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CENTER FOR ENVIRONMENTAL HEALTH
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
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11 CENTER FOR ENVIRONMENTAL HEALTH,
12 a non-profit corporation,

13 Plaintiff,

14 v.

15 MICHAELS STORES, INC., et al.,

16 Defendants.
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Case No. CGC-05446289

**[PROPOSED] CONSENT JUDGMENT
AS TO ORIENTAL TRADING
COMPANY, INC.**

**[PROPOSED] CONSENT JUDGMENT AS TO
ORIENTAL TRADING COMPANY, INC.
CGC-05446289**

1 **1. INTRODUCTION**

2 1.1 On November 2, 2005, plaintiff the Center for Environmental Health (“CEH”), a
3 non-profit corporation acting in the public interest, filed a complaint in San Francisco County
4 Superior Court, entitled *Center for Environmental Health v. Michaels Stores, Inc., et al.*, San
5 Francisco County Superior Court Case Number CGC-05446289 (the “Action”), for civil
6 penalties and injunctive relief pursuant to the provisions of California Health & Safety Code
7 §25249.5 *et seq.* (“Proposition 65”).

8 1.2 Defendant Oriental Trading Company, Inc. (“Oriental”) is a corporation that
9 currently employs ten or more persons and manufactures, distributes and/or sells imitation pearls
10 and imitation pearl necklaces made of materials containing lead and/or lead compounds (the
11 “Products”) to customers who reside in the State of California. Oriental and CEH are referred to
12 herein as the “Parties.”

13 1.3 CEH’s Complaint alleges that Oriental exposes individuals who use or otherwise
14 handle the Products to lead and/or lead compounds (referred to interchangeably herein as
15 “Lead”), chemicals known to the State of California to cause cancer, birth defects and other
16 reproductive harm, without first providing clear and reasonable warning to such persons
17 regarding the carcinogenicity and reproductive toxicity of Lead. The Complaint alleges that
18 Oriental’s conduct violates Health & Safety Code §25249.6, the warning provision of
19 Proposition 65.

20 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court
21 has jurisdiction over the subject matter of the violations alleged in the Complaint and personal
22 jurisdiction over Oriental as to the acts alleged in the Complaint, that venue is proper in the
23 County of San Francisco, and that this Court has jurisdiction to enter this Consent Judgment as a
24 full and final resolution of all claims which were or could have been raised in the Complaint
25 based on the facts alleged therein.

26 1.5 The Parties enter into this Consent Judgment pursuant to a settlement of all
27 disputed claims between the Parties as alleged in the Complaint. By executing this Consent
28 Judgment, the Parties and each of them do not admit any facts or conclusions of law, including,

1 but not limited to, any facts or conclusions of law suggesting or demonstrating any violations of
2 Proposition 65 or any other statutory, common law or equitable requirements relating to the
3 Products. It is the Parties' intent that nothing in this Consent Judgment shall be construed as an
4 admission by the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall
5 compliance with the Consent Judgment constitute or be construed as an admission by the Parties
6 of any fact, conclusion of law, issue of law, or violation of law. Except as otherwise provided
7 herein, nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy,
8 argument or defense the Parties may have in this or any other or future legal proceedings. This
9 Consent Judgment is the product of negotiation and compromise and is accepted by the Parties,
10 for purposes of settling, compromising and resolving issues disputed in the Action, and shall not
11 be used for any other purpose, or in any other matter.

12 **2. COMPLIANCE - REFORMULATION**

13 **2.1 Lead Reformulation.** After June 30, 2007 (the "Reformulation Date"), Oriental
14 shall not sell, manufacture or purchase for distribution or sale in California any Product that
15 contains Lead in concentrations that exceed 200 parts per million ("ppm") in the Product's
16 surface coating or substrate to which the coating is attached (the "Reformulation Standard")
17 other than those Products that are tested and sold in compliance with Section 2.3.2.

18 **2.2 Interim Warning.** From December 31, 2006 through the Reformulation Date,
19 Oriental may sell Products containing Lead in excess of the Reformulation Standard to
20 consumers who reside in California provided that Oriental provides the warning pursuant to
21 Section 2.3.2.

22 **2.3 Testing.** In order to help ensure compliance with the requirements of Section 2.1,
23 Oriental shall conduct periodic testing to confirm that the Products comply with the
24 Reformulation Standard. Testing pursuant to this Section shall be conducted pursuant to the test
25 protocol specified in California Health and Safety Code Section 25214.4 or another test protocol
26 approved by the Environmental Protection Agency or Consumer Product Safety Commission (or
27 their successor agencies) for testing of Lead in consumer products (the "Test Protocol"). All
28 testing pursuant to this Section shall be performed by an independent, accredited laboratory; such

1 a laboratory may be located overseas, provided that it is internationally accredited. The results
2 of all testing performed pursuant to this Section shall be retained for a period of three years from
3 the date of the test and made available to CEH upon reasonable request. The frequency and
4 amount of testing required shall vary as follows:

5 **2.3.1 Sample Testing.** For the initial shipment of Products received by Oriental
6 from each supplier and thereafter at least once per calendar year for subsequent shipments of
7 Products from each supplier, Oriental must test at least five randomly selected individual pieces
8 of each Product Stock Keeping Unit ("SKU"), except for those Product SKUs which are the
9 identical or substantially identical item from the same supplier as another Product SKU tested in
10 compliance with this Section. By way of example, a substantially identical Product would be
11 two necklaces from the same supplier consisting of the same color pearl beads that differed only
12 in total length of the necklaces or in bead size.

13 **2.3.2 Products that exceed 200 ppm Lead Standard pursuant to Oriental's**
14 **Testing.** If the results of the testing required pursuant to Section 2.3.1 shows levels of Lead
15 exceeding the Reformulation Standard, but such levels are below 600 ppm, Oriental may sell
16 such Products to consumers who reside in California provided that it also provides the warning
17 set forth below with such Products in the manner prescribed in this Section 2.3.2:

18 **WARNING:** This product contains lead, a chemical known to
19 the State of California to cause birth defects or other
 reproductive harm.

20 The warning required by this subsection may be delivered through the internet, by telephone, in a
21 catalog or with the Product's immediate packaging. For warnings delivered through the internet,
22 by telephone or in a catalog, the warning will be provided prior to the Product's purchase and
23 shall be delivered in such a manner that it is likely to be read or heard and understood by the
24 purchaser prior to purchase. For warnings delivered with the Product's immediate packaging: (a)
25 the warning shall be in compliance with 22 Cal. Code Reg. Section 12601(b)(1)(A); (b) the
26 warning may be either on a separate written notice sheet or on the invoice or packing slip (the
27 "Order Documentation"); (c) the warning must be in a format and appearance substantially
28 similar to the warning shown on the sample Order Documentation attached hereto as Exhibit A;

1 (d) the warning shall be displayed in a layout, format and font size such that it is at least as
2 prominent, conspicuous and large as any other text concerning the Product to which it relates; (e)
3 the warning shall be accompanied by a statement which advises that (i) the consumer may reject
4 the Product because of the warning within thirty (30) days of the consumer's receipt of the
5 Product, (ii) if the consumer chooses to reject the Product, Oriental will make a full refund to the
6 consumer, including refunding all postage charges and any other charges the consumer paid; (iii)
7 in order to receive the refund the consumer only needs to contact Oriental at a toll-free number
8 or email address provided with the statement, and (iv) Oriental will pay any cost of returning the
9 Product. Oriental shall comply with all of the obligations that it undertakes pursuant to its
10 warning obligation under this Section 2.3.2.

11 **2.3.3 Suppliers Of Products Exceeding Lead Standards.** If the results of the
12 testing required pursuant to Section 2.3.1 show levels of Lead exceeding 600 ppm for a
13 Product's surface coating or substrate to which the coating is attached, Oriental shall: (1) refuse
14 to accept for sale in California any of the Product from the same supplier shipped to Oriental
15 under that particular production run; (2) ensure that the supplier is notified that the Product
16 contains lead exceeding 600 ppm; and (3) increase the testing sample size set forth in 2.3.1 for
17 the following year for that supplier from at least five randomly selected individual pieces of each
18 Product SKU to at least ten of such randomly selected individual pieces of each SKU.

19 **2.4 Confirmatory testing by CEH.** CEH may conduct periodic testing of the
20 Products. Any such testing will be conducted pursuant to the Test Protocol at an independent,
21 accredited laboratory. In the event that CEH's testing demonstrates Lead levels exceeding the
22 Reformulation Standard (for Products without a warning required under Section 2.3.2) or in
23 excess of 600 ppm for Products sold with the warning required under Section 2.3.2, CEH and
24 Oriental shall follow the procedure set forth in subsection 2.4.1.

25 **2.4.1 Confirmatory testing procedure.** In the event that CEH and Oriental are
26 required to comply with this subsection pursuant to Section 2.4, CEH shall inform Oriental of the
27 situation and provide it with the test results and any reasonably available information permitting
28 Oriental to identify the Product(s) and its supplier. Oriental shall, within twenty-one (21) days of

1 receipt of CEH's notice, provide CEH, at the address listed in Section 12, with its testing
2 information demonstrating its compliance with Section 2.3 of this Consent Judgment. If Oriental
3 fails to provide CEH with information demonstrating that it complied with Section 2.3, Oriental
4 shall be liable for stipulated payments in lieu of penalties, as set forth below, for Products for
5 which CEH produces tests demonstrating Lead levels in excess of the Reformulation Standard
6 (for Products without a warning required under Section 2.3.2) or in excess of 600 ppm for
7 Products sold with the warning required under Section 2.3.2. The payments shall be made to
8 CEH and used for the purposes described in Section 3.1.

9 **2.4.2 Stipulated Payments In Lieu of Penalties.** If stipulated payments in lieu
10 of penalties are warranted under Section 2.4, the stipulated payment amount to CEH shall be as
11 follows:

12	First Occurrence:	\$5,000
13	Second Occurrence:	\$10,000
14	Third Occurrence:	\$15,000
	Thereafter:	\$20,000

15 **3. SETTLEMENT PAYMENTS**

16 **3.1 Monetary Payment in Lieu of Penalty.** A total of \$10,000 shall be paid to CEH
17 by Oriental in lieu of any penalties to be levied against Oriental pursuant to Health and Safety
18 Code § 25249.7(b). CEH shall use such funds to continue its work protecting people from
19 exposures to toxic chemicals. As part of this work, CEH intends to conduct periodic testing of
20 the Products as set forth in Section 2.4.

21 **3.2 Attorneys' Fees and Costs.** A total of \$35,000 to be paid by Oriental to the
22 Lexington Law Group shall be used to reimburse CEH and its attorneys for their reasonable
23 investigation fees and costs, attorneys' fees, and any other costs incurred as a result of
24 investigating, bringing this matter to Oriental's attention, and litigating and negotiating a
25 settlement in the public interest.

26 **3.3 Timing of payments.** The payments required under this Section shall be
27 delivered to CEH's address as set forth in Section 12 below via a single check made payable to
28 Lexington Law Group, LLP within fifteen (15) days of receipt of notice of entry of this Consent

1 Judgment by the Court. Any failure by Oriental to comply with the payment terms in Sections
2 3.1 and 3.2 herein shall be subject to a stipulated late fee in the amount of \$100 for each day after
3 the delivery date the payment is received. The late fees required under this Section shall be
4 recoverable, together with reasonable attorneys' fees, in an enforcement proceeding brought
5 pursuant to Section 5 of this Consent Judgment.

6 **4. MODIFICATION OF CONSENT JUDGMENT**

7 4.1 This Consent Judgment may be modified by written agreement of CEH and
8 Oriental, or upon motion of CEH or Oriental as provided by law.

9 **5. ENFORCEMENT OF CONSENT JUDGMENT**

10 5.1 CEH may, by motion or application for an order to show cause before the
11 Superior Court of the County of San Francisco, enforce the terms and conditions contained in
12 this Consent Judgment. Prior to bringing any such motion or application, CEH must make a
13 good faith effort to meet and confer with Oriental in an effort to resolve any dispute. If CEH
14 prevails on any such motion or application to the Court, it shall be entitled to recover from
15 Oriental its reasonable attorneys' fees and costs, unless Oriental is able to demonstrate that it
16 acted with substantial justification in opposing such motion or application.

17 **6. APPLICATION OF CONSENT JUDGMENT**

18 6.1 This Consent Judgment shall apply to and be binding upon the Parties hereto,
19 their divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

20 **7. CLAIMS COVERED/RELEASE OF LIABILITY**

21 7.1 This Consent Judgment is a full, final and binding resolution between CEH,
22 acting on behalf of itself and the general public, and Oriental for any violation of Proposition 65
23 or any other statutory or common law claim that was or could have been asserted in the
24 Complaint against Oriental or its parents, subsidiaries, directors, officers, employees, attorneys,
25 downstream distributors, downstream retailers or customers (collectively, "Defendant
26 Releasees") based on failure to warn about exposure to Lead contained in any Products
27 manufactured, distributed or sold by Oriental on or prior to the date of entry of this Consent
28 Judgment. Compliance with this Consent Judgment by Oriental shall hereinafter constitute

1 compliance with Proposition 65 by Oriental and its Defendant Releasees with respect to Lead in
2 any of Oriental's Products. This release does not limit or affect the obligations of any party
3 created under this Consent Judgment.

4 **8. SEVERABILITY**

5 8.1 In the event that any of the provisions of this Consent Judgment are held by a
6 court to be unenforceable, the validity of the enforceable provisions shall not be adversely
7 affected.

8 **9. SPECIFIC PERFORMANCE**

9 9.1 The Parties expressly recognize that Oriental's obligations under this Consent
10 Judgment are unique. In the event that Oriental is found to be in breach of this Consent
11 Judgment for failure to comply with the provisions of Section 2 hereof, CEH, in addition to any
12 other available rights or remedies, may sue in equity for specific performance, and Oriental
13 expressly waives the defense that a remedy in damages will be adequate.

14 **10. GOVERNING LAW**

15 10.1 The terms of this Consent Judgment shall be governed by the laws of the State of
16 California.

17 **11. RETENTION OF JURISDICTION**

18 11.1 This Court shall retain jurisdiction of this matter to implement and enforce the
19 terms this Consent Judgment.

20 **12. PROVISION OF NOTICE**

21 12.1 All notices required pursuant to this Consent Judgment and correspondence shall
22 be sent to the following:

23
24 For CEH: Eric S. Somers
Lexington Law Group, LLP
25 1627 Irving Street
San Francisco, CA 94122

26 For Oriental: James L. Arnone
27 Latham & Watkins LLP
633 West Fifth Street, Suite 4000
28 Los Angeles, CA 90071-2007

1 Robert R. Siffring
2 David Reddel
3 Oriental Trading Company, Inc.
4 4206 S. 108th Street
5 Omaha, Nebraska 68137

6 **13. COURT APPROVAL AND PHASE OUT**

7 13.1 **Court Approval.** If this Consent Judgment is not approved by the Court, it shall
8 be of no further force or effect. The Parties agree to support a Motion for Approval of this
9 Consent Judgment.

10 13.2 **Phase Out.** Oriental shall no longer be required to comply with the obligations
11 contained in Sections 2.3 and 2.4 of this Consent Judgment once Oriental has accumulated two
12 consecutive years of compliance with the terms of this Consent Judgment, but in no event shall
13 Oriental's obligations under Sections 2.3 and 2.4 be less than five years following the date of
14 entry of this Consent Judgment by the Court (the "Phase Out Date"). Following the Phase Out
15 Date, the Parties shall follow the enforcement provisions set forth in Section 5 for any alleged
16 violations of this Consent Judgment.

17 **14. EXECUTION AND COUNTERPARTS**

18 14.1 The stipulations to this Consent Judgment may be executed in counterparts and by
19 means of facsimile, which taken together shall be deemed to constitute one document.

20 **15. AUTHORIZATION**

21 15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
22 by the party he or she represents to stipulate to this Consent Judgment and to enter into and
23 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.

24 The undersigned have read, understand and agree to all of the terms and conditions of this
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1 Consent Judgment. Except as expressly provided herein, each party is to bear its own fees and
2 costs.

3 AGREED TO:

4 CENTER FOR ENVIRONMENTAL HEALTH

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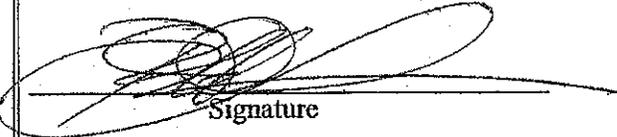
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7 Michael Green, Executive Director
Center for Environmental Health

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9 ORIENTAL TRADING COMPANY, INC.

10

11 
Signature

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13 Robert Harner
Printed Name

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15 VP Merchandising
Title

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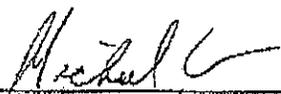
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1 Consent Judgment. Except as expressly provided herein, each party is to bear its own fees and
2 costs.

3 AGREED TO:

4 CENTER FOR ENVIRONMENTAL HEALTH

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7 Michael Green, Executive Director
8 Center for Environmental Health

9 ORIENTAL TRADING COMPANY, INC.

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11 _____
Signature

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13 _____
Printed Name

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Title

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9 [PROPOSED] CONSENT JUDGMENT AS TO
ORIENTAL TRADING COMPANY, INC.
CGC-05446289

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ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between the Parties, the settlement is approved and judgment is hereby entered according to the terms herein.

Dated: _____

Judge, Superior Court of the State of California

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EXHIBIT A

[Sample Warning Pursuant to Section 2.3.2]

WARNING: This product contains lead, a chemical known to the State of California to cause birth defects or other reproductive harm. If you wish to reject this product and receive a refund you may do so within thirty (30) days of receipt. In order to receive a refund, including shipping or other charges for this product, please contact Oriental Trading Company at 1-800-XXX-XXXX or send an email to XXXXXXX@oriental.com. Oriental Trading Company will pay any shipping costs of authorized returns of this product.