Exhibit 1

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
International Arbitration Tribunal

NEXT LEVEL VENTURES, LLC, a Washington limited liability corporation,	)
Claimant,	)
v.	)
AVID HOLDINGS, LTD., f/k/a AlderEgo Group, Ltd., a Hong Kong limited liability company,	)
Respondent.	)
ICDR Case No. 01-21-0016-8078	)

FINAL AWARD

Counsel:

David W. Tufts
Peter H. Donaldson
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USA

Counsel for Claimant NEXT LEVEL VENTURES, LLC.

None.

Counsel for Respondent AVID HOLDINGS, LTD., f/k/a AlderEgo Group, Ltd.

The Tribunal:

Thomas J. Brewer
188 Ericksen Avenue NE
Bainbridge Island, Washington 98110
USA

Date of Final Award: April 22, 2022

THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement set forth in a contract between the parties entitled "Exclusive Distribution Agreement," as amended and restated effective April 20, 2020, having been duly sworn, and having heard the proofs and allegations of the Parties, hereby AWARDS as follows:

I. INTRODUCTION

A. The Parties.

1. Claimant in this arbitration is NEXT LEVEL VENTURES, LLC ("NLV" or "Claimant"). Claimant is a Washington limited liability company. NLV markets and sells vaping devices and accessories ("VD's") to distributors of VD's. Claimant is represented in these proceedings by David W. Tufts, Peter H. Donaldson and Madeline A. Hock, Dentons Durham Jones Pinegar, P.C., 111 South Main Street, Suite 2400, Salt Lake City, Utah 84111 USA.

2. Respondent in this arbitration is AVID HOLDINGS, LTD. ("AVID" or "Respondent"). AVID is a Hong Kong limited liability company that was formerly known as AlderEgo Group, Ltd. AVID manufactures and sells VD's. Although given due notice of the pendency of this proceeding, Respondent has not appeared and is not represented by counsel in this arbitration.

B. Brief Summary of the Dispute

3. In brief, the parties entered into the Exclusive Distribution Agreement ("Agreement") in April 2020. Under the Agreement, AVID agreed to supply VD's to NLV for NLV to sell as the exclusive global distributor of those VD's. Claimant NLV contends that Respondent AVID breached the Agreement by refusing to fill certain purchase orders and refusing to accept new purchase orders, by refusing to indemnify NLV for NLV's costs and expenses incurred in defending a patent infringement proceeding brought by third parties, and by breaching the Agreement's exclusivity provision.

C. Pre-Hearing Proceedings.

4. Claimant initiated the present arbitration by submitting its Demand for Arbitration and Statement of Claims, which was filed with the International Centre for Dispute Resolution ("ICDR") on October 5, 2021. The ICDR is the international division of the American Arbitration Association ("AAA") responsible for administering international arbitrations. Claimant's operative claims are set forth in the Amended Statement of Claims ("ASOC"), which was filed with the ICDR on October 22, 2021. The ASOC alleges that Respondent breached the Contract by engaging in the conduct alleged at ASOC paragraphs 49-74, and seeks relief, including money damages and declaratory relief, as alleged in the ASOC's Prayer for Relief.

5. The documentary exhibits attached to the ASOC consist of Exhibit A, a copy of the executed Exclusive Distribution Agreement as amended and restated effective April 20, 2020; Exhibit B, copies of Purchase Orders dated February 19, 2021, April 20, 2021, May 6, 2021, May

19, 2021, June 3, 2021, July 1, 2021, and July 14, 2021, ; Exhibit C, a schedule showing undelivered or partially delivered orders and amounts of seized goods, Exhibit D, a collection of emails exchanged between the parties, Exhibit E, additional emails between the parties, Exhibit F, Claimant's Notice of Default sent by Claimant's counsel to Respondent dated September 2, 2021 and attached exhibits, Exhibit G, Claimant's Notice of Breach sent by Claimant's counsel to Respondent dated September 14, 2021, Exhibit H, Claimant's Notice of Indemnification Demand sent by Claimant's counsel to Respondent dated September 14, 2021 and including exhibits showing third-party claims of patent infringement, and Exhibit I, a copy of Company Registry information No. 6286238 on file with the Government of Hong Kong Special Administrative Region reporting that "AlderEgo Group Limited" changed its name to "AVID Holdings Limited" on July 29, 2021.

6. Exhibit A to the ASOC appears to be a copy of the parties' Agreement validly executed on behalf of Respondent. Other exhibits to the ASOC appear to document prior acknowledgement of the existence of the Agreement, and part performance of the Agreement, by Claimant and Respondent prior to the onset of the disputes alleged in the ASOC. As discussed in more detail below, other exhibits contained on the ICDR's website file for this arbitration document ICDR's prior measures taken to give due notice to Respondent of the pendency of this arbitration, including prior notice of the filing of the original Demand and SOC and also of filing of the Amended SOC given by Federal Express courier delivery to Respondent to the addresses provided by Claimant, followed by confirmation received from Federal Express that timely delivery of the notice was made on Respondent.

7. The parties' arbitration agreement, set forth at paragraph 30 of the Agreement, directs that this arbitration shall be conducted in accordance with the American Arbitration Association's ("AAA") Commercial Arbitration Rules. The currently effective version of those rules is the AAA's Commercial Arbitration Rules, as amended and effective October 11, 2013 ("Rules"). The Rules are posted at www.adr.org.

8. Section R-5 of the Rules provides in pertinent part:

> A respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the Demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of any answering statement to the claimant and to all other parties to the arbitration. If no answering statement is filed within the stated time, the respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

9. Respondent has not filed an answering statement with the ICDR.

10. Section R-31 of the Rules provides:

> R-31. Arbitration in the Absence of a Party or Representative.
>
> Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after

> due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

11. The parties were notified on January 3, 2022, by ICDR that I had been appointed to serve as the Arbitrator in this matter on December 29, 2021, and were asked to submit any objections to my service in that role. No such objections were received. Accordingly, my appointment was reaffirmed by ICDR on January 24, 2022.

12. An organizational telephonic Preliminary Hearing was held on February 10, 2022. Claimant NLV was represented at the Preliminary Hearing by David W. Tufts and Madeline A. Hock, Dentons Durham Jones Pinegar, P.C. Respondent did not appear at the Preliminary Hearing. At the Preliminary Hearing, the ICDR's Director assigned to this matter summarized ICDR's prior efforts to give due notice to Respondent of the pendency of this arbitration. He reported that these efforts included prior written notice of the Preliminary Hearing given by Federal Express courier delivery to Respondent to the addresses provided by Claimant, followed by confirmation received from Federal Express that timely delivery of the notice was made on Respondent. His report was confirmed by Federal Express delivery receipts posted on the ICDR's website file for this case.

13. Based on the record presented at the Preliminary Hearing, I found that Respondent had been given "due notice," as that term is used in Section R-31 of the Rules, of, and in addition had also received timely actual notice of, the pendency of this arbitration and of the scheduled date and time for the Preliminary Hearing. I further found that, despite having been given such due notice, and also having received actual notice, Respondent had failed to be present at or obtain a postponement of the Preliminary Hearing and that, pursuant to Section R-31 of the Rules, it was appropriate to proceed with the Preliminary Hearing in Respondent's absence. (Procedural Order No. 1, ¶3). That finding is hereby approved and incorporated by this reference into this Final Award.

14. At the Preliminary Hearing, as discussed in greater detail in Procedural Order No. 1, I also determined that "the arbitral rules governing this proceeding shall be the AAA's Commercial Arbitration Rules, as amended and effective October 11, 2013;" gave the parties instructions, in accordance with Section R-32 of those Rules, concerning the contents and schedule for pre-hearing evidentiary and other submissions and concerning the conduct of the Arbitration Hearing; set the Arbitration Hearing date for 10:00 a.m. Pacific time on April 1, 2022; decided that, due to the continuing coronavirus pandemic, and exercising my authority under Section R-32(c) of the Rules, the hearing would be conducted "virtually" (*i.e.*, using Zoom platform videoconferencing); decided that "the hearing shall be conducted in English;" decided the form of the award to be issued ("a narrative, reasoned format that explains the principal reasons for the relief awarded"); and directed the ICDR Director "to issue a Notice of Hearing confirming this hearing date and method of proceeding." Finally, I directed that "Any party that objects to any provision of this Order shall do so on or before February 25, 2022, or such objection shall be waived." (*See* Procedural Order No. 1, issued February 10, 2022.) No such objections were received from any party. Procedural Order No. 1 also directed ICDR to give notice by courier delivery to Respondent at all known addresses for Respondent of the issuance and contents of that Procedural Order and of all subsequent Orders, Hearing Notices, and similar formal notices issued in this arbitration, and to document all such efforts, including with copies of delivery confirmations, by posting these materials on the

ICDR/AAA website for this case. The ICDR website file for this case contains Federal Express receipts and delivery confirmations confirming that this was done. I further directed counsel for Claimant to serve Respondent in the same manner, and to document such service efforts, including supplementary delivery confirmations, on all submissions made by Claimant in this arbitration.

15. Subsequently, on March 11, 2022, Claimant timely submitted pre-hearing submissions as directed in Procedural Order No. 1. These included sworn written declarations from witnesses David W. Tufts, Michael Brosgart and Alex Kwon and also appended 31 documentary exhibits, along with a pre-hearing brief that included a written statement of the specific relief sought, a compilation of the legal authorities cited, and a certificate of proof of service of these materials on Respondent. Procedural Order No. 1 directed that "[a]ll witnesses who have provided a prior witness statement shall be present and available for cross-examination if designated for cross-examination by the opposing party on or before March 24, 2022. Witnesses not so designated need not attend the hearing." No such designations were received from any party.

16. No pre-hearing submissions of any kind were received from Respondent at any time prior to the beginning of the Arbitration Hearing.

D. <u>The Arbitration Hearing</u>.

17. On February 17, 2022, ICDR issued its formal Notice of Hearing to all parties, as directed in Procedural Order No. 1. The ICDR website file for this arbitration contains copies of courier receipts confirming that this notice was sent to Respondent by Federal Express courier, and also confirming that the Notice of Hearing was delivered to Respondent in Hong Kong by Federal Express.

18. Pursuant to that notice, the Arbitration Hearing in this matter was held and completed on April 1, 2022. As discussed above, the hearing was conducted videographically due to the covid emergency. See Rules, Section R-32(c). Claimant NLV was represented at the Arbitration Hearing by David W. Tufts, Peter H. Donaldson and Madeline A. Hock, Dentons Durham Jones Pinegar, P.C. Michael Brosgart and Alex Kwon also attended, as did Jeffrey Jones, corporate counsel to Claimant. Respondent AVID did not appear.

19. As discussed in ¶10 above, Section R-31 of the Rules provides that "[u]nless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award." Based on my review of the evidence and records on file in this case, I made findings at the Arbitration Hearing that (i) the tribunal and the ICDR had given all parties, including Respondent, due notice of the date, time, and manner (by videoconference, with detailed access instructions) of the Arbitration Hearing, (ii) that Respondent had received such notice, as confirmed by courier delivery receipt, and (iii) that Respondent had failed to appear at the Arbitration Hearing without showing sufficient cause, or indeed without showing any cause, for such failure. Accordingly, as provided in Section R-31 of the Rules, I directed that the Arbitration Hearing should proceed in Respondent's absence. Those findings and that direction are hereby confirmed and adopted in this Final Award.

20. Claimant then requested at the Arbitration Hearing that the declaration of David W. Tufts dated March 11, 2022 and its exhibits 1-2, the declaration of Michael Brosgart dated March 11, 2022, and its exhibits 1-29, and the declaration of Alex Kwon, and the March 11, 2022, certificate and proof of service executed by Mr. Tufts, should all be admitted into evidence. No objections were received to such admission. Based on the record presented, I granted Claimant's request and admitted all of these materials into evidence. Accordingly, those materials are all included in the evidentiary record of this arbitration. In addition, Mr. David W. Tufts gave sworn testimony at the Arbitration Hearing, in response to questions posed by me, confirming that Claimant received a delivery confirmation from Federal Express confirming that the materials (in brief, all of Claimant's pre-hearing evidentiary submissions) itemized in the certificate of proof of service submitted on March 11, 2022, were actually delivered to and received by Respondent at the Hong Kong address specified for the giving of contractual notices in paragraph 21 of the Agreement. I also asked such other questions of Mr. Tufts at the Arbitration Hearing about various aspects of the merits of Claimant's claims as I deemed appropriate.

21. Section R-39 of the Rules provides:

> R-39. Closing of Hearing:
>
> (a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed

22. In accordance with this provision, at the conclusion of the Arbitration Hearing I specifically inquired whether any party had any further proofs to offer or witnesses to be heard. Claimant gave a negative response to this inquiry. Respondent, having not appeared, gave no response.

23. Accordingly, the arbitral hearing in this case was hereby declared closed, as that term is used in Section R-31 of the Rules, effective as of April 1, 2022, and the matters addressed herein were submitted for decision.

II. ARBITRABILITY.

24. The Rules provide, in their Section R-7, as follows:

> **R-7. Jurisdiction**
>
> (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
>
> (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the

> arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
>
> (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

25. No such objections were received.

26. Similarly, Revised Code of Washington ("RCW") 7.05.170 (1)-(2) provides that "[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. . .A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. . .." Under the arbitral Rules applicable here, the due date for filing an answering statement was 14 days after Respondent received notice of the filing of the Demand. See Rules, Section, R-5(a). Under the schedule for evidentiary submissions set in Procedural Order No. 1, the due date for Respondent's evidentiary submissions was March 11, 2022. No "plea that the arbitral tribunal does not have jurisdiction" has been raised by Respondent at any time prior to the date of issuance of this Final Award. Accordingly, and regardless of whether the due date for "submission of the statement of defense" is deemed to be the due date for the answering statement, or the due date for Respondent's evidentiary submissions in support of its defenses, or the date of the Arbitration Hearing, I find and conclude that Respondent has failed to submit a timely plea that this arbitral tribunal lacks jurisdiction to hear the present matter within the time period mandated by RCW 7.05.170(2).

27. Paragraphs 29 and 30 of the Agreement (Ex. 1) provide:

> 29. Choice of Law. This Agreement. . . and all matters arising out of or relating to this Agreement are governed by, and construed in accordance with, the laws of the State of Washington, United States of America, without regard to the conflicts of laws provisions thereof . . .
>
> 30. Choice of Forum. Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof . . .

28. Based on the evidentiary findings and conclusions of law discussed in Part III below, I have concluded that the Agreement, including its paragraphs 29 and 30, is a valid, binding and enforceable contract. Washington law, applicable here as provided in paragraph 29 of the Agreement, requires that the agreement to arbitrate set forth in paragraph 30 of the Agreement must be enforced. See RCW 7.04A.060 (1)("An agreement. . .to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.") *See, e.g., Adler v. Fred Lind Manor,* 153 Wash. 2d 31, 342, 103 P.3rd 773 (2004).

29. Based on this record, and exercising the authority granted to this Tribunal under Section R-7 of the Rules, I make the following findings as to the arbitrability of the claims and defenses at issue in this case: All of the claims, defenses, disputes and issues asserted by the parties in this arbitration and addressed in this award constitute controversies or claims "arising out of or relating to" the Agreement" within the meaning of the parties' arbitration agreement referenced above. Claimant submitted the claims, disputes and issues now at issue to this binding arbitration. No timely objection, as required under those Rules, has been made to the arbitrability of any claim, defense, dispute or issue addressed in this award. No timely plea asserting that this tribunal lacks jurisdiction over the present matter has been asserted within the time period mandated by RCW 7.05.170(2). Accordingly, for these reasons, I find and conclude that all of the claims, defenses, disputes and issues asserted herein and adjudicated below are arbitrable in this proceeding. This Tribunal, acting as the arbitration tribunal in this arbitration, has jurisdiction over the parties, including Respondent AVID, as to all of those claims, defenses, disputes and issues under the agreed provisions governing dispute resolution set forth in the parties' Agreement.

III. PROCEDURAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

30. Based on the record presented, I find and conclude that Respondent AVID was given "due notice," as that term is used in Section R-31 of the applicable arbitral Rules, of the initiation and pendency of this arbitration, and of my appointment as the Arbitrator in this matter. I further find and conclude that Respondent AVID also received timely actual notice of the initiation and pendency of this arbitration and of my appointment as the Arbitrator in this matter. I also find and conclude that, despite having been given such notice, Respondent AVID failed to be present, or otherwise participate in any way, in this arbitration, and also failed to request or obtain a postponement of these proceedings. I find and conclude that fairness to the participating party—the Claimant—required, and that Section R-31 of the Rules allowed, the arbitration to proceed in the absence of Respondent AVID.

31. I also find and conclude that the ICDR gave prior "due notice," as that term is used in Section R-31 of the February 10, 2022, Preliminary Hearing in this matter, and that Respondent AVID also received timely actual advance notice of the scheduled date and time and method of participating in that Preliminary Hearing. I also find and conclude that, despite having been given such notice, Respondent AVID failed to appear or participate at the Preliminary Hearing and also failed to request or obtain a postponement of that hearing. I also find and conclude that, following the Preliminary Hearing, Respondent AVID was given both "due notice" by ICDR, and that Respondent also received actual notice, of the issuance and contents of Procedural Order No. 1, including that Order's requirements and schedule for submission of evidentiary materials. Accordingly, I find and conclude that fairness to the participating party—the Claimant—required, and that Section R-31 of the Rules allowed, the arbitration to proceed in the absence of Respondent AVID.

32. I find that on February 17, 2022, ICDR gave Respondent formal written notice of the date, time and method of participating in the Arbitration Hearing scheduled for April 1, 2022 ("Notice of Hearing"). I specifically find that the ICDR gave prior "due notice," as that term is used in Section R-31 of the Rules, of the Notice of Hearing, and that Respondent AVID also received timely actual notice of the Notice of Hearing. I also find and conclude that, despite having been given such notice, Respondent AVID failed to appear or participate at the Arbitration Hearing and also

failed to request or obtain a postponement of that hearing. Accordingly, I find and conclude that fairness to the participating party—the Claimant—required, and that Section R-31 of the Rules allowed, the arbitration to proceed in the absence of Respondent AVID.

33. I find and conclude that on March 11, 2022, Claimant filed with the ICDR the declaration of David W. Tufts dated March 11, 2022 and its exhibits 1-2, the declaration of Michael Brosgart dated March 11, 2022, and its exhibits 1-29, and the declaration of Alex Kwon, and the March 11, 2022, certificate and proof of service executed by Mr. Tufts, along with Claimant's pre-hearing brief , that included a written statement of the specific relief sought, and a compilation of the legal authorities cited. I find that Claimant served these materials on Respondent as detailed in the certificate of proof of service, and further find that Respondent received timely actual notice of the filing of these materials far in advance of the Arbitration Hearing date. Accordingly, I find and conclude that Claimant gave Respondent "due notice," as that term is used in Section R-31 of the Rules, of its submission of these materials in the present arbitration, and that Respondent AVID also received timely actual advance notice of the filing of Claimant's evidentiary submissions, certificate of service, pre-hearing brief, and itemization of specific relief requested well in advance of the Arbitration Hearing date. I also find and conclude that, despite having been given such notice, Respondent AVID failed to appear or participate at the Arbitration Hearing and also failed to request or obtain a postponement of that hearing. Accordingly, I find and conclude that fairness to the participating party—the Claimant—required, and that Section R-31 of the Rules allowed, the arbitration to proceed in the absence of Respondent AVID.

34. I also find and conclude that the Arbitration Hearing was held on beginning at 10:00 a.m. Pacific time on April 1, 2022, all as provided in Procedural Order No. 1 and also as provided in the ICDR's February 17, 2022, Notice of Hearing. I also find and conclude that, despite having been given such notice, Respondent AVID failed to appear or participate at the Arbitration Hearing and also failed to request or obtain a postponement of that hearing. Accordingly, I find and conclude that fairness to the participating party—the Claimant—required, and that Section R-31 of the Rules allowed, the arbitration to proceed in the absence of Respondent AVID.

35. For these reasons, I find and conclude that Respondent was given "due," reasonable and proper, and also actual, notice of the initiation of this arbitration, my appointment as the arbitrator, the subsequent pendency of these proceedings, including prior notice of the Preliminary Hearing and of the decisions reached there as reflected in Procedural Order No. 1, advance notice of the date, time and manner of participating in the Arbitration Hearing, and full notice of Claimant's evidentiary submissions and detailed itemization of relief sought. I find that Respondent AVID was given a full and fair opportunity to present its case in this arbitration, and has not indicated, at any stage in the proceedings, that it was unable to present its case in these proceedings. At no time while this case has been pending did Respondent object to any of the procedural decisions made or seek or obtain a postponement of any of the scheduled hearings or other deadlines set. Accordingly, I find that the initiation of the arbitration, my appointment as the arbitrator, and the subsequent conduct of the proceedings complied fully with the requirements of the parties' Agreement, the applicable arbitral Rules and Washington law.

36. Finally, as required under Section R-31 of the rules, I find that the award made herein is not "made solely on the default of a party." I required Claimant to submit detailed evidence, reviewed below, in support of its claims, and then questioned Claimant concerning its submissions

to the extent I deemed appropriate at the Arbitration Hearing. Claimant was required "to submit such evidence as" I required in order to demonstrate that sound bases exist for the award requested.

IV. MERITS-RELATED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

37. The following discussion is a statement of those facts found by this Tribunal, based on the totality of the evidence presented, to be true and necessary to this award. To the extent that this recitation differs from any party's position, that is the result of determinations as to credibility, relevance, burden of proof considerations, and the weighing of the evidence. The discussion that follows also sets forth the reasons and legal conclusions on which this award is based. All monetary figures are given in U.S. Dollars ("USD"). As discussed above, Washington law governs.

38. NLV markets and sells vaping devices and accessories (VDs) to distributors of VDs. (Declaration of Michael Brosgart ("Brosgart Decl.") ¶ 3; *see also* Declaration of Alex Kwon ("Kwon Decl."), ¶ 3.)

39. On or about April 20, 2020, NLV entered into an Exclusive Distribution Agreement (the "Agreement") with Respondent AVID. The Agreement is effective as of April 20, 2020. (Brosgart Decl. ¶ 4, Agreement attached to Brosgart Decl. as Exhibit 1; *see also* Kwon Decl. ¶ 3.) Exhibit 1 appears to be a copy of the parties' Agreement validly executed on behalf of both parties. Numerous other exhibits, discussed below, appear to document acknowledgement by both parties of the existence and validity of the Agreement. To give just one example, Exhibit 29, a letter sent to Claimant by Respondent AVID on September 1, 2021, about seventeen months after the Agreement had been executed in April 2020, acknowledged that previously "Next level was granted exclusive distribution rights." The exhibits admitted into evidence also document very substantial part performance of the Agreement, by Claimant and Respondent prior to the onset of the parties' disputes at issue here. Mr. Brosgart testified without contradiction that the parties mutually agreed to and executed the Agreement in April 2020. Based on this and the totality of the other evidence presented, I find and conclude that Exhibit 1 is a validly executed contract, binding on Claimant and Respondent, and enforceable under Washington law.

40. The Agreement amended and restated a prior agreement between the parties that began in January 2019 (the "Prior Agreement"). (Brosgart Decl. ¶ 5, Prior Agreement attached to Brosgart Decl. as Exhibit 2; *see also* Kwon Decl. ¶ 3.)

41. At all material times, NLV's dealings with AVID have been with either or both of Jonathan Carfield, the Chief Executive Officer of AVID, or Hanna Carfield, the Chief Operating Officer of AVID. Jonathan and Hanna are a married couple. (Brosgart Decl. ¶ 6; Kwon Decl. ¶ 3.)

42. Under the Agreement, the parties agreed that AVID would sell VDs ("Goods" under the Agreement) to NLV, and NLV would enjoy an exclusive right to market and resell the VDs worldwide with an exclusive license to use all of AVID's trademarks, including "AVD," "Advanced Vapor Devices," and affiliated names and trademarks such as "Smartpulse", and "Eazy-Press." (Agreement § 1.1, 6 and Brosgart Decl. ¶ 7; *see also* Kwon Decl. ¶ 3.)

43. Section 1.1 of the Agreement provides:

> 1.1 Exclusive Appointment. Seller [AVID] hereby appoints Distributor [NLV] as its exclusive distributor and manufacturer representative of the products set forth on Schedule 1 (as described in further detail on Schedule 1 as may be modified from time to time, collectively, the "Goods") for the entire world (the "Territory") during the Term, and Distributor accepts such appointment. Seller shall not, directly or indirectly through any Person, agents, representatives, or distributors, except through Distributor hereunder, sell or otherwise distribute the Goods in the Territory [the entire world].

(Agreement § 1.1.)

44. Schedule 1 of the Agreement states that "[a]ny product offered by Seller [AVID] to Distributor [NLV] and marketed or sold by Distributor . . . shall be deemed to be added to this Schedule I unless the parties agree to the contrary in a writing signed by both parties." (*Id.* Schedule 1). That schedule also includes a listing of various parts and components of the VDs, including resin cartridges, glass cartridges, Eazy-Press glass cartridges, disposables, and batteries. (*Id.*)

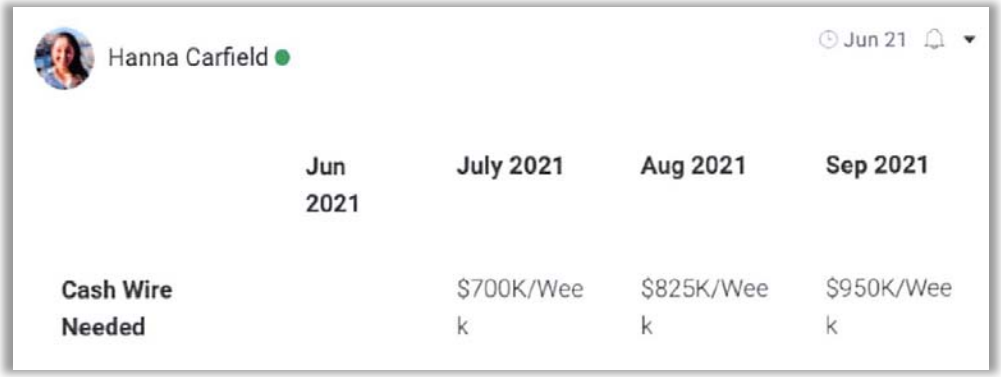
45. The Agreement provides that NLV and AVID may amend the prices and payment terms for the VDs "from time to time" by mutual agreement. (*Id.* § 3.)

46. Throughout the term of the Agreement and the Prior Agreement, the parties agreed to a series of continuous weekly payments in agreed-upon fixed amounts (as opposed to payments tied to specific purchase orders). The table attached to the Brosgart Decl. as Exhibit 3, shows the weekly payments made by NLV and accepted by AVID from January 2019 through the end of August 2021(Brosgart Decl. ¶ 8 and Exhibit 3 thereto; *see also* Kwon Decl. ¶ 3.)

47. For the past two years, the parties agreed to fixed weekly payment amounts through an exchange of posts on Monday.com, WeChat, and Zoom calls, AVID's preferred methods of communication. For example, the parties agreed to payments of $450,000 per week in January, February, and March 2021, and $550,000 per week in April 2021. (Brosgart Decl. ¶ 9 and Exhibit 4 thereto; *see also* Kwon Decl. ¶ 3.) For the time period from execution of the Agreement in April 2020 through the week of August 26, 2021, these payments totaled over $25 million.

48. Consistent with this practice, in June 2021, the parties agreed to weekly payment arrangements for July, August and September 2021. (Brosgart Decl. ¶ 10 and Exhibit 5 thereto; *see also* Kwon Decl. ¶ 3.)

49. Specifically, on June 21, 2021, Hanna Carfield of AVID sent the following message to Michael Brosgart and Alex Kwon of NLV (via the online communication service Monday.com) proposing and requesting that NLV remit to AVID the following weekly amounts as payment for orders in the months of July, August and September 2021:



This is referred to as the "July-September Payment Schedule." (Brosgart Decl. ¶ 11 and Exhibit 5 thereto; *see also* Kwon Decl. ¶ 3.)

50. NLV accepted this proposal and agreed to the July-September Payment Schedule. In so doing, NLV relied on this schedule by remitting payments to AVID according to the schedule, and by planning and conducting NLV's business operations so it could comply with the schedule. (Brosgart Decl. ¶ 12; *see also* Kwon Decl. ¶ 3.)

51. The Agreement requires AVID to accept, promptly fill, and ship all purchase orders it receives from NLV. (*See id.* § 4.2.) It further provides:

> Failure to fill three consecutive timely orders by Seller may be deemed a breach of this Agreement and under threat of failure to deliver timely orders to maintain business, ***Distributor may engage in seeking self-help*** and obtain similar substitution of goods from another country, region, manufacturer, or seller to maintain the orders ***and shall be authorized to utilize the marks with permission as outlined in Section 6 of this agreement***.

(Agreement § 4.2 (emphasis added).)

52. Section 5.1 of the Agreement requires AVID to ship Goods "to the freight forwarder and delivery location designated by [NLV] at [NLV's] expense." (Agreement § 5.1.)

53. Section 6 of the Agreement provides NLV with a world-wide "sublicensable, exclusive, non-transferable license" for NLV "to use all [AVID's] trademarks for the Goods (including "AVD" and "Advanced Vapor Devices" and the trademarks set forth on Schedule I), whether registered or unregistered, including the listed registrations and applications and any registrations, which may be granted pursuant to such applications." (Agreement § 6.)

54. Section 6 further provides that AVID "shall not use any of the trademarks licensed to [NLV] under this Agreement in any promotional, advertising or marketing materials or content, or other public-facing content," world-wide, "without the prior written consent" of NLV. (*Id.*)

55. Section 15.2 of the Agreement requires AVID to "indemnify, hold harmless and defend" NLV in connection with any loss, damage or injury relating to "an allegation that the Goods

or [AVID's] branding or trademark infringes or otherwise violates the property or intellectual property rights of a third party, including but not limited . . . patents or trademarks." (Agreement §15.2.).

56. The indemnification provision also specifically provides that NLV is entitled to be indemnified by AVID for "attorneys' fees, fees, and the costs of enforcing any right to indemnification under this Agreement." (*Id.*)

57. The term of the Agreement is for a period of five years, beginning April 20, 2020, with automatic renewals thereafter unless terminated for cause or by mutual agreement. (Agreement § 8.1.)

58. NLV has fully performed all of its obligations under the Prior Agreement and Agreement, including remitting all payments when due to NLV up until the time when AVID refused and stopped shipping the Goods to NLV, as described below. (Brosgart Decl. ¶ 13; *see also* Kwon Decl. ¶ 3).

59. The Parties operated under the Prior Agreement and Agreement for approximately three and a half years. Numerous purchase orders were placed and filled under those agreements. (Brosgart Decl. ¶ 14; *see also* Kwon Decl. ¶ 3.)

60. Beginning in mid-2021, NLV issued a number of purchase orders that AVID ultimately refused to fulfill. These orders were made between April 15, 2021 and August 31, 2021 (the "Unfilled POs"). (Brosgart Decl. ¶ 15, attached as Exhibit 6 to the Brosgart Decl. is a table identifying the Unfilled POs; attached as Exhibit 7 are the Unfilled POs; *see also* Kwon Decl. ¶ 3.)

61. AVID failed to deliver the Goods on the Unfilled POs, although, in some instances, AVID delivered a nominal subset of some of the Goods for a few of the Unfilled POs. (Brosgart Decl. ¶ 16; *see also* Kwon Decl. ¶ 3.) AVID's failure to deliver the Goods described in the Unfilled POs is a breach of AVID's obligations under Section 5.1 of the Agreement. Accordingly, AVID is in default under the Agreement.

62. As identified in Exhibit 6 to the Brosgart Declaration, in several instances more than three consecutive purchase orders were not filled by AVID, including purchase order numbers (with PO date in parentheses)

- 1693 (8/2/21), 1694 (8/2/21), 1695 (8/3/21), 1696 (8/5/21), 1697 (8/5/21), 1698 (8/5/21), 1699 (8/9/21), 1700 (8/10/21), 1701 (8/10/21);
- 1703 (8/12/21), 1704 (8/16/21), 1705 (8/17/21), 1706 (8/17/21);
- 1708 (8/19/21), 1709 (8/22/21), 1710 (8/23/21), 1711 (8/23/21), 1712 (8/23/21); and
- 1714 (8/23/21), 1715 (8/24/21), 1716 (8/24/22), 1717 (8/24/21).[1]

Brosgart Decl. ¶ 17; *see also* Kwon Decl. ¶ 3.)

[1] These purchase orders are specifically identified because of their consecutive nature. However, as indicated in the table attached as Exhibit 6 to the Brosgart Declaration, many additional purchase orders also were submitted by NLV but never filled by AVID.

63. AVID's refusal to ship ordered Goods is a breach of Sections 3.3, 4.2 and 5.1 of the Agreement.

64. After September 1, 2022, AVID refused to accept any new orders for Goods. (Brosgart Decl. ¶ 18; *see also* Kwon Decl. ¶ 3.)

65. The refusal to accept any new orders violates Section 4.2 of the Agreement.

66. AVID defaulted and remains in default under the Agreement because AVID never shipped the Goods described in the spreadsheet included in Exhibit 6 to the Brosgart Declaration, and it has refused to accept any new orders for Goods.

67. On or about August 6, 2021, Jonathan Carfield provided Michael Brosgart and Alex Kwon via WeChat with portions of an article from www.bluehole.com.cn stating that "a technology company in Shenzhen" alleged that "two batches of e-cigarette atomizer(s)" infringed that company's intellectual property causing Dapeng Customs to seize the e-cigarette atomizers for "suspected infringement." (Brosgart Decl. ¶ 20 and Exhibit 8 thereto; *see also* Kwon Decl. ¶ 3.)

68. AVID subsequently informed NLV that the complainant was Shenzhen SMOORE Technology Limited ("SMOORE") and the seized e-cigarette atomizers were a portion of the Goods ordered by NLV under several of the Unfilled POs (the "Seized Goods"). (Brosgart Decl. ¶ 21; *see also* Kwon Decl. ¶ 3.)

69. The actions of SMOORE constituted an allegation that the Seized Goods infringe SMOORE's intellectual property.

70. Once SMOORE took those actions, AVID was (and still is) obligated under Section 15.2 to indemnify, defend and hold harmless NLV from NLV's losses resulting from SMOORE's allegations. (Agreement § 15.2.)

71. NLV has received multiple allegations that certain of the Goods infringe United States design and utility patents. The first is a July 29, 2021, letter sent on behalf of AIRO Brands ("AIRO"). (Brosgart Decl. ¶ 22 and Exhibit 9 thereto; *see also* Kwon Decl. ¶ 3.)

72. That letter accuses various Goods, including the Seed, the Magnetic Ring Adapter, and the ARMR sleeve of the vaping cartridges sold by AVID to NLV, of infringing claims of U.S. Patent Nos. 10,398,178; 10,750,788; 11,044,943; and D800,310. (*Id.*)

73. NLV responded to AIRO's letter seeking more details, and AIRO responded by providing claim charts on August 31, 2021. (Brosgart Decl. ¶ 23 and Exhibit 10 thereto; *see also* Kwon Decl. ¶ 3.)

74. On September 8, 2021, SMOORE sent a letter to NLV that accuses the Goods of infringing claims of U.S. Patent Nos. D817,544; D823,534; D853,635; 10,357,623; 10,791,763; and 10,791,762. (Brosgart Decl. ¶ 24 and Exhibit 11 thereto; *see also* Kwon Decl. ¶ 3.). The September 8 letter from SMOORE included copies of the referenced patents and claim charts. (Brosgart Decl. ¶ 24 and Exhibit 11 thereto; *see also* Kwon Decl. ¶ 3.)

75. On September 14, 2021, NLV sent to AVID copies of the accusatory letters it received and reminded AVID of its duty to indemnify, hold harmless, and defend NLV pursuant to Section 15.2 of the Agreement in response to AIRO's and SMOORE's allegations that the Goods infringe their respective intellectual property. (Brosgart Decl. ¶ 25 and Exhibit 12 thereto; *see also* Kwon Decl. ¶ 3.)

76. NLV also demanded that AVID acknowledge in writing its obligations to indemnify, defend, and hold harmless to the full extent of Section 15.2. (S*ee* Exhibit 12 to Brosgart Decl.) AVID failed to do so, and has continually refused to indemnify Claimant. (Brosgart Decl. ¶ 26; *see also* Kwon Decl. ¶ 3.) This failure is a default under Section 15.2 of the Agreement.

77. Following AVID's failure to respond to the claims of AIRO and SMOORE, on or about October 4, 2021, NLV was named as a party in the ITC Proceedings commenced by SMOORE (the "ITC Proceedings"). (Brosgart Decl. ¶ 27; s*ee* Exhibit 13 to Brosgart Decl; *see also* Kwon Decl. ¶ 3)

78. As a result of the SMOORE claims, NLV is currently a named defendant in the ITC Proceedings. The ITC Proceedings is presently in the discovery and claim construction phase. The ITC will issue its final determination in March of 2023, and at that point the decision could be appealed to the Federal Circuit Court of Appeals. (Brosgart Decl. ¶ 28; *see also* Kwon Decl. ¶ 3.)

79. Through January 2022, NLV has incurred $582,283.76 in fees defending against the claims asserted in the ITC Proceeding, which is active and ongoing. (Brosgart Decl. ¶ 29 and Exhibit 25 thereto; *see also* Kwon Decl. ¶ 3.)[2] As such, NLV will have to continue to incur substantial fees related to its defense in the ITC Proceeding. The attorneys representing NLV in the ITC Proceedings have provided NLV with an estimate that it will cost NLV in excess of $3.6 million to defend against SMOORE's claims in the ITC Proceeding. (Brosgart Decl. ¶ 29 and Exhibit 14 thereto; *see also* Kwon Decl. ¶ 3.)

80. Additionally, to mitigate against the harm to NLV and its products as a result of the ITC Proceedings, NLV has expended $83,000.00 in public relations and lobbying services. This was paid to the Albright Stonebridge Group, a global business consulting group, which has devised and implemented a public relations strategy to lessen the impact on NLV's sales that would otherwise result from the publication of the pendency SMOORE's claims. (Brosgart Decl. ¶ 30 and Exhibit 15 thereto; *see also* Kwon Decl. ¶ 3.)

81. AVID has interfered with NLV's exclusive rights to distribute AVID-branded Goods under the Agreement by taking the following actions:

a. After NLV demanded performance under the Agreement, AVID informed NLV's leadership team via WeChat that AVID has "a back-up plan that involves an investor that will create a new entity for distribution and will be much more aligned with AVD moving forward." (Brosgart Decl. ¶ 31(a); S*ee* Exhibit 16 to Brosgart Decl.; *see also* Kwon Decl. ¶ 3.) This implies that AVID intends to move forward distributing AVD and/or Advanced

[2] Due to a joint defense agreement, NLV is only responsible for 40% of the fees associated with invoices 2498649, 2498693, and 818594.

Vapor Devices-branded VDs without NLV, in breach of Section 1.1 of the Agreement. (Brosgart Decl. ¶ 31(a).)

b. AVID posted on LinkedIn "[w]e are super excited to formalize our exclusive partnership and Joint Venture with Shenzhen Yuto[.]" Shenzhen Yuto is a manufacturer of VDs. (Brosgart Decl. ¶ 31(b); S*ee* Exhibit 17 to Brosgart Decl.; *see also* Kwon Decl. ¶ 3.) This indicates AVID is taking steps to manufacture and distribute AVD and/or Advanced Vapor Devices-branded VDs without NLV. (Brosgart Decl. ¶ 31(b).)

c. AVID posted on a public forum, Future4200, "What if you could buy AVD's directly from the factory and pay the same price as their distributors?" (Brosgart Decl. ¶ 31(c); S*ee* Exhibit 18 to Brosgart Decl.; *see also* Kwon Decl. ¶ 3.) By posting this to a cannabis community chat board, AVID is attempting to undermine NLV's distribution of AVD and/or Advanced Vapor Devices-branded VDs and let the community know AVID will be offering the same product but apparently at prices that would undercut NLV's. (Brosgart Decl. ¶ 31(c).)

d. AVID further posted on Future4200, "Next Level [NLV] is allowed to sell our AVD brand cartridges and work directly with our factory, as per our distribution agreement . .. However nothing restricts someone from manufacturing and producing our cartridges as 'unbranded cartridges' if they wish to save customers a boatload of money for the same product[.]" (Brosgart Decl. ¶ 31(d); S*ee* Exhibit 19 to Brosgart Decl.; *see also* Kwon Decl. ¶ 3.) What AVID leaves out of this post is the fact that NLV has the exclusive rights to distribute *any* vaping devices or related products manufactured or offered for sale by AVID during the terms of the Agreement. (Agreement, Schedule I.) Moreover, this post to the cannabis community shows AVID's intentions to compete with NLV by breaching the exclusivity provision and distributing VDs. (Brosgart Decl. ¶ 31(d).)

e. Again, on Future4200, AVID wrote, "For anyone interested, the AVD factory in China is now selling factory-direct and eliminating their distributors [NLV] that were doubling the price of the cartridges." When asked how a consumer will know it is the same product, AVID wrote: "You can send an email to jonathan@AVD710.com. He's the founder of the company, owns the trademark to AVD and [oversees] the manufacturing in China. I'm sure he can explain the reasons for him now selling direct." jonathan@AVD710.com is one of the email addresses used by Jonathan Carfield. (Brosgart Decl. ¶ 31(e); S*ee* Exhibit 20 to Brosgart Decl.; *see also* Kwon Decl. ¶ 3.) This post reflects the intention of the founder of AVID, Jonathan Carfield, to directly sell VDs in breach of Section 1.1 of the Agreement ("Seller shall not, directly or indirectly through any Person, agents, representatives, or distributors, except through Distributor hereunder, sell or otherwise distribute the Goods in the Territory [the entire world]"). (Brosgart Decl. ¶ 31(e).)

f. AVID also posted to Future4200 that "We started our own factory using the same SOP's created by AVID and suppliers. The only difference is that we sell factory direct." (Brosgart Decl. ¶ 31(f); S*ee* Exhibit 21 to Brosgart Decl.; *see also* Kwon Decl. ¶ 3.) Again, this post demonstrates that AVID wants the cannabis community to know that it sells the same VDs NLV offers. (Brosgart Decl. ¶ 31(f).)

g. AVID posted on Instagram a picture of NLV's website and claimed AVID will be producing the same goods as NLV, but at "higher quality" and "a lower price." (Brosgart Decl. ¶ 31(g); S*ee* Exhibit 22 to Brosgart Decl.; *see also* Kwon Decl. ¶ 3.) Here, AVID not only claims to be producing and distributing the same goods as NLV, but uses images from NLV's website. (Brosgart Decl. ¶ 31(g).)

h. AVID also posted an image of the AVD mark to sell AVID's product on Instagram. (Brosgart Decl. ¶ 31(h); S*ee* Exhibit 23 to Brosgart Decl.; *see also* Kwon Decl. ¶ 3.) NLV has the exclusive rights to the AVD mark, and AVID is not permitted to use that mark or any of the other marks licensed under the Agreement in commerce without NLV's consent. (Agreement § 6.) Nevertheless, AVID uses this mark to compete with NLV. (Brosgart Decl. ¶ 31(h).)

i. AVID also posted publicly that it opened a "second factory that exclusively manufactures for our Advanced Vapor Devices Brand". (Brosgart Decl. ¶ 31(i); S*ee* Exhibit 24 to Brosgart Decl.; *see also* Kwon Decl. ¶ 3.) AVID wrongly claims that its second factory can use the "Advanced Vapor Devices Brand" that it licensed exclusively to NLV, to compete with NLV and implies that AVID will continue to breach the exclusivity provision of the Agreement. (Brosgart Decl. ¶ 31(i).)

82. As expressly permitted under Section 4.2 of the Agreement, after AVID began refusing to fulfil POs, on October 1, 2021, NLV engaged in permitted "self-help" to obtain substitute VDs for the Goods that AVID failed to provide under the Agreement. (Brosgart Decl. ¶ 32; *see also* Kwon Decl. ¶ 3.)

83. AVID's breaches created significant urgency for NLV to find a manufacturer that was capable and willing to manufacture substitute VDs pursuant to NLV's specifications with AVID branding so that NLV could continue its business. (Brosgart Decl. ¶ 33; *see also* Kwon Decl. ¶ 3.)

84. In attempting to identify such manufacturers, NLV determined that the most cost-effective solution to the need to obtain the substitute VDs was to purchase them directly from the original manufacturer that had been selling them to AVID (the Factory), thereby minimizing the production expense, such as by avoiding having to create new molds and related engineering for the AVD-branded VDs. (Brosgart Decl. ¶ 34; *see also* Kwon Decl. ¶ 3.)

85. In order to obtain the needed VDs from the Factory, the Factory required NLV to resolve AVID's $7,000,000 unpaid accounts receivable balance before it would work with or ship VDs to NLV.[3] NLV found this requirement to be reasonable, and remitted the requested payment to the Factory because this was the only way for NLV to continue to receive VDs in a timely fashion, which was critical to NLV's business continuity. However, this required NLV to make a $7,000,000 payment to the Factory in a matter of days, which necessitated that NLV incur unanticipated financing costs that would otherwise have been unnecessary had AVID not breached. (Brosgart Decl. ¶ 35; *see also* Kwon Decl. ¶ 3.)

3 Despite NLV's consistent timely payments to AVID for Goods ordered from AVID, NLV learned AVID owed its manufacturers millions of dollars.

86. To date, NLV has incurred $40,674.83 in financing costs associated with making the $7,000,000 payment to the Factory to resolve AVID's unpaid accounts receivable balance. Also, in connection with this, NLV incurred $64,532.00 in attorneys' fees to mitigate its damages caused by AVID's breaches, including to negotiate and prepare new agreements with the Factory that would otherwise have been unnecessary had AVID not breached, and to obtain legal advice to enable NLV to continue to operate its business pursuant to its rights of "self-help" under Section 4.2 of the Agreement. (Brosgart Decl. ¶ 36; Tufts Decl. ¶ 16 and Exhibit 1 to Tufts Decl.; *see also* Kwon Decl. ¶ 3.)

87. NLV also incurred costs for its efforts to rebrand when it appeared that NLV would not be able to obtain a supply of AVID-branded VDs and due to uncertainty regarding the licensed trademarks and AVID's improper use of the trademarks. NLV engaged The OVO Branding Agency to perform this work and paid that agency $16,600. (Brosgart Decl. ¶ 37 and Exhibit 26 thereto; *see also* Kwon Decl. ¶ 3.)

88. NLV incurred the above costs to mitigate its damages. NLV continues to operate its business pursuant to its rights of "self-help" under Section 4.2 of the Agreement, and must continue to do so for the full term of the Agreement, including renewal terms, in order to obtain and enjoy the benefit of its bargain under the Agreement. (Brosgart Decl. ¶ 38; *see also* Kwon Decl. ¶ 3.)

89. NLV notified AVID on multiple occasions of AVID's new and continuing breaches of the Agreement, including in letters dated September 2, 2021, September 7, 2021, and September 14, 2021. (Brosgart Decl. ¶ 39; S*ee* Exhibits 12, 27, and 28 to Brosgart Decl; *see also* Kwon Decl. ¶ 3.)

90. AVID has not remedied its failure to deliver the VDs that NLV ordered under the Unfilled POs. (Brosgart Decl. ¶ 40; *see also* Kwon Decl. ¶ 3.)

91. AVID also has neither undertaken nor affirmed its obligation to indemnify and defend NLV in the ITC Proceedings as required under Section 15.2 of the Agreement. (Brosgart Decl. ¶ 41; *see also* Kwon Decl. ¶ 3.)

92. NLV made timely payments in accordance with the parties' payment agreements, including the July-September Payment Schedule, up until the time when AVID refused and stopped shipping the Goods to NLV absent additional payments significantly over and above what the parties had agreed. (Brosgart Decl. ¶ 42; *see also* Kwon Decl. ¶ 3.)

93. Notwithstanding the agreement on weekly payments stated in the July-September Payment Schedule, beginning on August 31, 2021, AVID began demanding additional payments in excess of those required under the July-September Payment Schedule and at the same time refused to ship Goods to NLV until its new, unilateral, and inflated payment demands were met. (Brosgart Decl. ¶ 43 and Exhibit 29 thereto; *see also* Kwon Decl. ¶ 3.)

94. On August 31, 2021, AVID demanded: "Orders placed before September 1, 2021 that are not shipped as of August 31, 2021 will require full payment for shipment" (Brosgart Decl. ¶ 44 and Exhibit 29 thereto; *see also* Kwon Decl. ¶ 3.)

95. This was directly contrary to the July-September Payment Schedule that had been agreed upon, as AVID suddenly demanded millions of dollars in excess of the agreed upon $950,000 per week amount for September. (Brosgart Decl. ¶ 45; *see also* Kwon Decl. ¶ 3.)

96. NLV made all of the payments required under the July-September Payment Schedule for the months of July and August. (Brosgart Decl. ¶ 46 and Exhibit 3 thereto; *see also* Kwon Decl. ¶ 3.)

97. In response to NLV's claims of breach and demand for performance, AVID has wrongfully claimed to terminate the Agreement, in breach of AVID's duties and obligations under the Agreement and the July-September Payment Schedule. (Brosgart Decl. ¶ 47; *see also* Kwon Decl. ¶ 3.)

98. NLV has not agreed to terminate the Agreement, and there are no grounds upon which AVID could terminate the Agreement "for cause", which is the only other instance that allows for termination of the Agreement under Section 8.1. (Brosgart Decl. ¶ 48; *see also* Kwon Decl. ¶ 3.)

99. As explained previously, NLV made timely payments in accordance with the parties' payment plans, including the July-September Payment Schedule up until AVID refused to ship the Goods unless it received additional payments contrary to, and far in excess of, the payments required under the July-September Payment Schedule. (Brosgart Decl. ¶ 49; *see also* Kwon Decl. ¶ 3.)

100. When AVID refused to ship properly ordered Goods on September 1, 2021, NLV ceased remitting payments to AVID. (Brosgart Decl. ¶ 50; *see also* Kwon Decl. ¶ 3.)

101. As a result of AVID's breaches of the Agreement, as described in the factual findings made above, NLV has been damaged in the amount of **$892,020.25**. This consists of the following:

a. $40,674.83 in lending fees incurred in connection with the $7,000,000 payment required by the Factory to obtain substitute Goods.
b. $64,532.00 in legal fees incurred to negotiate and prepare documents associated with making the $7,000,000 payment to the Factory to obtain substitute Goods, and to obtain legal advice to enable NLV to continue to operate its business pursuant to its rights of "self-help" under Section 4.2 of the Agreement.
c. $16,600.00 in re-branding fees incurred by NLV in connection with the mitigation of harms it has suffered as the result of AVID's breaches of the Agreement.
d. $582,283.76 in legal fees NLV incurred with the Dentons law firm in connection with NLV's involvement in the ITC proceedings.
e. $83,000.00 in fees NLV incurred with the Albright Stonebridge Group to mitigate the harm it has suffered in connection with NLV's involvement in the ITC proceedings.
f. $95,020.94 in legal fees NLV incurred with the Dentons law firm to date in connection with NLV's involvement in this Arbitration, and $43.72 in costs NLV incurred in this Arbitration (Tufts Decl. ¶ 16).

g. $4,865.00 in legal fees NLV incurred with the Davis Wright & Tremaine law firm in connection with NLV's involvement in this Arbitration (Tufts Decl. ¶¶ 17-19).

h. $5,000 for attorneys' fees incurred in connection with the Arbitration Hearing held on April 1, 2022 (Tufts Decl. ¶ 21).

102. The Final Award should include interest at the rate of 12% per annum until paid in full.

103. "In a breach of contract action, the plaintiff must prove that a valid agreement existed between the parties, the agreement was breached, and the plaintiff was damaged." *Univ. of Washington v. Gov't Employees Ins. Co.,* 200 Wn. App. 455, 467, 404 P.3d 559, 566 (2017). Any failure to perform a contractual duty when the time for performance has accrued constitutes a breach. *DC Farms, LLC v. Conagra Foods Lamb Weston, Inc*., 179 Wn. App. 205, 230, 317 P.3d 543, 555 (2014). "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." RCW § 62A.2-204.

104. In addition, "[u]nder Washington law, there is in every contract an implied duty of good faith and fair dealing that obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Rekhter v. State, Dep't of Soc. & Health Servs.*, 323 P.3d 1036, 1041 (2014) (en banc). The duty of good faith and fair dealing arises "in connection with terms agreed to by the parties," *id.*, and it requires "that the parties perform in good faith the obligations imposed by their agreement," *United Fin. Cas. Co. v. Coleman*, 295 P.3d 763, 770 (2012). Therefore, a party to a contract may not frustrate the purpose of the contract or the reasonable and justifiable expectations of the other parties. *See Microsoft Corp. v. Motorola, Inc.*, 963 F. Supp. 2d 1176, 1184 (W.D. Wash. 2013) (applying Washington law and collecting Washington cases that stand for the same proposition). Where a contract affords a party discretion over a contract term, that party "has an implied duty of good faith and fair dealing in setting and performing that contractual term." *Rekhter*, 323 P.3d at 1042.[4]

105. As found above, the Agreement constitutes a valid contract between NLV and AVID. AVID breached the provisions of the Agreement discussed above, and also breached the implied covenant of good faith and fair dealing, by failing to ship substantially all of the Goods specified in the Unfilled POs as required by the Agreement. NLV is harmed as a result of AVID's breach of the Agreement. NLV is entitled to damages as described in RCW § 62A.2-713: "Subject to the provisions of this Article with respect to proof of market price (RCW 62A.2-723), the measure of damages for

[4] Many Washington cases apply and discuss the implied covenant of good faith and fair dealing. *See*, *e.g.*, *Coleman*, 295 P.3d at 770 (concluding that attorney breached the duty of good faith and fair dealing inherent in a settlement agreement by not disbursing funds to pay client's hospital bill even though there was no actual lien); *Khalid v. Microsoft Corp.*, 14 Wash. App. 2d 1055 (2020), *review denied*, 487 P.3d 519 (2021) (concluding that the trial court erred in dismissing employee's claim for breach of the duty of good faith and fair dealing inherent in his employment agreement, wherein he assigned all rights to his inventions to defendant unless exempted, where the employee alleged defendant continued to claim rights in certain patents even after the employee produced evidence that he had exempted those inventions); *Skansgaard v. Bank of Am., N.A.*, 896 F. Supp. 2d 944, 948 (W.D. Wash. 2011) ("Plaintiff has sufficiently alleged a claim for breach of the covenant of good faith and fair dealing. Plaintiff alleges Defendants unilaterally decided to require more insurance than was required by the deed of trust.").

nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (RCW 62A.2-715), but less expenses saved in consequence of the seller's breach."

106. I find and conclude that NLV is therefore entitled to recover the damages it incurred in obtaining substitute Goods when AVID refused to ship Goods in breach of the Agreement. These damages consist of $40,674.83 in lending fees on the $7,000,000 needed for the payment required by the Factory in order to obtain substitute Goods, $64,532.00 in legal fees relating to that transaction, and $16,600 in re-branding expenses. In addition, NLV is also awarded the declaratory relief granted below.

107. To prove NLV's Second Claim for Relief, NLV must show that there "exists a contract containing an indemnity provision that binds the defendant to reimburse the plaintiff for the amount claimed." *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc*., 168 Wn. App. 86, 100, 285 P.3d 70, 79 (2012). Indemnity agreements are subject to the fundamental rules of contract interpretation, including the controlling effect of the intent of the parties. *Donner v. Blue*, 187 Wn. App. 51, 59, 347 P.3d 881, 885 (2015); *Newport Yacht,* 168 Wn. App. at 100 ("[T]his intent must be inferred from the contract as a whole; the meaning afforded the provision and the whole contract must be reasonable and consistent with the purpose of the overall undertaking").

108. As found above, the Agreement constitutes a valid contract between NLV and AVID. The Agreement includes an indemnification clause at Section 15.2 which requires AVID to indemnify, hold harmless and defend NLV in connection with any loss, damage or injury relating to "an allegation that the Goods … infringe or otherwise violate the property or intellectual property rights of a third party, including but not limited to … patents …." NLV notified AVID of its duty to indemnify and defend NLV of claims asserted by SMOORE and AIRO. AVID has not responded to NLV's notifications and has not undertaken the required defense and indemnification. AVID therefore breached the Agreement, including but not limited to Section 15.2 and the implied covenant of good faith and fair dealing, by failing to indemnify and defend NLV against the claims by SMOORE and AIRO.

109. NLV has been harmed as a result of AVID's breach of the Agreement. "Indemnity requires full reimbursement and transfers liability from the one who has been compelled to pay damages to another who should bear the entire loss." *Cent. Wash. Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 513, 946 P.2d 760, 762 (1997) (quoting *Stevens v. Security Pac. Mortgage Corp*., 53 Wn. App. 507, 517, 768 P.2d 1007). NLV is therefore entitled to recovery of the expenses it has incurred in connection with the ITC Proceedings involving SMOORE and in responding to AIRO's allegations of infringement. These damages amount to $582,283.76 in legal fees incurred with the Dentons law firm, and $83,000 in public relations fees incurred with the Albright Stonebridge Group in connection with the ITC Proceedings and in responding to AIRO's allegations. In addition, although the Agreement does not contain a prevailing-party fee-shifting provision, Section 15.2 does require indemnification for all damages "or expenses of whatever kind, including attorneys' fees, fees, and the costs of enforcing any right to indemnification under this Agreement. . ." Accordingly, Claimant's recoverable damages attributable to Respondent's breach of the Agreement's indemnification obligation also includes all fees and costs incurred by Claimant in prosecuting the present arbitration, which Claimant was required to do in order to

enforce its right to indemnification under the Agreement. Finally, NLV is also awarded the declaratory relief granted below.

110. NLV is also entitled to declaratory relief in this Arbitration due to the ongoing disputes between NLV and AVID in relation to AVID's (1) failure to ship substantially all of the Goods specified in the Unfilled POs, (2) failure to indemnify and defend NLV against claims by SMOORE and AIRO, and (3) interfering with NLV's exclusivity rights under the Agreement. NLV and AVID have legally protectable interests in the Agreement underlying this dispute, and the interests of NLV and AVID are adverse to each other. In particular, AVID has purported to terminate the Agreement despite its obligations to indemnify and defend NLV. The dispute is ripe and would be resolved by, and NLV is therefore awarded a declaration and decree in this Arbitration as follows:

a. AVID is in breach of the Agreement for (1) failing to ship substantially all of the Goods specified in the Unfilled POs, (2) failing to indemnify and defend NLV against claims by SMOORE and AIRO, and (3) interfering with NLV's exclusivity rights under the Agreement.

b. NLV performed all of its obligations under the Agreement.

c. There is no just or legally enforceable cause that will allow AVID to terminate the Agreement at this time, and the Agreement therefore remains in full force and effect.

d. NLV is entitled to continue to rely on the Agreement and is entitled to receive the full benefit of its bargain under the Agreement.

e. AVID is required, pursuant to Section 15.2 of the Agreement to indemnify, hold harmless and defend NLV against the losses, damages and injuries incurred by NLV arising from the claims asserted by SMOORE and AIRO.

f. NLV is entitled to exercise its rights under Sections 4.2 and 6 of the Agreement, including (i) the right to continue to engage in self-help by obtaining substitute Goods from the Factory (Section 4.2) and (ii) the right to continue with the worldwide exclusive use of all AVID's trademarks licensed to NLV under the Agreement (Section 6).

g. AVID and its affiliates are not entitled to use any of the trademarks licensed to NLV under the Agreement, including those referenced herein, in any promotional, advertising or marketing materials or content of, on or relating to Goods, or other public-facing content anywhere in the world without the prior written consent of NLV.

h. AVID and its affiliates are not entitled to publish statements that interfere with NLV's exclusivity rights under Section 1.1 of the Agreement.

i. AVID and its affiliates are prohibited from interfering with NLV's exclusivity rights under Section 1.1 of the Agreement by engaging with third parties to manufacture, market, promote, distribute or sell the Goods.

The foregoing declaratory relief is presently necessary and appropriate to determine the parties' rights and obligations in this Arbitration.

111. As found above, the Agreement constitutes a valid contract between NLV and AVID. AVID breached the Agreement, including the Exclusive Appointment clause at Section 1.1 of the Agreement and the implied covenant of good faith and fair dealing, by repeatedly interfering with NLV's exclusivity to market, sell and distribute the Goods, including by taking the following actions:

a. AVID posted on Monday.com to NLV's entire team and threatened to remove NLV's exclusivity.

b. AVID informed NLV's team via WeChat that AVID does "have a back-up plan that involves an investor that will create a new entity for distribution and will be much more aligned with AVID moving forward."

c. AVID posted on LinkedIn "[w]e are super excited to formalize our exclusive partnership and Joint Venture with Shenzhen Yuto[.]"

112. Accordingly, AVID has breached the Agreement by interfering with NLV's right to be the exclusive distributor of the Goods and procure substitute Goods with the licensed marks. NLV has been harmed as a result of AVID's breach of the Agreement, in at least a nominal amount, and is therefore entitled to the declaratory relief granted above for this additional reason.

113. This Final Award includes an interest at the rate of 12% per annum on the amount of monetary damages assessed against AVID herein. RCW § 4.56.110 specifies various interest rates depending on the claim for relief. In the case of a claim for breach of contract where the contract does not specify what the post-judgment interest rate will be, the catchall of subsection 6 would apply, which reads: "Except as provided under subsections (1) through (5) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof." Section 19.52.020 in turn provides:

> Except as provided in subsection (4) of this section [dealing with medical debt, not applicable], any rate of interest shall be legal so long as the rate of interest does not exceed the higher of: (a) ***Twelve percent per annum***; or (b) four percentage points above the equivalent coupon issue yield (as published by the Board of Governors of the Federal Reserve System) of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the later of (i) the establishment of the interest rate by written agreement of the parties to the contract, or (ii) any adjustment in the interest rate in the case of a written agreement permitting an adjustment in the interest rate. No person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater interest for the loan or forbearance of any money, goods, or things in action.

RCW § 19.52.020 (emphasis added).

114. The State of Washington publishes the relevant information above at https://leg.wa.gov/codereviser/documents/rates.htm, which as of the date of this award shows that the 12% rate is higher than the "four percentage points" of subsection (b). Accordingly, this Final Award includes interest at the rate of 12% per annum until paid in full.

IV. RELIEF AWARDED.

115. WHEREFORE, based on the foregoing findings of fact and conclusions of law, I hereby award Claimant **NEXT LEVEL VENTURES, LLC,** the following specific relief against Respondent **AVID HOLDINGS, LTD.**:

A. Claimant **NEXT LEVEL VENTURES, LLC**, is hereby awarded money damages in the amount of **$892,020.25** USD against Respondent **AVID HOLDINGS, LTD.**, consisting of the following:

a. $40,674.83 in financing costs associated with making the $7,000,000 payment to the Factory to obtain substitute Goods;

b. $64,532.00 in legal fees incurred to negotiate and prepare documents associated with making the $7,000,000 payment to the Factory to obtain substitute Goods, and to obtain legal advice to enable NLV to continue to operate its business pursuant to its rights of "self-help" under Section 4.2 of the Agreement;

c. $16,600.00 in re-branding fees incurred in connection with the mitigation of harms NLV has suffered as the result of AVID's breaches of the Agreement;

d. $582,283.76 in legal fees incurred with the Dentons law firm in connection with NLV's involvement in the ITC proceedings;

e. $83,000.00 in fees incurred with the Albright Stonebridge Group to mitigate the harm NLV has suffered in connection with its involvement in the ITC proceedings;

f. $95,020.94 in legal fees NLV incurred with the Dentons law firm to date in connection with NLV's involvement in this Arbitration;

g. $4,865.00 in legal fees NLV incurred with the Davis Wright & Tremaine law firm in connection with NLV's involvement in this Arbitration;

h. $43.72 in costs NLV incurred in this Arbitration, exclusive of fees paid to the American Arbitration Association (addressed separately below), and

i. $5,000 for its attorneys' fees incurred in connection with the Arbitration Hearing conducted on April 1, 2022.

j. This award of damages is intended to compensate Claimant for damages suffered prior to and proven at the Arbitration Hearing held on April 1, 2022, by reason of Respondent AVID's breaches of the Agreement found above. This award is made without prejudice to Claimant's entitlement to seek other damages that may accrue after April 1, 2022, if Respondent continues to commit breaches of the Agreement.

B. Within thirty (30) days from the date of transmittal of this Final Award to the parties Respondent **AVID HOLDINGS, LTD,** referred to herein as "AVID," shall pay to Claimant **NEXT LEVEL VENTURES, LLC**, referred to herein as "NLV," the sum of USD $892,020.25 awarded above in Paragraph 115.A.

C. Claimant **NEXT LEVEL VENTURES, LLC**, is also awarded interest on the monetary award made herein at the rate of 12% per annum until paid in full.

D. Claimant **NEXT LEVEL VENTURES, LLC**, is also awarded the following declaratory relief:

a. AVID is in breach of the Agreement for (1) failing to ship substantially all of the Goods specified in the Unfilled POs, (2) failing to indemnify and defend NLV against claims by SMOORE and AIRO, and (3) interfering with NLV's exclusivity rights under the Agreement;

b. NLV performed all of its obligations under the Agreement;

c. There is no "cause" that would allow AVID to terminate the Agreement at this time, and the Agreement remains in full force and effect;

d. NLV is entitled to continue to rely on the Agreement and is entitled to receive the full benefit of its bargain under the Agreement;

e. AVID is required, pursuant to Section 15.2 of the Agreement to indemnify, hold harmless and defend NLV against the losses, damages and injuries incurred by NLV arising from the claims asserted by SMOORE and AIRO;

f. NLV is entitled to exercise its rights under Sections 4.2 and 6 of the Agreement, including (i) the right to continue to engage in self-help by obtaining substitute Goods from the Factory (Section 4.2) and (ii) the right to continue with the worldwide exclusive use of all AVID's trademarks licensed to NLV under the Agreement (Section 6);

g. AVID and its affiliates are not entitled to use any of the trademarks licensed to NLV under the Agreement, including those referenced herein, in any promotional, advertising or marketing materials or content of, on or relating to Goods, or other public-facing content anywhere in the world without the prior written consent of NLV;

h. AVID and its affiliates are not entitled to publish statements that interfere with NLV's exclusivity rights under Section 1.1 of the Agreement; and

i. AVID and its affiliates are prohibited from interfering with NLV's exclusivity rights under Section 1.1 of the Agreement by engaging

with third parties to manufacture, market, promote, distribute or sell the Goods.

E. Exercising my authority under Sections R-47(c) of the Rules, the administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totaling US$19,350.00 shall be borne by Respondent **AVID HOLDINGS, LTD.** The compensation and expenses of the arbitrator totaling US$20,625.00 also shall be borne by Respondent **AVID HOLDINGS, LTD**. Therefore, Respondent shall also reimburse Claimant **NEXT LEVEL VENTURES, LLC** the sum of US$39,975.00, representing that portion of said fees and expenses previously incurred by Claimant **NEXT LEVEL VENTURES, LLC.**

F. This award is in full settlement of all claims and requests for relief submitted to this Arbitration.

I hereby certify that, for the purposes of Article I of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award was made in Seattle, King County, Washington, USA.

April 22, 2022 — Thomas J. Brewer

Date April 22, 2022

Thomas J. Brewer
Arbitrator

State of WASHINGTON)
) SS:
County of KING)

I, THOMAS J. BREWER, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Final Award.

State of WASHINGTON)
) SS:
County of KING)

On this 22nd day of April, 2022 before me personally came and appeared Thomas Brewer, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Kimberly E. Welsh

Notary Public

KIMBERLY E WELSH 42751 NOTARY PUBLIC COMM. EXPIRES 10-10-22 STATE OF WASHINGTON