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8 Attorneys for Plaintiff  
MATEEL ENVIRONMENTAL JUSTICE FOUNDATION

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 FOR THE COUNTY OF SAN FRANCISCO

13 MATEEL ENVIRONMENTAL JUSTICE  
FOUNDATION,

14 Plaintiff,

16 vs.

17 MAURICE SPORTING GOODS, INC., *et al.*,

18 Defendants.

Case No. 433004

**[PROPOSED] CONSENT JUDGMENT AS  
TO BERKSHIRE FASHIONS, INC.**

20 **1. INTRODUCTION**

21 1.0 On July 14, 2004, the MATEEL ENVIRONMENTAL JUSTICE FOUNDATION  
22 (“Plaintiff” or “MEJF”) acting on behalf of itself and the general public, filed a Complaint for civil  
23 penalties and injunctive relief (“Complaint”) in San Francisco Superior Court, Case No. 433004,  
24 against defendant, BERKSHIRE FASHIONS, INC. (“Defendant” or “Berkshire”) among others.  
25 (MEJF and Berkshire are collectively referred to as “the Parties.”) The Complaint alleges that  
26 Berkshire violated provisions of the Safe Drinking Water and Toxic Enforcement Act of 1986,  
27 Health and Safety Code sections 25249.5, *et seq.* (Proposition 65), and Business and Professions  
28

1 Code sections 17200 *et seq.* (the “Unfair Competition Act”), by, among other things, knowingly  
2 and intentionally exposing persons to products containing lead and/or lead compounds, which are  
3 chemicals known to the State of California to cause cancer and/or birth defects or other  
4 reproductive harm, without first providing a clear and reasonable warning to such individuals.  
5 The Complaint was based upon a 60-Day Notice letter, dated April 6, 2004, sent by MEJF to  
6 Berkshire, the California Attorney General, all District Attorneys, and all City Attorneys with  
7 populations exceeding 750,000. On January 14, 2005, MEJF served an amended 60 Day Notice  
8 letter on Berkshire and the above-listed government officials. The two 60 Day Notice letters are  
9 collectively referred to as the "60Day Notice".)

10 1.1 Berkshire filed a timely answer to the Complaint denying each and every allegation  
11 set forth therein and asserting numerous affirmative defenses.

12 1.2 Defendant is a business that employs more than ten persons and manufactures,  
13 distributes and/or markets within the State of California clothing made with lead-containing  
14 polyvinyl chloride, neoprene and/or other plastic materials (“PVC Materials”). Pursuant to  
15 Proposition 65, lead and lead compounds are chemicals known to the State of California to cause  
16 cancer and reproductive toxicity. Products containing lead and/or lead compounds that are sold or  
17 distributed in the State of California may be, under specified circumstances, subject to the  
18 Proposition 65 warning requirement set forth in Health and Safety Code section 25249.6. Plaintiff  
19 alleges that clothing, including ponchos, raincoats and umbrellas, made with lead-containing PVC  
20 Materials (“PVC Clothing”), that is manufactured, distributed, sold and/or marketed by Berkshire  
21 for use in California, requires a warning under Proposition 65. For purposes of this Consent  
22 Judgment, the term “Covered Products” shall be defined as PVC Clothing that is: (i) distributed,  
23 sold or used within the State of California, and (ii) Manufactured by Berkshire or any other entity  
24 acting on its behalf, and distributed, marketed and/or sold by Berkshire or by any other entity that  
25 distributes, markets or sells Berkshire’s PVC Clothing, or manufactured by any other entity for  
26 Berkshire, whether or not the clothing bears Berkshire labels.

27 1.3 For purposes of this Consent Judgment only, the parties stipulate that this Court has  
28 subject matter jurisdiction over the allegations of violations contained in the Complaint and

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

6       1.4     This Consent Judgment resolves claims that are denied and disputed. The parties  
7 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims  
8 between the parties for the purpose of avoiding prolonged litigation. The Parties intend that this  
9 Consent Judgment provide, to the maximum extent permitted by law, *res judicata* and *collateral*  
10 *estoppel* protection for Berkshire against any and all other claims based on the same or similar  
11 allegations under Proposition 65 and the Unfair Competition Act.

12       1.5     Berkshire disputes that it has violated Proposition 65 as described in the 60-Day  
13 Notice Letter, the Complaint, or otherwise. Berkshire contends that no warning is required for the  
14 exposures Plaintiff alleges. This Consent Judgment shall not constitute an admission with respect  
15 to any material allegation of the Complaint, each and every allegation of which Berkshire denies,  
16 nor may this Consent Judgment or compliance with it be used as evidence of any wrongdoing,  
17 misconduct, culpability or liability on the part of Berkshire.

18       1.6     Berkshire's willingness to enter into this Consent Judgment is based upon the  
19 understanding that this Consent Judgment will fully and finally resolve all claims related to  
20 Covered Products for which a Proposition 65 warning is required, and that this Consent Judgment  
21 will have *res judicata* and *collateral estoppel* effect to the extent allowed by law with regards to  
22 both the Proposition 65 allegations and the Unfair Competition Act allegations. Therefore, it is  
23 understood and agreed by the Parties hereto that the rights and obligations contained in this  
24 Consent Judgment are expressly conditioned on the California Attorney General not objecting to  
25 this Consent Judgment. Should the Attorney General object to the entry of this Consent Judgment,  
26 the parties shall negotiate in good faith to modify the Consent Judgment in a manner that resolves  
27 the objection(s) of the Attorney General. If the Parties cannot agree on appropriate modifications  
28 within 15 days of receiving the Attorney General's objection(s), this Consent Judgment shall, at

1 either Party's option, be deemed null and void as to that Party and shall not be used for any  
2 purpose, including construing any portion hereof as an admission or waiver of any claim or  
3 defense. If either Party withdraws from the Consent Judgment based on the Attorney General's  
4 objection(s), the case shall be put back on the Court's trial calendar, leaving enough time for the  
5 Parties to conduct pre-trial discovery.

6 **2. SETTLEMENT PAYMENT**

7 2.0 In settlement of all of the claims that are alleged, or could have been alleged, in the  
8 Complaint concerning Berkshire, within ten (10) days following the Court's entry of a final  
9 judgment, including any third-party appeals to the entry of the judgment. Berkshire shall pay  
10 \$17,500 to the Klamath Environmental Law Center ("KELC") to cover Plaintiff's attorneys' fees.  
11 Additionally, within ten (10) days following the Court's entry of a final judgment, including any  
12 third-party appeals to the entry of the judgment, Berkshire shall pay \$8,750 to Californians for  
13 Alternatives to Toxics; and \$8,750 to the Ecological Rights foundation for use toward reducing  
14 exposures to toxic chemicals and other pollutants, and toward increasing consumer, worker and  
15 community awareness of health hazards posed by lead and other toxic chemicals. The parties  
16 agree and acknowledge that the charitable contributions made pursuant to this section shall not be  
17 construed as a credit against the personal claims absent third parties for restitution against  
18 Defendant.

19 Berkshire shall not be required to pay a civil penalty pursuant to Health and Safety Code  
20 section 25249.7(b).

21 **3. ENTRY OF CONSENT JUDGMENT**

22 3.0 The Parties hereby request that the Court enter this Consent Judgment forty-five  
23 (45) days after the filing of a motion for approval of the Consent Judgment in accordance with  
24 Title 11, *California Code of Regulations*, section 3003(a). Upon the Court's entry of a final  
25 judgment, including any third-party appeals to the entry of the judgment, MEJF and Berkshire  
26 waive their respective rights to a hearing or trial on the allegations in the Complaint.

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

28

1           4.0     This Consent Judgment, once entered by the Court, is a final and binding resolution  
2 between MEJF, acting on behalf of itself and (as to those matters raised in the 60 Day Notice) the  
3 general public, and Berkshire of: (i) any violation of Proposition 65 or the Unfair Competition Act  
4 (including but not limited to the claims made in the Complaint); and (ii) any other statutory or  
5 common law claim to the fullest extent that any of the foregoing described in (i) or (ii) were or  
6 could have been asserted by any person or entity against Berkshire or its parents, subsidiaries or  
7 affiliates, and all of their customers, distributors, wholesalers, retailers, or any other person in the  
8 course of doing business, and the successors and assigns of any of them, who may use, maintain,  
9 distribute or sell Covered Products (“Released Entities”), based on its or their exposure of persons  
10 to Covered Products or their failure to provide a clear and reasonable warning of exposure to such  
11 individuals; and (iii) as to alleged exposures to Covered Products, any other claim based in whole  
12 or in part on the facts alleged in the Complaint, whether based on actions committed by the  
13 Released Entities. As to alleged exposures to Covered Products, compliance with the terms of this  
14 Consent Judgment resolves any issue, now and in the future, concerning compliance by Berkshire  
15 and the Released Entities, with the requirements of Proposition 65 and the Unfair Competition Act  
16 with respect to Covered Products, and any alleged resulting exposure.

17           4.1     As to alleged exposures to Covered Products and other claims in the Complaint,  
18 MEJF, by and on behalf of itself, and its respective agents, successors, attorneys and assigns,  
19 waives any and all rights to institute any form of legal action, and releases all claims against  
20 Berkshire and the Released Entities, and all of their respective parents, subsidiaries or affiliates,  
21 and all of their customers, distributors, wholesalers, retailers, or any other person in the course of  
22 doing business, and the successors and assigns of any of them, who may use, maintain, distribute  
23 or sell the Covered Products, whether, under Proposition 65, the Unfair Competition Act or any  
24 other statute, provision of common law or any theory or issue, arising out of or resulting from, or  
25 related directly or indirectly to, in whole or in part, the Covered Products, including but not  
26 limited to any exposure to, or failure to warn with respect to, the Covered Products (referred to  
27 collectively in this paragraph as the “Claims”). In furtherance of the foregoing, as to alleged  
28 exposures to Covered Products, MEJF hereby waives any and all rights and benefits which it now

1 has, or in the future may have, conferred upon it with respect to the Claims by virtue of the  
2 provisions of section 1542 of the California Civil Code, which provides as follows:

3 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH  
4 THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS  
5 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF  
6 KNOWN BY HIM, MUST HAVE MATERIALLY AFFECTED HIS  
7 SETTLEMENT WITH THE DEBTOR.

8 MEJF understands and acknowledges that the significance and consequence of this waiver of  
9 California Civil Code section 1542 is that even if it suffers future damages arising out of or  
10 resulting from, or related directly or indirectly to, in whole or in part, the Covered Products,  
11 including but not limited to any exposure to, or failure to warn with respect to exposure to, the  
12 Covered Products, MEJF will not be able to make any claim for those damages against Berkshire  
13 or the Released Entities. Furthermore, MEJF acknowledges that it intends these consequences for  
14 any such Claims as may exist as of the date of this release but which MEJF does not know exist,  
15 and which, if known, would materially affect their decision to enter into this Consent Judgment,  
16 regardless of whether their lack of knowledge is the result of ignorance, oversight, error,  
17 negligence, or any other cause.

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

19 5.0 The terms of this Consent Judgment shall be enforced exclusively by the Parties  
20 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of  
21 San Francisco County, giving the notice required by law, enforce the terms and conditions  
22 contained herein. In any proceeding brought by either party to enforce this Consent Judgment,  
23 such Party may seek whatever fines, costs, penalties or remedies as may be provided by law for  
24 any violation of Proposition 65 or this Consent Judgment. Additionally, if in such a proceeding  
25 the Court finds that Berkshire failed to comply with the reformulation requirements as specified in  
26 Section 7 of this Consent Judgment, and notwithstanding any other provision of this Consent  
27 Judgment, then as to such Covered Products, Berkshire shall not benefit from any release from  
28 liability specified in any provision of this Consent Judgment.

1           5.1     Entry of judgment by the Court pursuant to this Consent Judgment, and  
2 Defendant's compliance with its terms, *inter alia*:

3           i)       Constitutes full and fair adjudication of all claims against Berkshire and the  
4 Released Entities, including, but not limited to, all claims set forth in the Complaint, based upon  
5 alleged violations of Proposition 65 and the Unfair Competition Act, as well as any other statute,  
6 provision of common law or any theory or issue which arise from the alleged failure to provide  
7 warning of exposure to the Covered Products;

8           ii)      Bars any and all other persons, on the basis of *res judicata*, the doctrine of  
9 mootness and the doctrine of *collateral estoppel* from prosecuting against Berkshire and the  
10 Released Entities any Claims with respect to the Covered Products based upon alleged violations  
11 of (a) Proposition 65, or (b) the Unfair Competition Act which arise from the alleged failure to  
12 provide warning of exposure to the Covered Products which may contain lead and/or lead  
13 compounds which are known to the State of California to cause cancer and/or birth defects or  
14 other reproductive harm; and

15           iii)     Constitutes full and fair adjudication of all claims against Berkshire and the  
16 Released Entities based upon alleged violations of Proposition 65 and the Unfair Competition Act,  
17 which arise from the alleged failure to provide warnings of exposure to the Covered Products  
18 which may contain lead and/or lead compounds which are known to the State of California to  
19 cause cancer and/or birth defects or other reproductive harm.

20 **6.     MODIFICATION OF JUDGMENT**

21           6.0     This Consent Judgment may be modified only upon written agreement of the  
22 parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of  
23 any party as provided by law and upon entry of a modified Consent Judgment by the Court.

24 **7.     INJUNCTIVE RELIEF**

25           7.0     On and after July 1, 2005, the PVC Materials in all Covered Products sold by  
26 Berkshire for resale or use in California shall meet the following criteria:

27           (a)     The PVC Materials shall have no lead as an intentionally added constituent;  
28

1 (b) A representative sample of the bulk PVC Materials used to manufacture the  
2 Covered Products shall have been tested for lead, and must have shown lead  
3 content by weight of less than 0.003% (30 parts per million "30 ppm"), using a test  
4 method of sufficient sensitivity to establish a limit of quantification (as  
5 distinguished from detection) of less than 30 ppm.

6 7.1 Berkshire may comply with the above requirements by relying on information  
7 obtained from its suppliers of the Covered Products, and the PVC Materials utilized in their  
8 manufacture, so long as such reliance is in good faith. Demonstration of good faith reliance may  
9 include, but is not limited to e-mails or other written correspondence from suppliers attesting to  
10 compliance with the provisions of this Section 7.1.

11 7.2 In the event that MEJF settles another actual or potential claim concerning the  
12 alleged failure of a business to provide adequate Proposition 65 warnings concerning its  
13 manufacture, distribution or sale of PVC Clothing in California, and agrees to a standard for  
14 reformulation that allows for lead content by weight of greater than 30 ppm in the PVC Materials,  
15 Berkshire's compliance with the less stringent standard will be deemed to meet the requirements  
16 of Sections 7.0(b) above. MEJF shall notify Berkshire of any and each such settlement by written  
17 notice pursuant to Section 15, within ten (10) days of execution of such settlement or consent  
18 judgment.

19 **8. AUTHORITY TO STIPULATE**

20 8.0 Each signatory to this Consent Judgment certifies that he or she is fully authorized  
21 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of  
22 the party represented and legally to bind that party.

23 **9. RETENTION OF JURISDICTION**

24 9.0 This Court shall retain jurisdiction of this matter to implement the Consent  
25 Judgment.

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

27 10.0 MEJF shall serve a copy of this Consent Judgment, signed by both parties, on the  
28 California Attorney General on behalf of the parties so that the Attorney General may review this

1 Consent Judgment. MEJF, in compliance with Title 11, *California Code of Regulations*, section  
2 3003(a), also shall file and serve notice of the motion for approval of this Consent Judgment.

3 10.1 Plaintiff agrees to comply with the Proposition 65 reporting requirements,  
4 including those referenced in Health & Safety Code section 25249.7(f) and Title 11, *California*  
5 *Code of Regulations*, sections 3303, 3304 and 3305.

6 10.2 Plaintiff represents and warrants that it will comply or has fully complied with all  
7 regulatory requirements regarding submissions to the Attorney General of all required notices and  
8 certificates of merit pertaining to the Complaint and this Consent Judgment.

9 **11. ENTIRE AGREEMENT**

10 11.0 This Consent Judgment contains the sole and entire agreement and understanding  
11 of the Parties with respect to the entire subject matter hereof and any and all prior discussions,  
12 negotiations, commitments and understandings related hereto. No representations, oral or  
13 otherwise, express or implied, other than those contained herein have been made by either Party  
14 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed  
15 to exist or to bind any of the Parties.

16 **12. NO ADMISSIONS**

17 12.0 This Consent Judgment has been reached by the Parties to avoid the costs of  
18 prolonged litigation. By entering into this Consent Judgment, Berkshire does not admit any issue  
19 of fact or law, including any violations of Proposition 65 or the Unfair Competition Act. The  
20 settlement of claims herein shall not be deemed an admission or concession of liability or  
21 culpability by Berkshire, at any time, for any purpose. Neither this Consent Judgment, nor any  
22 document referred to herein, nor any action taken to carry out this Consent Judgment, shall be  
23 construed as giving rise to any presumption or inference of admission or concession by Berkshire  
24 as to any fault, wrongdoing or liability whatsoever. Neither this Consent Judgment, nor any of its  
25 terms or provisions, nor any of the negotiations or other proceedings connected with it, nor any  
26 other action taken, to carry out this Consent Judgment, by the Parties hereto, shall be referred to,  
27 offered as evidence, or received in evidence in any pending or future civil, criminal or  
28 administrative action or proceeding, except in a proceeding to enforce this Consent Judgment, to

1 support using the doctrines of *res judicata* and *collateral estoppel*, to defend against the assertion  
2 of the Released Claims or as otherwise required by law.

3  
4 **13. GOVERNING LAW**

5 13.0 The validity, construction and performance of this Consent Judgment shall be  
6 governed by the laws of the State of California, without reference to any conflicts of law  
7 provisions of California law.

8 **14. COURT APPROVAL**

9 14.0 If this Consent Judgment, in its entirety, is not approved by the Court, it shall be of  
10 no force or effect, and cannot be used in any proceeding for any purpose.

11 **15. NOTICES**

12 15.0 Any notices under this Consent Judgment shall be by personal delivery of First  
13 Class Mail.

14  
15 15.1

16 If to MEJF: William Verick, Esq.  
17 Klamath Environmental Law Center  
424 First Street  
Eureka, CA 95501

18 If to Berkshire: Ralph Dweck  
19 Berkshire Fashions, Inc.  
20 1 West 37<sup>th</sup> Street  
New York, NY 10018

21 COPY TO:

22 Malcolm C. Weiss, Esq.  
23 Jeffer, Mangels, Butler & Marmaro  
24 1900 Ave. of the Stars  
7<sup>th</sup> Floor  
25 Los Angeles, CA 90067  
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IT IS SO STIPULATED:

DATED:

7/5/05

MATEEL ENVIRONMENTAL JUSTICE  
FOUNDATION

BY:

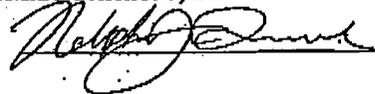
  
WILLIAM VERICK

DATED:

BERKSHIRE FASHIONS, INC.

BY:

ITS:



IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT