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10 Attorneys for Plaintiff
11 MATEEL ENVIRONMENTAL JUSTICE
FOUNDATION

13 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

16 MATEEL ENVIRONMENTAL JUSTICE
FOUNDATION,

17 Plaintiff,

18 vs.

19 WEAR ME APPAREL LLC,

20 Defendant.
21

Case No. 476326

[PROPOSED] CONSENT JUDGMENT

22 **1. INTRODUCTION**

23 1.0 The MATEEL ENVIRONMENTAL JUSTICE FOUNDATION ("Plaintiff" or
24 "MEJF") acting on behalf of itself and the general public, filed a Complaint for civil penalties and
25 injunctive relief ("Complaint") in San Francisco Superior Court, Case No. 463859, against
26 defendant, Wear Me Apparel LLC ("Defendant" or "WMA"), simultaneously with the filing of
27 this [Proposed] Consent Judgment. MEJF and WMA are collectively referred to as "the Parties"
28 and individually as a "Party" to this [Proposed] Consent Judgment.

**ENDORSED
FILED**

San Francisco County Superior Court

AUG 26 2008

GORDON PARK-LI, Clerk

BY: ERICKA LARNAUTI
Deputy Clerk

1 1.1 The Complaint alleges that WMA violated provisions of the Safe Drinking Water
2 and Toxic Enforcement Act of 1986, Health and Safety Code sections 25249.5, et seq.
3 (Proposition 65), and Business and Professions Code sections 17200 et seq. (the “Unfair
4 Competition Act”), by, among other things, knowingly and intentionally exposing persons to
5 products containing lead and/or lead compounds, which are chemicals known to the State of
6 California to cause cancer and/or birth defects or other reproductive harm, without first providing
7 a clear and reasonable warning to such individuals. The Complaint was based upon a 60-Day
8 Notice letter, dated December 20, 2007, sent by MEJF to WMA, the California Attorney General,
9 all District Attorneys, and all City Attorneys with populations exceeding 750,000. A copy of the
10 60-Day Notice letter is attached as Exhibit A to the Complaint in this action.

11 1.2 WMA denies the claims and allegations of the Complaint and the 60-Day Notice
12 letter.

13 1.3 WMA is a business that employs more than ten persons and, itself or through its
14 manufacturers, customers, licensees and business partners, manufactures, distributes and/or
15 markets within the State of California children’s clothing products made with polyvinyl chloride,
16 neoprene and/or other plastic materials (“PVC Materials”).

17 1.4 For purposes of this Consent Judgment, the term “Covered Products” shall be
18 defined as children’s clothing products containing PVC Materials that: (i) are distributed, sold or
19 used within the State of California, and (ii) bear the Avirex trademark or other Avirex-related
20 trademarks, and are manufactured, distributed or sold by or on behalf of WMA.

21 1.5 MEJF alleges that PVC Materials in such Covered Products contain lead and lead
22 compounds. Pursuant to Proposition 65, lead and lead compounds are chemicals known to the
23 State of California to cause cancer and reproductive toxicity. Products containing lead and/or
24 lead compounds that are sold or distributed in the State of California may be, under specified
25 circumstances, subject to the Proposition 65 warning requirement set forth in Health and Safety
26 Code section 25249.6. MEJF alleges that Covered Products made with lead-containing PVC
27 Materials that are manufactured, distributed, sold and/or marketed by WMA for use in California,
28 require a warning under Proposition 65.

1 1.6 For purposes of this Consent Judgment only, the Parties stipulate that this Court
2 has subject matter jurisdiction over the allegations of violations contained in the Complaint and
3 personal jurisdiction over WMA as to the acts alleged in the Complaint, that venue is proper in
4 the County of San Francisco and that this Court has jurisdiction to enter this Consent Judgment as
5 a full settlement and resolution of the claims and allegations contained in the Complaint, and of
6 all claims which were or could have been raised by any person or entity based in whole or in part,
7 directly or indirectly, on the facts alleged therein or arising therefrom or related to.

8 1.7 WMA disputes that it has violated Proposition 65 as described in the 60-Day
9 Notice Letter, the Complaint, or otherwise. This Consent Judgment shall not constitute an
10 admission with respect to any claim or material allegation of the Complaint, each and every claim
11 and allegation of which WMA denies, nor may this Consent Judgment or compliance with it be
12 used as evidence of any wrongdoing, misconduct, culpability or liability on the part of WMA.

13 **2. SETTLEMENT PAYMENT**

14 2.0 In settlement of all of the claims that are alleged or could have been alleged in the
15 Complaint, WMA shall pay \$20,000 to the Klamath Environmental Law Center ("KELC") to
16 cover Plaintiff's attorneys' fees. Additionally, WMA shall pay \$15,000 to the Ecological Rights
17 Foundation for use toward reducing exposures to toxic chemicals and other pollutants, and toward
18 increasing consumer, worker and community awareness of health hazards posed by lead and other
19 toxic chemicals. The Parties agree and acknowledge that the charitable contributions made
20 pursuant to this section shall not be construed as a credit against personal claims by absent third
21 parties, if any, for restitution against Defendant. WMA shall not be required to pay a civil
22 penalty pursuant to Health and Safety Code section 25249.7(b).

23 2.1 The above described payments shall be forwarded by Defendant so that they are
24 received at least five (5) days prior to the hearing date scheduled for approval of this Consent
25 Judgment. If the Consent Judgment is not approved within 120 days of the date scheduled for
26 approval, the above-described payments shall be returned and the provisions of this Consent
27 Judgment shall become null and void.

28

1 **3. ENTRY OF CONSENT JUDGMENT**

2 3.0 The Parties hereby request that the Court enter this Consent Judgment forty-five
3 (45) days after the Consent Judgment is served on the Attorney General in accordance with Title
4 11, California Code of Regulations, section 3003(a). Upon the Court's entry of a final judgment,
5 including any third-party appeals to the entry of the judgment, MEJF and WMA waive their
6 respective rights to a hearing or trial on the allegations in the Complaint.

7 **4. MATTERS COVERED BY THIS CONSENT JUDGMENT**

8 4.0 With respect to Covered Products, this Consent Judgment, once entered by the
9 Court, is a final and binding resolution between MEJF, acting on behalf of itself and (as to those
10 matters raised in the Notice Letter) the general public, and WMA of: (i) any violation of
11 Proposition 65 (including but not limited to the claims made in the Complaint); and (ii) any other
12 statutory or common law claim to the fullest extent that any of the foregoing described in (i) or
13 (ii) were or could have been asserted by any person or entity against WMA or its parents,
14 subsidiaries or affiliates, and all of their customers, distributors, wholesalers, retailers, licensors,
15 licensees, including without limitation Flight Club THC, LLC, and Flight Club, LLC (the owner
16 and licensee, respectively, of the Avirex trademark and Avirex-related trademarks) and Mervyn's,
17 or any other person in the course of doing business, and the successors and assigns of any of
18 them, who may use, maintain, manufacture, distribute, advertise, market or sell Covered Products,
19 and the officers, directors, managers, employees, members, shareholders, agents, insurers and
20 representatives of each of them (collectively, the "Released Entities"), based on its or their
21 exposure of persons to Covered Products or their failure to provide a clear and reasonable
22 warning of exposure to such individuals; and (iii) as to alleged exposures to Covered Products,
23 any other claim based in whole or in part on the facts alleged in the Complaint, whether based on
24 actions or omissions by the Released Entities. Notwithstanding any other provision of this
25 Consent Judgment, any and all releases on behalf of the general public are limited to the claims
26 made and the chemicals identified in the 60-Day Notice Letter.

27 4.1 As to alleged exposures to Covered Products and other claims in the Complaint,
28 MEJF, by and on behalf of itself, and its respective agents, successors, attorneys and assigns,

1 waives any and all rights to institute any form of legal action, and releases all claims against
2 WMA and the Released Entities, or any other person in the course of doing business, and the
3 successors and assigns of any of them, who may use, maintain, manufacture, distribute, advertise,
4 market or sell the Covered Products, whether, under Proposition 65, the Unfair Competition Act
5 or any other statute, provision of common law or any theory or issue, arising out of or resulting
6 from, or related directly or indirectly to, in whole or in part, the Covered Products, including but
7 not limited to any exposure to, or failure to warn with respect to, the Covered Products (referred
8 to collectively herein as the "Claims"). As to alleged exposures to Covered Products, compliance
9 with the terms of this Consent Judgment resolves any issue, now and in the future, concerning
10 compliance by WMA and the Released Entities, with the requirements of Proposition 65 with
11 respect to Covered Products, and any alleged resulting exposure.

12 4.2 In furtherance of the foregoing, as to alleged exposures to Covered Products,
13 MEJF hereby waives any and all rights and benefits which it now has, or in the future may have,
14 conferred upon it with respect to the Claims by virtue of the provisions of section 1542 of the
15 California Civil Code, which provides as follows:

16 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
17 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
18 EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE
19 RELEASE, WHICH IF KNOWN BY HIM, MUST HAVE
MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
DEBTOR.

20 MEJF understands and acknowledges that the significance and consequence of this waiver of
21 California Civil Code section 1542 is that even if it suffers future damages arising out of or
22 resulting from, or related directly or indirectly to, in whole or in part, the Covered Products,
23 including but not limited to any exposure to, or failure to warn with respect to exposure to, the
24 Covered Products, MEJF will not be able to make any claim for those damages against WMA or
25 the Released Entities. Furthermore, MEJF acknowledges that it intends these consequences for
26 any such Claims as may exist as of the date of this release but which MEJF does not know exist,
27 and which, if known, would materially affect their decision to enter into this Consent Judgment,
28

1 regardless of whether their lack of knowledge is the result of ignorance, oversight, error,
2 negligence, or any other cause.

3 **5. ENFORCEMENT AND PRECLUSIVE EFFECT OF JUDGMENT**

4 5.0 The terms of this Consent Judgment shall be enforced exclusively by the Parties
5 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of
6 San Francisco County, giving the notice required by law, enforce the terms and conditions
7 contained herein. In any proceeding brought by either party to enforce this Consent Judgment,
8 such Party may seek whatever fines, costs, penalties or remedies as may be provided by law for
9 any violation of Proposition 65 or this Consent Judgment. Additionally, if in such a proceeding
10 the Court finds that WMA failed to comply with the reformulation requirements as specified in
11 Section 7 of this Consent Judgment, and notwithstanding any other provision of this Consent
12 Judgment, then as to such Covered Products, WMA shall not benefit from any release from
13 liability specified in any provision of this Consent Judgment.

14 **6. MODIFICATION OF JUDGMENT**

15 6.0 This Consent Judgment may be modified only upon written agreement of the
16 parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
17 any party as provided by law and upon entry of a modified Consent Judgment by the Court.

18 **7. INJUNCTIVE RELIEF**

19 7.0 On and after September 30, 2008, the PVC Materials in all Covered Products
20 manufactured by WMA, itself or through its manufacturers, licensees and business partners, for
21 distribution or use in California, shall meet the following criteria:

- 22 (a) The PVC Materials shall have no lead as an intentionally added
23 constituent;
- 24 (b) A representative sample of the bulk PVC Materials used to manufacture the
25 Covered Products shall have been tested for lead, and must have shown
26 lead content by weight of less than 0.003% (30 parts per million "30
27 ppm"), using a test method of sufficient sensitivity to establish a limit of
28 quantification (as distinguished from detection) of less than 30 ppm.

1 7.1 WMA and the Released Entities may comply with the above requirements by
2 relying on information obtained from its suppliers of the Covered Products, and the PVC
3 Materials utilized in their manufacture, so long as such reliance is in good faith. Demonstration
4 of good faith reliance may include, but is not limited to e-mails or other written correspondence
5 from suppliers attesting to compliance with the provisions of this Section.

6 7.2 In the event that MEJF settles another actual or potential claim concerning the
7 alleged failure of a business to provide adequate Proposition 65 warnings concerning its
8 manufacture, distribution or sale of clothing in California, and agrees to a standard for
9 reformulation that allows for lead content by weight of greater than 30 ppm in polyvinyl chloride,
10 neoprene and/or other plastic materials used in making such clothing, WMA's compliance with
11 the less stringent standard will be deemed to meet the requirements of Sections 7.0(b) above.
12 MEJF shall notify WMA of any and each such settlement by written notice pursuant to Section 14
13 below, within 10 days of execution of such settlement or consent judgment.

14 **8. AUTHORITY TO STIPULATE**

15 8.0 Each signatory to this Consent Judgment certifies that he or she is fully authorized
16 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
17 the party represented and legally to bind that party.

18 **9. RETENTION OF JURISDICTION**

19 9.0 This Court shall retain jurisdiction of this matter to implement the Consent
20 Judgment.

21 **10. SERVICE ON THE ATTORNEY GENERAL**

22 10.0 MEJF shall serve a copy of this Consent Judgment, signed by both parties, on the
23 California Attorney General on behalf of the parties so that the Attorney General may review this
24 Consent Judgment. MEJF, in compliance with Title 11, California Code of Regulations,
25 section 3003(a), also shall file and serve notice of the motion for approval of this Consent
26 Judgment.

1 **11. ENTIRE AGREEMENT**

2 11.0 This Consent Judgment contains the sole and entire agreement and understanding
3 of the Parties with respect to the entire subject matter hereof and any and all prior discussions,
4 negotiations, commitments and understandings related hereto. No representations, oral or
5 otherwise, express or implied, other than those contained herein have been made by either Party
6 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
7 deemed to exist or to bind any of the Parties.

8 **12. GOVERNING LAW**

9 12.0 The validity, construction and performance of this Consent Judgment shall be
10 governed by the laws of the State of California, without reference to any conflicts of law
11 provisions of California law.

12 **13. COURT APPROVAL**

13 13.0 If this Consent Judgment, in its entirety, is not approved by the Court, it shall be of
14 no force or effect, and cannot be used in any proceeding for any purpose.

15 **14. NOTICES**

16 14.0 Any notices under this Consent Judgment shall be by personal delivery of First
17 Class Mail.

18 If to MEJF: William Verick, Esq.
19 Klamath Environmental Law Center
20 424 First Street
 Eureka, CA 95501

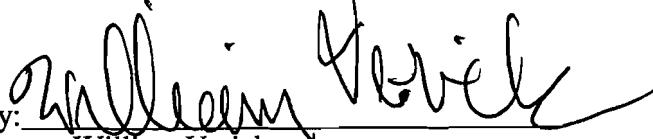
21 If to WMA: Eric Gul, Esq.
22 Wear Me Apparel LLC
23 31 West 34th Street, 4th Floor
24 New York, New York 10001
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IT IS SO STIPULATED:

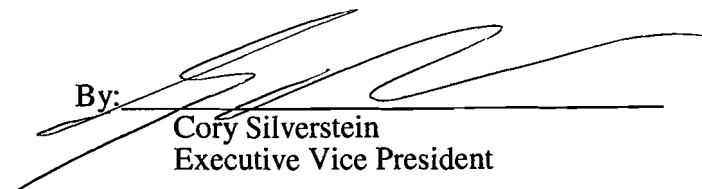
Dated:

MATEEL ENVIRONMENTAL JUSTICE FOUNDATION

By: 
William Verick

Dated:

WEAR ME APPAREL LLC

By: 
Cory Silverstein
Executive Vice President

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated:

AUG 26 2008

PATRICK J. MAHONEY
JUDGE OF THE SUPERIOR COURT

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11 Attorneys for Plaintiff
12 MATEEL ENVIRONMENTAL JUSTICE FOUNDATION

13
14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SAN FRANCISCO
16

17 MATEEL ENVIRONMENTAL JUSTICE
18 FOUNDATION,

19 Plaintiff,

20 vs.

21 WEAR ME APPAREL CORP., ET AL,

22 Defendant.
23 _____/

CASE NO. 476326

~~Proposed~~ ORDER APPROVING
SETTLEMENT

Date: August 26, 2008
Time: 9:30 a.m.
Dept. No.: 302

24 Plaintiff's motion for approval of settlement and entry of Consent Judgment was heard on
25 noticed motion on August 26, 2008. The court finds that:

- 26 1. The reformulation requirements of the Consent Judgment comply with the
27 requirements of Proposition 65;
28

ENDORSED
FILED

San Francisco County Superior Court

AUG 26 2008

GORDON PARK-LI, Clerk

BY: ERICKA LARNAUTI
Deputy Clerk

- 1 2. The payments in lieu of civil penalty specified in the Consent Judgment are
2 reasonable based on the criteria in Cal Health & Safety Code §25249.7(b)(2); and
3 3. The attorneys' rates and fees awarded under the Consent Judgment are reasonable
4 under California law.

5
6 Based upon these findings, the settlement and Consent Judgment are approved.

7
8 IT IS SO ORDERED.

9 Dated: AUG 26 2008

 PATRICK J. MAHONEY

10 Judge of the Superior Court
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