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9

10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF ALAMEDA, UNLIMITED JURISDICTION
12

13 PEOPLE OF THE STATE OF CALIFORNIA, ex rel.
BILL LOCKYER, Attorney General,

14 Plaintiffs,

15 v.

16 BURLINGTON COAT FACTORY WAREHOUSE
CORPORATION, et al.

17 Defendants.
18

19 AND RELATED CONSOLIDATED CASES
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ENDORSED
FILED
ALAMEDA COUNTY

JAN 27 2006

CLERK OF THE SUPERIOR COURT
BY YASMIN SINGH, Deputy

Case No.: RG 04-162075

(Consolidated with Case Nos.
RG 04-162037, RG 04-169511)

**NOTICE OF MOTION
AND JOINT MOTION FOR
APPROVAL OF CONSENT
JUDGMENT AND ORDER FOR
ENTRY OF CONSENT
JUDGMENT**

Date: February 21, 2006
Time: 3:00 p.m.
Place: Department 21
Judge: Hon. James Richman
Reservation Number: 558614

(Filed concurrently with Declarations
of Weil, Somers, Naficy and
Stipulation for Entry of Judgment:
Order)

1 TO ALL PARTIES IN THIS LITIGATION AND THEIR COUNSEL OF RECORD,
2 PLEASE TAKE NOTICE, that on February 21, 2006, at 3:00 p.m., or as soon thereafter as the
3 matter may be heard, in Department 21 of the Alameda Superior Court, located at The Rene C.
4 Davidson Alameda County Courthouse, 1221 Oak Street, Oakland, California, Plaintiffs People
5 of the State of California, the Center For Environmental Health and As You Sow in the
6 consolidated Case Nos. RG 04-162075, RG 04-162037, and RG 04-169511 and each of the
7 Settling Defendants identified in the Consent Judgment filed herewith, hereby move this Court
8 for its approval of the Consent Judgment and the settlement of this case that it reflects, and also
9 move the Court for an Order directing the clerk of the Court to enter judgment in accordance
10 with that Consent Judgment.

11 The Settling Defendants join in the motion seeking this Court's approval of the Consent
12 Judgment, and in sections I, II and IV of the Memorandum of Points and Authorities in Support
13 thereof, but take no position with respect to the "discussion" in section III of the Memorandum.

14 This Motion is based upon this Notice, the attached Memorandum of Points and
15 Authorities in support of this Motion, the Declarations of Edward G. Weil, Eric S. Somers, and
16 Babak Naficy, the Stipulation for Entry of Judgment: Order (Proposed), and the proposed
17 Consent Judgment attached thereto, all filed concurrently with this Motion.

18 Respectfully submitted,

19 DATED: January 26, 2006

20 BILL LOCKYER, Attorney General
of the State of California
21 TOM GREENE
Chief Assistant Attorney General
22 THEODORA BERGER
Assistant Attorney General
23 EDWARD G. WEIL
Supervising Deputy Attorney General
24

25 
26 By: EDWARD G. WEIL
27 Supervising Deputy Attorney General

28 Attorneys for Plaintiffs People of the State of California
and Plaintiffs' Liaison Counsel

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs, the People of the State of California, by and through Bill Lockyer, Attorney
4 General ("People"), Center for Environmental Health ("CEH"), and As You Sow ("AYS"), and
5 each of the defendants identified in the Consent Judgment submitted herewith as "Initial Settling
6 Defendants" jointly move this Court for judicial approval of such Consent Judgment. Approval
7 of the Consent Judgment will resolve all claims as to the Initial Settling Defendants.

8 The Consent Judgment, which is attached to the Stipulation For Entry of Judgment:
9 Order, is the product of careful consideration of complex legal, scientific, technical, and policy
10 issues, and follows more than a year of mediation. It enforces the law, benefits the public, and
11 saves the burden and risk of further litigation. Resolution of the People's claims in Case No. RG
12 04-162075 pursuant to the terms of the Consent Judgment is within the discretion of the Attorney
13 General and should be afforded substantial deference by this Court. Resolution of CEH's and
14 AYS' claims in Case Nos. RG 04-162037 and RG 04-169511 pursuant to the terms of the
15 Consent Judgment fully justifies the findings this Court must make in an action brought by a
16 person in the public interest pursuant to Health & Safety Code section 25249.7, subdivision
17 (f)(4). The Plaintiffs therefore respectfully request that the Court approve and enter the Consent
18 Judgment with the Initial Settling Defendants and additional Add-On Defendants to be identified
19 (collectively "Settling Defendants").^{1/}

20 **II. BACKGROUND**

21 **A. Statutory Background.**

22 On June 23, 2004, the People and CEH filed complaints for civil penalties and injunctive
23 relief under the Safe Drinking Water and Toxic Enforcement Act of 1986, popularly known as
24 Proposition 65 (Health and Saf. Code, §§ 25249.5 *et seq.*),^{2/} and the Unfair Competition Law

25
26 1. The Parties are submitting a Stipulation For Entry of Judgment: Order (Proposed)
27 concurrent with this motion that sets forth a procedure for new entities to join in the Consent
28 Judgment during a 30-day opt-in period.

2. Citations to statutory sections are to the Health and Safety Code unless otherwise
noted.

1 (Bus. and Prof. Code, §§ 17200 *et seq.*). On August 10, 2004, AYS filed a similar complaint.
2 The complaints allege that the defendants violated Proposition 65 and the Unfair Competition
3 Law by selling jewelry that contains lead, a chemical known to the State of California to cause
4 cancer and birth defects or other reproductive harm, without providing clear and reasonable
5 warnings that use of the jewelry would result in exposure to lead.

6 Proposition 65 requires that any business that exposes individuals to chemicals known to
7 the State of California to cause cancer or reproductive harm must provide those individuals with
8 a clear and reasonable warning. (§ 25249.6.) The statute authorizes the Attorney General to
9 bring actions enforcing the law in the name of the People of the State of California. (§ 25249.7,
10 subd. (c).) Private individuals may also sue to enforce Proposition 65 if they give the requisite
11 60-day notice of intent to sue to the public prosecutors and to the potential defendants. (§
12 25249.7, subd. (d).) The statute provides that no warning need be given if the exposure poses no
13 significant risk of cancer or reproductive harm. Unlike most environmental statutes, once the
14 plaintiff has proven exposure, the burden to prove that the exposure does not pose a significant
15 risk rests on the defendant. (§ 25249.10, subd. (c).)

16 Section 25249.7 of Proposition 65 was amended, effective January 2, 2002, to require
17 that private plaintiffs submit settlements to the court for approval on a noticed motion, and that
18 the Court find that the warning complies with the law, that the award of attorneys fees is
19 reasonable under California law, and that any penalty amount is reasonable based on criteria set
20 forth in the statute. (§ 25249, subd. (f)(4).) The private plaintiff has the burden of producing
21 evidence sufficient to sustain the findings. The amendment to Proposition 65 and the new
22 requirements imposed do not apply to settlements negotiated and entered into by the Attorney
23 General or any other public prosecutor.

24 **B. Parties.**

25 **1. Initial Settling Defendants.**

26 The Initial Settling Defendants are comprised of Initial Settling Vendors and Initial
27 Settling Retailers. These terms are defined in Section 2.9 of the Consent Judgment. Exhibit A
28 identifies the entities that are in each category. The Initial Settling Defendants are further

1 divided according to which plaintiffs sued them, the People, CEH, and AYS, and each of these
2 parties are identified in Sections 1.2, 1.3 and 1.5 of the Consent Judgment.

3 **2. Add-On Defendants.**

4 The Consent Judgment will require Settling Defendants to comply with comprehensive
5 materials standards for jewelry that, potentially, will set an industry-wide standard. Therefore,
6 the Consent Judgment contains provisions that allow companies subject to Proposition 65 to join
7 and become subject to the Consent Judgment during a 30-day opt-in period, provided they are
8 not subject to 60-Day Notice for any Covered Product issued prior to January 13, 2006. After
9 the conclusion of the opt-in period, liaison counsel for Plaintiffs and liaison counsel for
10 Defendants will file with the Court an amended Consent Judgment that lists the Add-On
11 Defendants and allocates their payments according to a formula that is presently in the Consent
12 Judgment. Section 6.2 of the Consent Judgment, and the stipulation filed herewith, provide that
13 if no party objects within 15 days of service of the amendment, the Court will enter the Amended
14 Consent Judgment and the Consent Judgment will be deemed so amended. The Plaintiffs may
15 settle with companies that are not part of the opt-in process on any terms.

16 **C. Procedural Background.**

17 On September 24, 2004, the three cases were designated as complex pursuant to Rules
18 1800 *et seq.* of the California Rules of Court. On November 8, 2004, the Court ordered the cases
19 consolidated for pretrial purposes pursuant to a stipulation by the parties.

20 In November 2004 and thereafter, most of the defendants filed demurrers to the
21 complaints. The hearings have been continued, and, therefore, no oppositions have yet been
22 filed.

23 On January 11, 2005, the Court entered Case Management Order No. 2, which stayed
24 litigation pursuant to a Mediation Agreement that was attached to the order. The mediation had
25 commenced on December 23, 2004, and has continued since that time through completion of the
26 Consent Judgment.

27 On November 29, 2005, the Court entered an order to lift the *de facto* stay of litigation
28 and set a case management conference for January 31, 2006, which was subsequently continued

1 to February 21, 2006. The Court ordered all parties who have not settled their claims by
2 February 21, 2006 to appear at the case management conference.

3 **D. The Consent Judgment.**

4 The Consent Judgment requires reformulation of jewelry covered in the agreement to use
5 lead-free and low-lead materials. There is no requirement to warn, because jewelry that meets
6 the standards in the Consent Judgment will not require a warning under Proposition 65. The
7 Consent Judgment also covers the use of chromium and nickel in jewelry, although there is no
8 reformulation for these materials because their routine use in jewelry does not create exposures
9 that require Proposition 65 warnings. The principal features of the settlement are described
10 below.

11 **1. Covered Products.** The Consent Judgment defines Covered Products as “the
12 following ornaments worn by a person: an anklet, arm cuff, bracelet, brooch, chain, crown, cuff
13 link, decorated hair accessories, earring, necklace, pin, ring, and Body Piercing Jewelry,” and any
14 “bead, chain, link, pendant, or other component of such an ornament.” It defines Children’s
15 Jewelry – for which there is a more restrictive lead standard – as Covered Products that are
16 “made for, marketed for use by, or marketed to, Children” aged six and under.

17 **2. Injunctive Relief.** Settling Defendants must stop selling jewelry in California that
18 does not meet detailed, materials-based, lead specifications. There are tighter standards for
19 children’s jewelry. The standards are set forth in Section 3 and Exhibit B of the Consent
20 Judgment.

21 Within 90 days of entry of the Consent Judgment, each Settling Defendant is required to
22 provide the reformulation requirements to each of their suppliers of jewelry, and to request that
23 each such supplier use best efforts to provide them with compliant jewelry as soon as
24 commercially practicable. The next phase of implementation of the standards occurs on February
25 1, 2007, for Children’s Jewelry, and August 1, 2007, for all other jewelry, when settling vendors
26 must stop shipping non-compliant jewelry for retail sale in California. After September 1, 2007,
27 for Children’s Jewelry, and March 1, 2008, for all other jewelry, no Settling Defendant may offer
28 for sale in California jewelry that does not comply with the standards. Finally, in 2009, a more

1 restrictive lead standard for plated metal and for PVC plastics takes effect.

2 **3. Enforcement.** The Consent Judgment contains the exclusive means to enforce the
3 materials standards through a notice-and-cure procedure. Stipulated penalties for materials
4 violations that a Settling Defendant concedes range from zero to \$7,500, with a maximum
5 stipulated penalty of \$15,000 in any thirty-day period, depending on how long it takes the
6 Settling Defendant to elect to cure the violation. The Court will determine penalties in contested
7 matters. The Court will retain jurisdiction to resolve contested materials violations (in
8 accordance with the procedures in Section 4.2), and all other enforcement actions that arise
9 under the Consent Judgment.

10 **4. Monetary Relief.**

11 **a. Initial Settling Defendants.**

12 Within 15 days after entry of the Consent Judgment, 71 Initial Settling Defendants will
13 each pay \$25,000. In addition, the 10 Initial Settling Defendants which became parties to the
14 Consent Judgment through their affiliation with other Initial Settling Defendants will pay
15 \$10,000 each. The aggregate payment from the Initial Settling Defendants is \$1,875,000. It will
16 be allocated as follows.

17 **i. Civil Penalty.**

18 There will be a payment of \$100,000 as a civil penalty pursuant to Section 25249.7,
19 subdivision (b). The civil penalty will be distributed entirely from settlement proceeds paid for
20 by the Initial Settling Vendors. None of the payments by the Initial Settling Retailers will be
21 allocated toward the civil penalty.

22 **ii. Payments-in-Lieu of Penalties.**

23 There will be a payment of \$250,000 to establish the Proposition 65 Jewelry Testing
24 Fund. This fund will be used by the Plaintiffs exclusively for obtaining and testing Covered
25 Products, and for the purpose of preparing and compiling notices of violation. CEH will report
26 on its use of the funds annually to the Attorney General, and such reports will be available to the
27 public upon request. (Declaration of Eric S. Somers ("Somers Decl.") ¶7. The Attorney General
28 will disclose its use of the funds to the public upon request. (Declaration of Edward G. Weil

1 (“Weil Decl.”) ¶ 2.)

2 There also will be a payment of \$170,000 to CEH and \$55,000 to AYS to be used to
3 continue each group’s work educating and protecting people from exposures to toxic chemicals,
4 including heavy metals. The Consent Judgment requires the groups to submit proposals to the
5 Attorney General for use of the funds, approval of which shall not be unreasonably withheld.
6 The accompanying declarations of Eric S. Somers and Babak Naficy provide additional
7 information about how the groups will use these funds. (Somers Decl. ¶8, Naficy Decl. ¶19.)

8 **iii. Attorneys Fees and Costs.**

9 There will be a payment of \$383,993 to partially reimburse the Attorney General for
10 reasonable attorneys’ fees and costs; \$811,870 to partially reimburse CEH for reasonable
11 attorneys’ fees and costs; and \$82,284 to partially reimburse AYS for reasonable attorneys’ fees
12 and costs.

13 **b. Add-On Defendants.**

14 Each Add-On Defendant that elects to join the Consent Judgment during the 30-day Add-
15 On period will pay \$40,000. Of that amount, \$5,000 is a civil penalty. The remaining \$35,000
16 will be divided evenly by the Plaintiffs and the Initial Settling Defendants, however the Initial
17 Settling Defendants’ total recovery from the funds is capped at \$1,065,729, after which the
18 Plaintiffs will receive the entire \$35,000.

19 The higher Add-On amount and the payment to Initial Settling Defendants are justified
20 because the Initial Settling Defendants – many of whom initially were not sued and approached
21 the Attorney General voluntarily to participate in the mediation – incurred substantial costs
22 mediating an agreement that will benefit the entire industry. At the cap, Initial Settling
23 Defendants will recover less than 25% of their costs, including attorneys’ fees. (Weil Decl. ¶3)

24 The Initial Settling Defendants will distribute their share of Add-On payments as follows:

- 25 • Distribution of funds shall be apportioned 46.28% to Initial Settling Vendors and
26 53.72% to the Initial Retailer Settling Defendants, up to the cap of \$1,065,729.
- 27 • The Settlement Related Costs that qualify for reimbursement are:
 - 28 • No more than \$93,492 for sums paid to the mediator who presided over

1 negotiations leading to this Consent Judgment;

2 • No more than \$479,737 for sums paid for experts in toxicology, metallurgy and
3 testing necessary for the development of compliance standards;

4 • No more than \$492,500 for sums paid for legal counsel who participated in the
5 mediation leading to this Consent Judgment.

6 • These sums are also subject to the following limitations:

7 • \$7,500 to each Initial Settling Vendor

8 • \$10,000 to each Initial Retailer Settling Defendant whose counsel participated
9 in the Retailers' Mediation Committee, as identified on Exhibit A of the Consent Judgment.

10 • \$2,500 to each other Initial Retailer Settling Defendant.

11 The Plaintiffs will distribute their share of the \$17,500 remaining from each Add-On
12 payments as follows:

13 • \$1,500 from each Add-On payment will go to augment the Proposition 65 Jewelry
14 Testing Fund discussed above.

15 • \$8,000 will go to attorneys fees, up to a cap of \$248,603, which will be reached after
16 31.1 Add-On Payments. Of the \$8,000 from each Add-On Defendant, \$4,350 will go to pay
17 attorneys fees and costs incurred by the Attorney General, \$3,243 will go to pay attorneys fees
18 and costs incurred by the CEH, and \$407 will go to pay attorneys fees and costs incurred by
19 AYS. After the cap of \$250,000 is reached, all remaining payments will go to cy pres in the
20 percentages outlined below.

21 • \$8,000 will go to cy pres, of which, \$5,600 will go to CEH (70%), \$1,600 will go to the
22 Attorney General Proposition 65 Fund (20%), and \$800 will go to AYS (10%). After the
23 reimbursement of attorneys fees reach the cap (after 31 Add-On Payments), \$16,000 will go to cy
24 pres in the percentages identified above.

25 **5. Claims Covered.**

26 The Consent Judgment is a full, final, and binding resolution between the People, CEH,
27 AYS, and the Initial Settling Defendants, their parents, shareholders, divisions, subdivisions,
28 subsidiaries, partners, sister companies and their successors and assigns ("Defendant Releasees"),

1 and all entities to whom they distribute or sell Covered Products, including but not limited to
2 distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees
3 (“Downstream Defendant Releasees”), of any violation of Proposition 65, Business &
4 Professions Code sections 17200 *et seq.*, or any other statutory or common law claims that have
5 been or could have been asserted in the public interest or on behalf of the general public against
6 Settling Defendants, Defendant Releasees, and Downstream Defendant Releasees, regarding the
7 failure to warn about exposure to chromium, lead, and nickel arising in connection with Covered
8 Products, or any claim based on the facts or conduct alleged in the Complaints. Compliance with
9 the terms of the Consent Judgment by Settling Defendants and Defendant Releasees also resolves
10 any issue arising in the future concerning compliance by Settling Defendants, Defendant
11 Releasees and Downstream Defendant Releasees. The full terms of the release are set forth in
12 Sections 7.1 and 7.2.

13 III. DISCUSSION

14 The Consent Judgment resolves three actions, one brought by the Attorney General and
15 two by private Plaintiffs CEH and AYS. The Court should approve the Consent Judgment with
16 respect to the Attorney General’s action because it is within the discretion of the Attorney
17 General and should be afforded substantial deference by this Court. The Court should approve
18 the Consent Judgment with respect to the actions brought by CEH and AYS because (i) any
19 warning required by the settlement complies with Proposition 65, (ii) the award of attorneys’ fees
20 is reasonable under California law, and (iii) the penalty amount is reasonable based on the criteria
21 set forth in the statute. (§ 25249.7, subd. (f)(4).)

22 **A. The Court Should Approve the Consent Judgment in the Action by the Attorney**
23 **General Because the Terms of the Consent Judgment Are Within the Attorney**
24 **General’s Prosecutorial Discretion, it Obtains a Beneficial Resolution of Disputed**
Issues, and it Avoids Prolonged Litigation.

25 In determining whether a particular settlement is appropriate, the Court should afford
26 substantial deference to the judgment of the Attorney General. The Attorney General is
27 constitutionally designated as the “chief law officer of the state” and has the constitutional duty
28 to ensure that state law is adequately enforced. (*See* Cal.Const. Art. V, § 13; *Camp v. Board of*
Supervisors (1981) 123 Cal.App.3d 334, 353.) Under both Proposition 65 and the Unfair

1 Competition Act, the Attorney General sues “in the name of the People of the State of
2 California,” which signifies that the action is an exercise of the sovereign power. (*See* Gov.
3 Code, § 100.) The discretionary power of a prosecutor to investigate, prosecute charges, and
4 negotiate settlements that traditionally applied in criminal proceedings has been specifically held
5 to apply to civil law enforcement actions filed by the Attorney General under the Unfair
6 Competition Law. (*People v. Cimarusti* (1978) 81 Cal.App.3d 314, 322-24.) As that court
7 stated, it is “the function of the executive to engage in any negotiation with the defense by which
8 a lenient disposition of the charge made is secured without trial.” (*Id.*, p. 323.) Accordingly, the
9 determination of the Attorney General to settle on the terms set forth in the Consent Judgment
10 should be accorded substantial deference by the Court.

11 The Consent Judgment obtains a beneficial resolution of disputed issues and avoids
12 prolonged litigation, which is consistent with the public policy that favors settlement. (*Nearby v.*
13 *Regents of University of California* (1992) 3 Cal.4th 273, 280.) Litigating the case would be
14 time consuming, complex, and may involve a significant delay in obtaining any resolution.
15 During the course of this action, the Initial Settling Defendants have argued that the exposure to
16 listed chemicals from Covered Products falls below the Maximum Allowable Dose Level
17 (“MADL”), and therefore is therefore exempt from the warning requirement. (§ 25249.10, subd.
18 (c).) At trial, they would be entitled to attempt to prove that the exposure is below the MADL.
19 There would be significant debate concerning what constitutes “jewelry,” the amount of lead in
20 jewelry, how much of the lead becomes dislodged from the jewelry during ordinary use, how
21 much of the lead is ingested and absorbed, and how much of that lead an average user of jewelry
22 would be exposed to. Additionally, discovery in the case would be massive, given the number of
23 defendants and amount of products at issue. The Consent Judgment resolves the case without
24 unnecessary time and expense, and benefits consumers by requiring the Settling Defendants to
25 reformulate jewelry to substantially reduce exposures to lead.

26 Additionally, the Consent Judgment is fair to all parties and to entities that manufacture,
27 distribute, or sell jewelry for retail sale in California that presently are not parties, because it
28 contains a mechanism to opt in. The Consent Judgment permits the Settling Defendants to

1 implement substantial reformulation requirements while continuing to sell jewelry during the
2 transition period. Further, notwithstanding the implementation dates in 2007 and 2008 for the
3 reformulation requirements, Settling Defendants must provide the requirements to their suppliers
4 within 90 days of entry of the Consent Judgment, and ask their suppliers to use best efforts to
5 provide compliant product as soon as commercially practicable. (Section 3.1 of the Consent
6 Judgment)

7 In sum, the Consent Judgment enforces the law, benefits the public, and saves all
8 concerned the burden of further litigation. The Consent Judgment should be approved by the
9 Court because it is within the discretion of the Attorney General, is not contrary to public policy
10 or law, and should be afforded substantial deference by this Court.

11 **B. The Court Should Approve The Consent Judgment in the Actions by the Private**
12 **Plaintiffs Because the Reformulation Requirements Obviate Any Need for a**
13 **Warning, the Attorneys' Fees are Reasonable Under California Law, and the**
14 **Penalty Amount is Reasonable Based Upon the Criteria in Proposition 65.**

15 Proposition 65 requires the Court to make the following three findings before it can
16 approve a settlement and enter judgment thereon in a citizen enforcement action:

- 17 1. any warning required by the settlement complies with Proposition 65;
- 18 2. any attorneys fees award is reasonable under California law; and
- 19 3. any penalty amount is reasonable based on the criteria listed in Section 25249.7(b)(2).
20 (§25249.7, subd. (f)(4)). As set forth below, the terms and conditions of the Consent Judgment
21 submitted herewith satisfy these requirements.

22 **1. "Any Warning Required by the settlement" Complies with Proposition 65.**

23 This provision requires the Court to determine only whether any warnings required by the
24 settlement comply with Proposition 65. The provision is intended to assure that private plaintiffs
25 do not enter into settlements in which the warning provided does not meet the necessary
26 standards for providing a "clear and reasonable warning" under the law. In this instance, the
27 settlement does not require any warnings, because compliance will be achieved through
28 reformulation of the products in order to avoid the duty to warn. Thus, there is no "warning
required by the settlement" for the Court to review.

The Consent Judgment, however, creates a greater public benefit than would be created

1 by a warning, because it requires Settling Defendants to reformulate the Covered Products to
2 ensure that any exposure to lead from the Covered Products will occur at levels below those
3 requiring a warning under Proposition 65. The Consent Judgment also creates and funds a
4 Jewelry Testing Fund that Plaintiffs will use to conduct testing to confirm that the level of lead in
5 the Covered Products meets the standards in the Consent Judgment. The Consent Judgment
6 contains procedures to notify Settling Defendants of any violation, for Settling Defendants to
7 take corrective action by removing the item from sale in California, and (in some cases) paying a
8 stipulated penalty or to contest the alleged violation.

9 **2. The Attorneys' Fees Award In The Consent Judgment Is Reasonable Under**
10 **California Law.**

11 The \$740,000 fee reimbursement to CEH and \$75,000 to AYS required under the
12 Consent Judgment are reasonable under California law. Under California Code of Civil
13 Procedure Section 1021.5, attorneys' fee awards in public interest litigation are determined by a
14 "lodestar" figure, based on a "careful compilation of the time spent and reasonable hourly
15 compensation for each attorney involved in the presentation of the case." (*Citizens Against Rent*
16 *Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 232.)

17 CEH has spent over two and one-half years working on this case, with the last 14
18 months being primarily spent in a marathon mediation session that culminated in this Consent
19 Judgment. Specific tasks include:

- 20 • supervising the investigation regarding the locations where the Covered
21 Products were sold and whether such Covered Products were sold with Proposition 65
22 warnings;
- 23 • researching the corporate identity and structure of each defendant;
- 24 • supervising the initial swab testing of the Covered Products;
- 25 • preparing the Covered Products that swabbed positive for Lead for further
26 testing by an independent certified laboratory;
- 27 • reviewing the test results from the independent laboratory and consulting with
28 an expert to discuss the exposure risk to consumers from use of the Covered Products;
- drafting the Notices of Violation and related Certificates of Merit;
- drafting the Complaint;
- drafting, reviewing and revising Status Conference Statements and Case
Management Orders;

- 1 • conducting research regarding lead in jewelry and the use of alternative
- 2 materials and processes in jewelry manufacture;
- 3 • conducting research into quality control in foreign countries and monitoring
- 4 reformulation efforts in such countries
- 5 • preparing evidentiary support for the AG;
- 6 • reviewing and preparing to oppose various demurrers;
- 7 • drafting and revising opposition to the motion to consolidate;
- 8 • drafting, revising and negotiating the Mediation Agreement;
- 9 • working with various experts in preparation for the various mediation sessions;
- 10 • developing and implementing mediation strategy;
- 11 • preparing and filing multiple FOIA requests to federal agencies regarding lead in
- 12 jewelry;
- 13 • researching and working with experts regarding various governmental standards
- 14 for lead in jewelry;
- 15 • participating in multiple confidential mediation sessions and related telephone
- 16 conferences that culminated in the Consent Judgement; and
- 17 • reviewing and revising this Motion for Settlement Approval.

18 The time spent by CEH's attorneys is in excess of the time necessary to justify the entire
19 potential recovery of CEH attorneys fees and costs allowed under the Consent Judgment. The
20 Consent Judgment provides for a payment of \$811,871 to CEH from the Initial Settling
21 Defendants, which includes reimbursement of approximately \$20,000 in costs. This number may
22 increase to a maximum of \$911,750 through participation of the Add-On Defendants. Even
23 assuming full Add-On Defendant participation, the award of attorneys fees and costs to CEH is
24 less than the loadstar fee and actual costs incurred by CEH in prosecuting this action. Somers
25 Decl. ¶9.

26 AYS spent a significant amount of time and money investigating the case and preparing
27 and filing its initial notices. Since the mediation started, AYS has conserved resources and
28 monitored the mediation and settlement process. AYS attorneys have participated in various
mediation sessions, reviewed drafts of the Consent Judgment and keeping AYS apprised of

1 developments in the case. Naficy Decl. ¶8-17. The \$95,000 in total potential attorneys fees and
2 costs payable to AYS, assuming full Add-On Defendant participation, would fully reimburse
3 AYS for the time and costs incurred in prosecuting this matter. *Id.* ¶17.

4 **3. The Payment In Lieu of Penalty in the Consent Judgment Is Reasonable.**

5 The Court must find that “any” civil penalty amount in a private Proposition 65
6 settlement is reasonable. (§ 25249.7, subd. (f)(4)(C).) The Consent Judgment requires the
7 Settling Defendants to pay a civil penalty, as well as a penalty in lieu of civil penalties. A
8 payment in lieu of penalties is specifically authorized in the Proposition 65 Settlement
9 Guidelines adopted by the Attorney General where, as here, the funds are received by an
10 accountable non-profit organization and the funded activities have a nexus to the basis for the
11 litigation. (*See* 11 Cal. Code of Regs. §3203, subd. (b))

12 Here part of the cy pres funds will be used to form the Proposition 65 Jewelry Testing
13 Fund, which will purchase and test jewelry from Settling Defendants to monitor compliance with
14 the reformulation requirements of the Consent Judgment. (Somers Decl. ¶7.) Money from the
15 Proposition 65 Jewelry Testing Fund will also be used for the purpose of preparing and
16 compiling notices of violation under the Consent Judgment. Thus these cy pres funds have a
17 direct nexus to the litigation at issue.

18 In addition, both CEH and AYS will use additional cy pres funds (\$170,000 and \$55,000
19 to CEH and AYS, respectively, from the Initial Settling Defendants^{3/}) for restricted projects to
20 educate the public about lead and other heavy metals and to reduce exposures to such toxic
21 substances. (Somers Decl. ¶8, Naficy Decl. ¶19. Both CEH and AYS shall submit proposals to
22 the Attorney General for use of these funds, approval of which by the Attorney General shall not
23 be unreasonably withheld. More information about specific CEH projects for these funds is
24 included in the Somers Decl. Ex. A.

25 The civil penalty and the payments in lieu of penalties required under the Consent
26 Judgment serve the public interest and are reasonable in light of the facts of this case. Under
27

28 **3. Add-On participation will increase the total cy pres numbers. Assuming 31 Add-On Defendants, these numbers will increase to \$343,600 for CEH and \$79,800 for AYS.**

1 Section 25249.7(b)(2), the following factors must be considered in assessing a civil penalty:

- 2 A. the nature and extent of the violation;
- 3 B. the number of, and severity of, the violations;
- 4 C. the economic effect of the penalty on the violator;
- 5 D. whether the violator took good faith measures to comply with the statute
and the time these measures were taken;
- 6 E. the willfulness of the violator's misconduct;
- 7 F. the deterrent effect that the imposition of the penalty would have on both
the violator and the regulated community; and
- 8 G. any other factor that justice may require.

9 Because of the substantial California sales of jewelry made with lead, the fact that some
10 jewelry is designed and marketed exclusively for use by children, and the fact that health hazard
11 warnings have been nearly non-existent on lead containing jewelry, penalty factors (A) (the
12 nature and extent of the violation) and (B) (the number and severity of the violations) mitigate in
13 favor of a large payment. On the other hand, Initial Settling Defendants' willingness to
14 reformulate their Covered Products to substantially reduce the lead content and the fact that most
15 of the jewelry is not manufactured by the Initial Settling Defendants, penalty factors (D) (whether
16 the violator took good faith measures to comply with the statute and the time these measures
17 were taken) and (E) (the willfulness of the violator's misconduct) mitigate in favor of a reduced
18 amount. Thus, in consideration of the factors set forth in Section 25249.7(b)(2), the payment of
19 \$100,000 in civil penalties and the \$225,000 monetary payment in lieu of penalty from the Initial
20 Settling Defendants, and the potential additional penalty and payment in lieu of penalty from the
21 Add-On Defendants as required by the Consent Judgment⁴, are appropriate. (Weil Decl. ¶4.)

22 **IV. CONCLUSION**

23 For the foregoing reasons, the People, CEH, and AYS respectfully request that the Court
24 make the findings required under section 25249.7, subdivision (f)(4), and approve the Consent
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26

27
28 4. While it is impossible to know how many Add-On Defendants will participate, if 31
Add-On Defendants opt-in to the Consent Judgment, the total penalty will be \$255,000 and the
total cy pres payment in lieu of penalty will be \$473,000.

1 Judgment as a final resolution of these consolidated actions against the Initial Settling
2 Defendants and any Add-On Defendants that join during the Add-On period.

3 Respectfully submitted,

4 DATED: January 26, 2006

5 BILL LOCKYER, Attorney General
6 of the State of California
7 TOM GREENE
8 Chief Assistant Attorney General
9 THEODORA BERGER
10 Assistant Attorney General
11 EDWARD G. WEIL
12 Supervising Deputy Attorney General



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16 By: JEFFREY B. MARGULIES
17 Counsel for Defendants AIJJ Enterprises, Inc.; Burlington
18 Coat Factory Warehouse Corporation; Federated
19 Department Stores, Inc.; Bloomingdales; Hot Topic, Inc.;
20 J.C. Penney Corporation, Inc.; Kohl's Department Stores,
21 Inc.; Kohl's Corporation; Macy's West, Inc.; Mervyn's,
22 LLC; Monogram International, Inc.; Nordstrom, Inc.;
23 Rainbow Apparel of America, Inc.; Rainbow Apparel
24 Distribution Center Corp.; Ross Stores, Inc.; dd's
25 DISCOUNTS; Target Corporation; The Associated
26 Merchandising Corporation; The Buckle, Inc.; Federated
27 Retail Holdings, Inc. (sued and served herein as The May
28 Department Stores, Inc.); The New 5-7-9 And Beyond, Inc.;
Toys "R" Us, Inc.; and Walt Disney World Co.; and Disney
Enterprises, Inc.

And

Defendants' Liaison Counsel on behalf of Defendants
American Eagle Outfitters, Inc.; Aeropostale, Inc.; CBI
Distributing Corp.; Charlotte Russe, Inc.; Claire's
Boutiques, Inc.; Cost Plus, Inc.; Express, LLC; The Limited
Stores, Inc.; Victoria's Secret Stores, LLC; Victoria's
Secret Direct, LLC; Forever 21, Inc.; Forever 21 Retail,
Inc.; Gottschalks, Inc.; Group USA Apparel, Inc.; Hub
Distributing, Inc.; Joe Boxer Company, LLC; Kmart

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Corporation; Lane Bryant, Inc.; Catherines, Inc.; Fashion
Bug Retail Companies, Inc.; Lerner New York, Inc.;
Limited Too Store Planning, Inc.; Justice Stores LLC;
Longs Drug Stores California, Inc.; Sears Roebuck and Co.;
Styles For Less, Inc.; Walgreen Co.; The Wet Seal, Inc.;
The Wet Seal Retail, Inc.; Too, Inc.; ~~Walgreen Co.~~
~~Walgreen Co.~~; and Zumiez, Inc.