



FILED
ALAMEDA COUNTY

AUG 01 2019

CLERK OF THE SUPERIOR COURT

By *[Signature]* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,
a non-profit corporation,

Plaintiff,

v.

ROSS STORES, INC., *et al.*,

Defendants.

Case No. RG 18-923611

~~PROPOSED~~ CONSENT
JUDGMENT AS TO ONYX
APPAREL, INC.

1. INTRODUCTION

1.1 This Consent Judgment is entered into by Plaintiff Center for Environmental Health, a California non-profit corporation ("CEH") and Defendant Onyx Apparel, Inc. ("Defendant"), to settle certain claims asserted by CEH against Defendant as set forth in the operative complaint in the matter entitled *Center for Environmental Health v. Ross Stores, Inc., et al.*, Alameda County Superior Court Case No. RG 18-923611.

1.2 On September 18, 2018, CEH served a Notice of Violation under Proposition 65 alleging that Defendant violated Proposition 65 (California Health & Safety Code § 25249.5, *et seq.*) by exposing persons to cadmium contained in jewelry, including but not limited to jewelry

1 sold with clothing, without first providing a clear and reasonable warning pursuant to Proposition
2 65. On October 5, 2018, CEH filed the operative First Amended Complaint based on the
3 allegations in the Notice. On November 9, 2018, Onyx was named as a defendant in the First
4 Amended Complaint.

5 1.3 Defendant is a corporation that manufactures, distributes and/or sells Covered
6 Products (as defined herein) that are sold in the State of California.

7 1.4 For purposes of this Consent Judgment only, CEH and Defendant (the "Parties")
8 stipulate that this Court has jurisdiction over the allegations of violations contained in the
9 Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint, that
10 venue is proper in the County of Alameda, and that this Court has jurisdiction to enter this
11 Consent Judgment as a full and final resolution of all claims which were or could have been raised
12 in the Complaint based on the facts alleged therein with respect to Covered Products
13 manufactured, distributed or sold by Defendant.

14 1.5 CEH and Defendant enter into this Consent Judgment as a full and final settlement
15 of all claims that were raised in the Complaint, or which could have been raised in the Complaint,
16 arising out of the facts or conduct related to Defendant alleged therein. By execution of this
17 Consent Judgment and agreeing to comply with its terms, the Parties do not admit any facts or
18 conclusions of law including, but not limited to, any facts or conclusions of law suggesting or
19 demonstrating any violations of Proposition 65 relating to cadmium in jewelry. Nothing in this
20 Consent Judgment is or shall be construed as an admission by the Parties of any fact, conclusion
21 of law, issue of law or violation of law, nor shall compliance with the Consent Judgment
22 constitute or be construed as an admission by the Parties of any fact, conclusion of law, issue of
23 law, or violation of law. Defendant denies the material, factual and legal allegations in CEH's
24 Complaint and expressly denies any wrong doing whatsoever. Nothing in this Consent Judgment
25 shall prejudice, waive or impair any right, remedy, argument or defense the Parties may have in
26 this or any other pending or future legal proceedings. This Consent Judgment is the product of
27 negotiation and compromise and is accepted by the Parties solely for purposes of settling,
28 compromising, and resolving issues disputed in this action.

1 **2. DEFINITIONS**

2 2.1 The term “Cadmium Limit” means a concentration of 0.01 percent (100 parts per
3 million (“ppm”)) by weight cadmium in any component of a Covered Product, or in any material
4 used in a Covered Product.

5 2.2 The term “Covered Product” means jewelry, including but not limited to trim,
6 whether sold individually or as part of a set with a dress or other piece of clothing.

7 2.3 The term “Effective Date” means the date of entry of this Consent Judgment.

8 **3. INJUNCTIVE RELIEF**

9 3.1 **Reformulation of Covered Products.** Defendant shall comply with the following
10 requirements to achieve expeditious reformulation of the Covered Products to reduce or eliminate
11 exposures to cadmium arising from the Covered Products:

12 3.1.1 **Specification Compliance Date.** To the extent it has not already done
13 so, no more than 30 days after the Effective Date, Defendant shall provide the Cadmium Limit to
14 each of its suppliers of Covered Products and Covered Product components and shall instruct each
15 such supplier to only deliver Covered Products and Covered Product components that are below
16 the Cadmium Limit.

17 3.1.2 **Reformulation Date.** As of the Effective Date, Defendant shall not
18 manufacture, purchase, import, supply, sell or offer to sell any: (i) Covered Product that exceeds
19 the Cadmium Limit or (ii) any Covered Product that contains a component that exceeds the
20 Cadmium Limit.

21 3.2 **Market Withdrawal of Covered Products.** To the extent not already done, on or
22 before the Effective Date, Defendant shall have: (i) ceased shipping the following specific
23 products (“Recall Products”):

- 24 • Onyx Apparel Gold Brooch with Crystals (Sold with Onyx Apparel Lace Top in Ivory),
25 Style No. 20194-CM;

26 to stores and/or customers in California, (ii) withdrawn the Recall Products from the market in
27 California, and (iii) if the Recall Products were not withdrawn from sale in California prior to the
28 Effective Date, sent instructions to any of its stores and/or customers that offer the Recall Products

1 for sale in California to cease offering the Recall Products for sale and to either return all Recall
2 Products to Defendant for destruction, or to directly destroy the Recall Products. Any destruction
3 of the Recall Products shall be in compliance with all applicable laws. Within ninety days of the
4 Effective Date, Defendant shall certify to CEH that it has complied with this Section 3.2.

5 **4. ENFORCEMENT**

6 **4.1 General Enforcement Provisions.** CEH may, by motion or application for an
7 order to show cause before this Court, enforce the terms and conditions contained in this Consent
8 Judgment. Any action to enforce alleged violations of this Consent Judgment with respect to the
9 Cadmium Limit by Defendant shall be brought exclusively pursuant to this Section 4.

10 **4.2 Enforcement of Materials Violation.**

11 **4.2.1 Notice of Consent Judgment Violation.** In the event that, at any time
12 following the Effective Date, CEH identifies one or more Covered Products manufactured,
13 distributed, or sold by Defendant that CEH believes in good faith exceed the Cadmium Limit,
14 CEH may issue a Notice of Consent Judgment Violation pursuant to this Section.

15 **4.2.2 Service of Notice of Consent Judgment Violation and Supporting** 16 **Documentation.**

17 **4.2.2.1** The Notice of Consent Judgment Violation shall be sent to the
18 person(s) identified in Section 8 to receive notices for Defendant, and must be served within 75
19 days of the date the Covered Product at issue was purchased or otherwise acquired by CEH,
20 provided, however, that: (i) CEH may have up to an additional 45 days to provide Defendant with
21 the test data required by Section 4.2.2.3 below if it has not yet obtained it from its laboratory; and
22 (ii) CEH may serve a subsequent Notice of Consent Judgment Violation to a supplier of a Covered
23 Product identified in a previous Notice of Consent Judgment Violation so long as: (a) the identity
24 of the supplier cannot be discerned from the labeling of the Covered Product; and (b) the Notice of
25 Consent Judgment Violation to the supplier is served within 75 days of the date the supplier is
26 identified in writing to CEH by Defendant.

27 **4.2.3** The Notice of Consent Judgment Violation shall, at a minimum, set forth
28 for each Covered Product: (a) the date the alleged violation was observed, (b) the location at

1 which the Covered Product was offered for sale, (c) a description of the Covered Product giving
2 rise to the alleged violation, and (d) all test data obtained by CEH regarding the Covered Product
3 and supporting documentation sufficient for validation of the test results. Such Notice of Consent
4 Judgment Violation shall be based upon total acid digest test data from an independent laboratory.
5 Wipe, swipe, and swab testing are not sufficient to support a Notice of Consent Judgment
6 Violation. CEH shall promptly make available for inspection and copying upon request by and at
7 the expense of Defendant, any supporting documentation in its possession related to the testing of
8 the Covered Products and associated quality control samples, including chain of custody records,
9 all laboratory logbook entries for laboratory receiving, sample preparation, and instrumental
10 analysis, and all printouts from all analytical instruments relating to the testing of Covered Product
11 samples and any and all calibration tests performed or relied upon in conjunction with the testing
12 of the Covered Products, that pertains to the Covered Product's alleged exceedance of the
13 Cadmium Limit.

14 **4.2.4 Notice of Election of Response.** No more than 45 days after service of a
15 Notice of Consent Judgment Violation, Defendant shall provide written notice to CEH whether it
16 elects to contest the allegations contained in a Notice of Consent Judgment Violation (“Notice of
17 Election”). Failure to provide a Notice of Election within 45 days of service of a Notice of
18 Consent Judgment Violation shall be deemed an election to contest the Notice of Consent
19 Judgment Violation.

20 **4.2.4.1** If a Notice of Consent Judgment Violation is contested, the Notice
21 of Election shall include all then-available documentary evidence regarding the alleged violation,
22 including all test data, if any. If Defendant or CEH later acquires additional test or other data
23 regarding the alleged violation, it shall notify the other party and promptly provide all such data or
24 information to the party.

25 **4.2.5 Meet and Confer.** If a Notice of Consent Judgment Violation is
26 contested, CEH and Defendant shall meet and confer to attempt to resolve their dispute. Within
27 30 days of serving a Notice of Election contesting a Notice of Violation, and if no enforcement
28 motion or application has been filed by CEH pursuant to Section 4.1, Defendant may withdraw the

1 original Notice of Election contesting the violation and serve a new Notice of Election conceding
2 the violation, provided however that Defendant shall pay \$5,000 in addition to any payment
3 required under Section 4.2.7. At any time, CEH may withdraw a Notice of Consent Judgment
4 Violation, in which case for purposes of this Section 4 the result shall be as if CEH never issued
5 any such Notice of Consent Judgment Violation. If no informal resolution of a Notice of Consent
6 Judgment Violation results within 30 days of a Notice of Election to contest, CEH may file an
7 enforcement motion or application pursuant to Section 4.1. In any such proceeding, CEH may
8 seek whatever fines, costs, penalties attorneys' fees or remedies are provided by law for failure to
9 comply with the Consent Judgment.

10 **4.2.6 Non-Contested Matters.** If Defendant elects not to contest the
11 allegations in a Notice of Consent Judgment Violation, it shall undertake corrective action
12 pursuant to Section 4.2.6 and shall make any payments required by Section 4.2.7.

13 **4.2.7 Corrective Action in Non-Contested Matters.** If Defendant elects not to
14 contest the allegation, it shall include in its Notice of Election a detailed description with
15 supporting documentation of the corrective action that it has undertaken or proposes to undertake
16 to address the alleged violation. Any such correction shall, at a minimum, provide reasonable
17 assurance that the Covered Product will no longer be offered for sale in California. Corrective
18 action must include instructions to Defendant's customers that offer the Covered Product for sale
19 to consumers to cease offering the Covered Product(s) identified in the Notice of Consent
20 Judgment Violation for sale in California as soon as practicable. The Notice of Election shall also
21 include the name, address, telephone number, and other contact information, of Defendant's
22 supplier(s) of each Covered Product or Covered Product component identified in the Notice of
23 Consent Judgment Violation. Defendant shall make available to CEH for inspection and copying
24 records and correspondence regarding the corrective action. If there is a dispute over the
25 corrective action, the Parties shall meet and confer pursuant to Section 4.2.4 before seeking any
26 remedy in court.

27 **4.2.8 Payments in Non-Contested Matters.** In addition to the corrective
28 action, Defendant shall be required to make a payment as reimbursement for costs for

1 investigating, preparing, sending and prosecuting Notices of Violation, and to reimburse
2 attorneys' fees and costs incurred in connection with these activities, as specified below:

3 4.2.8.1 If Defendant serves a Notice of Election not to contest the
4 allegations in the instant Notice of Consent Judgment Violation, it shall be required to make a
5 payment of \$10,000. This payment shall, however, be reduced to \$5,000 if Defendant produces
6 with its Notice of Election test data showing that the Covered Product that is the subject of the
7 Notice of Consent Judgment Violation did not exceed the Cadmium Limit. For purposes of this
8 Section 4.2.8.1 only, "test data" shall mean total cadmium by acid digest performed by an
9 accredited laboratory on the same Covered Product that is the subject of the Notice of Consent
10 Judgment Violation. For purposes of this Section, the "same Covered Product" must be a Covered
11 Product that has a label attached that demonstrates that the Covered Product was produced at the
12 same factory and on the same production date as that indicated on the label of the Covered Product
13 tested by CEH that supports the Notice of Consent Judgment Violation.

14 4.2.8.2 The payment shall be made by check payable to the Lexington Law
15 Group and shall be paid within 15 days of service of a Notice of Election triggering a payment.

16 4.2.9 **Repeat Violations.** If Defendant has received three or more Notices of
17 Violation that were not successfully contested or withdrawn in any 12-month period then, at
18 CEH's option, CEH may seek whatever fines, costs, penalties, attorneys' fees or other remedies
19 that are provided by law for failure to comply with the Consent Judgment. Prior to seeking such
20 relief, CEH shall meet and confer with Defendant for a period not to exceed 30 days (unless
21 extended by mutual agreement) to determine if the parties can agree on measures Defendant can
22 undertake to prevent future violations.

23 5. PAYMENTS

24 5.1 **Payments by Defendant.** On or before ten (10) days after Defendant's receipt of a
25 notice of entry of this Consent Judgment, Defendant shall send payments via overnight courier in
26 the total sum of \$35,000 as a settlement payment ("Settlement Payment") as further set forth in
27 this Section.
28

1 5.2 **Allocation of Payments.** The total Settlement Payment shall be paid in five (5)
2 separate checks in the amounts specified below and delivered as set forth below. Any failure by
3 Defendant to comply with the payment terms herein shall be subject to a stipulated late fee to be
4 paid by Defendant in the amount of \$100 for each day the full payment is not received after the
5 applicable payment due date set forth in Section 5.1. The late fees required under this Section
6 shall be recoverable, together with reasonable attorneys' fees, in an enforcement proceeding
7 brought pursuant to Section 4 of this Consent Judgment. The Settlement Payment paid by
8 Defendant shall be allocated as set forth below between the following categories and made
9 payable as follows:

10 5.2.1 Defendant shall pay \$4,670 as a civil penalty ("Civil Penalty") pursuant
11 to Health & Safety Code §25249.7(b). The Civil Penalty payment shall be apportioned in
12 accordance with Health & Safety Code §25249.12 (25% to CEH and 75% to the State of
13 California's Office of Environmental Health Hazard Assessment ("OEHHA")). Accordingly,
14 Defendant shall pay the OEHHA portion of the Civil Penalty payment for \$3,504 by check made
15 payable to OEHHA and associated with taxpayer identification number 68-0284486. This
16 payment shall be delivered as follows:

17 For United States Postal Service Delivery:

18 Attn: Mike Gyurics
19 Fiscal Operations Branch Chief
20 Office of Environmental Health Hazard Assessment
21 P.O. Box 4010, MS #19B
22 Sacramento, CA 95812-4010

23 For Non-United States Postal Service Delivery:

24 Attn: Mike Gyurics
25 Fiscal Operations Branch Chief
26 Office of Environmental Health Hazard Assessment
27 1001 I Street, MS #19B
28 Sacramento, CA 95814

29 Defendant shall pay the CEH portion of the Civil Penalty payment for \$1,166 by check made
30 payable to the Center for Environmental Health and associated with taxpayer identification
31 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero

1 Street, San Francisco, CA 94117.

2 5.2.2 Defendant shall pay \$3,502 as an Additional Settlement Payment
3 (“ASP”) to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of
4 Regulations, Title 11, § 3204. CEH intends to place these funds in CEH’s Toxics and Youth Fund
5 and use them to support CEH programs and activities that seek to educate the public about
6 cadmium and other toxic chemicals in consumer products that are marketed to youth, work with
7 industries that market products to youth to reduce exposure to cadmium and other toxic chemicals,
8 and thereby reduce the public health impacts and risks of exposure to cadmium and other toxic
9 chemicals in consumer products that are marketed to youth in California. CEH shall obtain and
10 maintain adequate records to document that ASPs are spent on these activities and CEH agrees to
11 provide such documentation to the Attorney General within thirty days of any request from the
12 Attorney General. The payment pursuant to this Section shall be made payable to the Center for
13 Environmental Health and associated with taxpayer identification number 94-3251981. This
14 payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA
15 94117.

16 5.2.3 Defendant shall pay \$26,828 as a reimbursement of a portion of CEH’s
17 reasonable attorneys’ fees and costs. The attorneys’ fees and cost reimbursement shall be made in
18 two separate checks as follows: (a) \$22,542 payable to the Lexington Law Group and associated
19 with taxpayer identification number 94-3317175; and (b) \$4,286 payable to the Center For
20 Environmental Health and associated with taxpayer identification number 94-3251981. Both of
21 these payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco,
22 CA 94117.

23 5.2.4 To summarize, Defendant shall deliver checks made out to the payees
24 and in the amounts set forth below:

25 Payee	Type	Amount	Deliver To
26 OEHHA	Penalty	\$3,504	OEHHA per Section 5.2.1
27 Center For Environmental Health	Penalty	\$1,166	LLG

Center For Environmental Health	ASP	\$3,502	LLG
Lexington Law Group	Fee and Cost	\$22,542	LLG
Center For Environmental Health	Fee and Cost	\$4,286	LLG

5.2.5 Notwithstanding the provisions of the Enforcement of Judgments Law and Code of Civil Procedure § 780.160, in the event that Defendant does not comply fully with its payment obligations under this Section 5, in addition to any other enforcement mechanism available to CEH, CEH may seek an order requiring Defendant to submit to a debtor's examination in the Alameda County Superior Court. In the event that Settling Defendant fails to submit to any such debtor's examination ordered by the Court, CEH may seek an order holding Settling Defendant in contempt of Court.

6. MODIFICATION AND DISPUTE RESOLUTION

6.1 **Modification.** This Consent Judgment may be modified from time to time by express written agreement of the Parties with the approval of the Court, or by an order of this Court upon motion and in accordance with law.

6.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to modify the Consent Judgment.

1 **7. CLAIMS COVERED AND RELEASE**

2 7.1 This Consent Judgment is a full, final, and binding resolution between CEH and
3 Defendant and Defendant’s parents, shareholders, divisions, subdivisions, subsidiaries, partners,
4 sister companies and their successors and assigns (“Defendant Releasees”), and all entities to
5 whom they distribute or sell Covered Products, including, but not limited to, distributors,
6 wholesalers, customers, retailers, franchisees, cooperative members, and licensees (“Downstream
7 Defendant Releasees”), of any violation of Proposition 65 that have been or could have been
8 asserted in the public interest against Defendant, Defendant Releasees, and Downstream
9 Defendant Releasees, regarding the failure to warn about exposure to cadmium arising in
10 connection with Covered Products manufactured, distributed, or sold by Defendant prior to the
11 Effective Date.

12 7.2 CEH, for itself and acting on behalf of the public interest pursuant to Health &
13 Safety Code § 25249.7(d), releases, waives, and forever discharges any and all claims against
14 Defendant, Defendant Releasees, Burlington Coat Factory and Downstream Defendant Releasees
15 arising from any violation of Proposition 65 or any other statutory or common law claims that
16 have been or could have been asserted in the public interest regarding the failure to warn about
17 exposure to cadmium arising in connection with Covered Products manufactured, distributed or
18 sold by Defendant prior to the Effective Date.

19 7.3 Compliance with the terms of this Consent Judgment by Defendant and the
20 Defendant Releasees shall constitute compliance with Proposition 65 by Defendant, the Defendant
21 Releasees and the Downstream Defendant Releasees with respect to any alleged failure to warn
22 about cadmium in Covered Products manufactured, distributed or sold by Defendant after the
23 Effective Date.

24 **8. PROVISION OF NOTICE**

25 8.1 When any Party is entitled to receive any notice under this Consent Judgment, the
26 notice shall be sent by first class and electronic mail as follows:

27 8.1.1 **Notices to Defendant.** The person for Defendant to receive Notice
28 pursuant to this Consent Judgment shall be:

1 Steven C. Kim
2 Steven C. Kim & Associates
3 3701 Wilshire Blvd. #1040
4 Los Angeles, CA 90010
5 stevenckim@sbcglobal.net

6 8.1.2 **Notices to Plaintiff.** The person for CEH to receive Notices pursuant to
7 this Consent Judgment shall be:

8 Eric S. Somers
9 Lexington Law Group
10 503 Divisadero Street
11 San Francisco, CA 94117
12 esomers@lexlawgroup.com

13 8.2 Any Party may modify the person and address to whom the notice is to be sent by
14 sending the other Party notice by first class and electronic mail.

15 **9. COURT APPROVAL**

16 9.1 This Consent Judgment shall become effective on the Effective Date, provided
17 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
18 Defendant shall support approval of such Motion.

19 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or effect
20 and shall not be introduced into evidence or otherwise used in any proceeding for any purpose.

21 **10. GOVERNING LAW AND CONSTRUCTION**

22 10.1 The terms of this Consent Judgment shall be governed by the laws of the State of
23 California.

24 **11. ENTIRE AGREEMENT**

25 11.1 This Consent Judgment contains the sole and entire agreement and understanding
26 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
27 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
28 and therein. There are no warranties, representations, or other agreements between the Parties
except as expressly set forth herein. No representations, oral or otherwise, express or implied,
other than those specifically referred to in this Consent Judgment have been made by any Party
hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,

1 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
2 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
3 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
4 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
5 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
6 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
7 whether or not similar, nor shall such waiver constitute a continuing waiver.

8 **12. RETENTION OF JURISDICTION**

9 12.1 This Court shall retain jurisdiction of this matter to implement, enforce or modify
10 the Consent Judgment.

11 **13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

12 13.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
13 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
14 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

15 **14. NO EFFECT ON OTHER SETTLEMENTS**

16 14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
17 against any other entity on terms that are different than those contained in this Consent Judgment.

18 **15. EXECUTION IN COUNTERPARTS**

19 15.1 The stipulations to this Consent Judgment may be executed in counterparts and by
20 means of facsimile, which taken together shall be deemed to constitute one document.

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**IT IS SO ORDERED, ADJUDGED,
AND DECREED**

Dated:

Judge of the Superior Court of the State of California

IT IS SO STIPULATED:

Dated: <u>3/21</u> , 2019	CENTER FOR ENVIRONMENTAL HEALTH _____ <i>Michael Green</i> _____ Printed Name _____ CEO _____ Title
Dated: _____, 2019	DEFENDANT ONYX APPAREL, INC. _____ _____ Printed Name _____ Title

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**IT IS SO ORDERED, ADJUDGED,
AND DECREED**

Dated: *August 1, 2019*

Winifred J. Smith

Judge of the Superior Court of the State of California

IT IS SO STIPULATED:

Dated: _____, 2019	CENTER FOR ENVIRONMENTAL HEALTH _____ _____ Printed Name _____ Title
Dated: <u>3/20/19</u> , 2019	DEFENDANT ONYX APPAREL, INC.  _____ <i>Jeannie Ky</i> Printed Name <i>Authorize Agent</i> _____ Title