial invoice. Yogibo did not provide the QC Invoice to its customs broker for determining duties owed on Leadershow imports and, instead, only provided the commercial invoice with the lower total price. As a result, the customs broker did not calculate the duties owed based on the “FOB, Project Management and QC costs” in the QC Invoice. The conduct described in this paragraph is referred to below as the “Covered Conduct.”

G. The United States contends that it has certain civil claims against Yogibo arising from the Covered Conduct.

H. Yogibo has been credited in this Agreement under the Department of Justice’s guidelines for taking disclosure, cooperation, and remediation into account in False Claims Act cases, Justice Manual § 4-4.112.

I. Relator claims entitlement under 31 U.S.C. § 3730(d) to a share of the proceeds of this Agreement and to Relator’s reasonable expenses, attorney’s fees and costs.

In consideration of the mutual promises and obligations of this Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. Defendant shall pay to the United States \$217,832.41 plus interest accruing annually at a rate of 5.25% from May 25, 2023 (the “Settlement Amount”), of which \$145,221.61 is restitution, no later than 10 calendar days after the Effective Date

of this Agreement by electronic funds transfer pursuant to written instructions to be provided by the United States Attorney's Office for the District of Massachusetts.

2. Conditioned upon the United States receiving the Settlement Amount from Defendant in accordance with Paragraph 1, the United States, as soon as feasible after receipt of payment, shall pay to Relator 20% of the Settlement Amount. Relator's counsel shall provide written instructions to the United States for the electronic transfer of funds.

3. No later than 10 calendar days after the Effective Date of this Agreement, Defendant shall pay Relator's counsel \$30,410 for expenses, and attorneys' fees and costs.

4. Subject to the exceptions in Paragraph 6 (concerning excluded claims) below, and conditioned upon Defendant's full payment of the Settlement Amount, the United States releases Defendant, its predecessors, its current and former parents, divisions, subsidiaries, successors, and assigns from any civil or administrative monetary claim the United States has for the Covered Conduct under the federal False Claims Act, 31 U.S.C. §§ 3729-3733; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; 19 U.S.C. §§ 1592 and 1595a of the Tariff Act of 1930, as amended; or the common law theories of fraud and unjust enrichment.

5. Subject to the exceptions in Paragraph 6 below and conditioned upon Defendant's full payment of the Settlement Amount and Relator's expenses, attorney's fees and costs as set forth in Paragraph 3 above, Relator, for himself and for his heirs, successors, attorneys, agents, and assigns, releases Defendant, its predecessors, its current and former parents, divisions, subsidiaries, successors, and assigns from any civil

monetary claim Relator has on behalf of the United States for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733, or under 31 U.S.C. § 3730(d) for expenses or attorney's fees and costs.

6. Notwithstanding the releases given in Paragraphs 4 and 5 of this Agreement, or any other term of this Agreement, the following claims of the United States are specifically reserved and are not released:

- a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);
- b. Any criminal liability;
- c. Except as explicitly stated in this Agreement, any administrative liability, including the suspension and debarment rights of any federal agency;
- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- e. Any liability based upon obligations created by this Agreement;
and
- f. Any liability of individuals.

7. Relator and his heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B).

Conditioned upon Relator's receipt of the payment described in Paragraph 2, Relator and his heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge the United States, its agencies, officers, agents, employees, and

servants, from any claims arising from the filing of the Civil Action or under 31 U.S.C. § 3730, and from any claims to a share of the proceeds of this Agreement and/or the Civil Action.

8. Defendant waives and shall not assert any defenses it may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action.

9. Defendant fully and finally releases the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Defendant has asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, agents, employees, and servants, related to the Covered Conduct and the United States' investigation and prosecution thereof.

10. Defendant, for itself and for its heirs, successors, transferees, attorneys, agents, and assigns, together with its current and former parent corporations, direct and indirect subsidiaries, brother or sister corporations, divisions, and current or former corporate owners, fully and finally release Relator and his heirs, personal and legal representatives, successors, attorneys, agents, and assigns from any claims (including for attorney's fees, costs, and expenses of every kind and however denominated) and from all liability, claims, demands, actions, or causes of action whatsoever, whether known or unknown, fixed or contingent, in law or in equity, in contract or in tort, under any federal

or state statute or regulation, or in common law, that Defendant or its heirs, successors, transferees, attorneys, agents, assigns, current and former parent corporations, direct and indirect subsidiaries, brother or sister corporations, divisions, and current or former corporate owners, have asserted, could have asserted, or may assert in the future against Relator and his heirs, personal and legal representatives, successors, attorneys, agents, and assigns, related to the Covered Conduct and Relator's investigation and prosecution thereof.

11. a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47) incurred by or on behalf of Defendant, and its present or former officers, directors, employees, shareholders, and agents in connection with:

- (1) the matters covered by this Agreement;
- (2) the United States' audit(s) and civil investigation(s) of the matters covered by this Agreement;
- (3) Defendant's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil investigation(s) in connection with the matters covered by this Agreement (including attorney's fees);
- (4) the negotiation and performance of this Agreement;
- (5) the payment Defendant makes to the United States pursuant to this Agreement and any payments that Defendant may make to Relator, including costs and attorney's fees,

are unallowable costs for government contracting purposes (hereinafter referred to as Unallowable Costs).

b. Future Treatment of Unallowable Costs: Unallowable Costs will be separately determined and accounted for by Defendant, and Defendant shall not charge such Unallowable Costs directly or indirectly to any contract with the United States.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 calendar days of the Effective Date of this Agreement, Defendant shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by Defendant or any of its subsidiaries or affiliates from the United States. Defendant agrees that the United States, at a minimum, shall be entitled to recoup from Defendant any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine Defendant's books and records and to disagree with any calculations submitted by Defendant or any of its subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by Defendant, or the effect of any such Unallowable Costs on the amount of such payments.

12. Defendant agrees to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, Defendant shall encourage, and agrees not to impair, the cooperation of its directors, officers, and employees, and shall use its best efforts to make available, and

encourage, the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals. Defendant further agrees to furnish to the United States, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in its possession, custody, or control concerning any investigation of the Covered Conduct that it has undertaken, or that has been performed by another on its behalf.

13. This Agreement is intended to be for the benefit of the Parties only.

14. Upon receipt of the payments described in Paragraphs 1 and 3, above, the Relator and the United States shall promptly sign and file in the Civil Action a Stipulation of Dismissal of the Claims Against Defendant pursuant to Rule 41(a)(1).

15. Except as provided above, each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

16. Each party and signatory to this Agreement represents that it freely and voluntarily enters into this Agreement without any degree of duress or compulsion.

17. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the District of Massachusetts. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

18. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

19. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

20. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

21. This Agreement is binding on Defendant's successors, transferees, heirs, and assigns.

22. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.

23. All parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public.

24. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

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THE UNITED STATES OF AMERICA

DATE: July 20, 2023

BY:


BRIAN M. LAMACCHIA
Assistant United States Attorney
United States Attorney's Office,
District of Massachusetts

DATED: July 19, 2023

BY:


PATRICIA M. MCCARTHY
Director
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: July 19, 2023

BY:


STEPHEN C. TOSINI
Senior Trial Counsel
Commercial Litigation Branch
Civil Division
United States Department of Justice

YOGIBO, LLC

DATED: July 12th, 2023

BY: 
Eyal Levy, CEO

DATED: July 14, 2023

BY: 
JERRY COHEN
Counsel for Yogibo, LLC

DAVID KOHLENBERGER - RELATOR

DATED: July ___, 2023

BY: _____
DAVID KOHLENBERGER
Relator

DATED: July ___, 2023

BY: _____
GREGG SHAPIRO
Counsel for Relator

YOGIBO, LLC

DATED: July __, 2023

BY: _____

DATED: July __, 2023

BY: _____

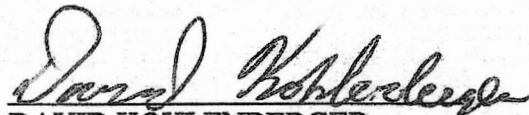
JERRY COHEN

Counsel for Yogibo, LLC

DAVID KOHLENBERGER - RELATOR

DATED: July 10, 2023

BY:



DAVID KOHLENBERGER

Relator

DATED: July 10, 2023

BY:



GREGG SHAPIRO

Counsel for Relator