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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF MARIN**
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12 CENTER FOR ENVIRONMENTAL HEALTH,)
13 a non-profit corporation,)

14 Plaintiff,)

15 vs.)

16 FABRIC.COM, INC., *et al.*,)

17 Defendants.)
18

Case No. CIV-1102079

**[PROPOSED] CONSENT JUDGMENT
AS TO OSGOOD TEXTILE COMPANY,
INC.**

19 **1. INTRODUCTION**

20 1.1 This Consent Judgment is entered into by the Center For Environmental Health, a
21 California non-profit corporation (“**CEH**”) on the one hand, and Osgood Textile Company, Inc.
22 (“**Defendant**” or “**Osgood**”) on the other hand, to settle certain claims asserted by CEH against
23 Defendant as set forth in the operative complaint in the matter entitled *Center for Environmental*
24 *Health v. Fabric.com, Inc., et al.*, Marin County Superior Court Case No. CIV-1102079 (the
25 “**Action**”).

26 1.2 On March 25, 2011, CEH provided a “Notice of Violation of Proposition 65” to
27 the California Attorney General, the District Attorneys of every county in California, the City
28

1 Attorneys of every California city with a population greater than 750,000, and to Defendant
2 regarding the presence of lead and lead compounds (collectively referred to as “**Lead**”) in vinyl,
3 oilcloth or imitation leather fabric (“**Covered Products**”).

4 1.3 On June 23, 2011, CEH amended the operative complaint in the Action to name
5 Defendant as a party.

6 1.4 Defendant is a corporation that employs 10 or more persons, and that
7 manufactures, distributes and/or sells Covered Products in the State of California in the course of
8 doing business.

9 1.5 For purposes of this Consent Judgment only, CEH and Defendant (the “**Parties**”)
10 stipulate that this Court has jurisdiction over the allegations of violations contained in the
11 Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint, that
12 venue is proper in the County of Marin, and that this Court has jurisdiction to enter this Consent
13 Judgment as a full and final resolution of all claims which were or could have been raised in the
14 Complaint based on the facts alleged with respect to Covered Products manufactured, distributed,
15 and/or sold by Defendant.

16 1.6 CEH and Defendant enter into this Consent Judgment as a full and final settlement
17 of all claims that were raised in the Complaint, or which could have been raised in the Complaint,
18 arising out of the facts or conduct related to Defendant alleged in such Complaint. By execution
19 of this Consent Judgment and agreeing to comply with its terms, the Parties do not admit any
20 facts or conclusions of law including, but not limited to, any facts or conclusions of law
21 suggesting or demonstrating any violations of Proposition 65 or any other statutory, common law
22 or equitable requirements. Nothing in this Consent Judgment is or shall be construed as an
23 admission by the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall
24 compliance with the Consent Judgment constitute or be construed as an admission by the Parties
25 of any fact, conclusion of law, issue of law, or violation of law. Defendant denies the material,
26 factual and legal allegations in CEH’s Complaint and expressly denies any wrong doing
27 whatsoever. Nothing in this Consent Judgment shall prejudice, waive or impair any right,
28 remedy, argument or defense the Parties may have in this or any other pending or future legal

proceedings. This Consent Judgment is the product of negotiation and compromise and is entered into and accepted by the Parties solely for purposes of settling, compromising, and resolving issues disputed in the Action.

1.7 CEH acknowledges that Osgood is principally a retailer of the Covered Products, and not a manufacturer of such products. CEH has also named as Defendants in the Action two of Osgood's suppliers of the Covered Products. CEH has reached a settlement with Nassimi, LLC as to all products manufactured by Nassimi, LLC, including Nassimi products sold by Osgood, and the settlement payment by Nassimi included a payment for the products later sold by Osgood, and therefore the settlement amount described below reflects a credit in favor of Osgood for amounts to be paid by Nassimi.

1.8 CEH represents and warrants that, as of the date of its execution of this Consent Judgment, other than the violations alleged in the Notice as to the Covered Products, it: (a) has no current knowledge or information based upon any investigation or otherwise that Osgood is currently manufacturing, distributing, shipping, selling or offering for sale in California any product(s) that CEH believes is causing a violation of Proposition 65; and (b) that it has no present intention of filing suit or providing a 60-Day Notice to Defendant with respect to any other listed chemical under Proposition 65 with respect to the Covered Products.

2. INJUNCTIVE RELIEF

2.1 **Reformulation of Covered Products.** As of the date of entry of this Consent Judgment (the "**Effective Date**"), Defendant shall not manufacture, purchase, or import any Covered Product unless such Covered Product contains no more than 0.03 percent total Lead by weight (300 parts per million ("**ppm**")), as determined by the sample preparation method used in USEPA Method 3050 or 3050B followed by ICP/MS (Inductively coupled plasma-mass spectrometry) testing method 6020, as described in "SW846" – "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," Third Edition, Nov. 1986 and updates (<http://www.epa.gov/osw/hazard/testmethods/sw846/online/>). As of 120 days after the date of entry of this Consent Judgment, Defendant shall not distribute, ship, sell or offer for sale any Covered Product unless such Covered Product contains no more than .03 percent total Lead by

weight (300 ppm), as determined by the sample preparation method used in USEPA Method 3050 or 3050B followed by ICP/MS (Inductively coupled plasma-mass spectrometry) testing method 6020, as described in “SW846” – “Test Methods for Evaluating Solid Waste, Physical/Chemical Methods,” Third Edition, Nov. 1986 and updates.

2.2 **Certifications from Suppliers.** As of the Effective Date, Defendant shall obtain written certifications from its suppliers of Covered Products covering each shipment confirming that each Covered Product included in such shipment complies with the Lead Limits established by Section 2.1.

3. ENFORCEMENT

3.1 **Enforcement Procedures.** Prior to bringing any motion or order to show cause to enforce the terms of this Consent Judgment, any Party seeking to enforce shall provide the violating Party thirty (30) days advance written notice of the alleged violation. To the extent CEH alleges that Defendant has violated the requirements of Section 2.1 above, the notice from CEH shall include a description of the Covered Product giving rise to the alleged violation, including any item, lot or SKU numbers on the Covered Product and its packaging, labeling and receipt. The Parties shall meet and confer during such thirty (30) day period in an effort to try to reach agreement on whether a violation has occurred and an appropriate remedy for the alleged violation. After such thirty (30) day period, the Party seeking to enforce may, after meeting and conferring, by motion or application for an order to show cause before this Court, enforce the terms and conditions contained in this Consent Judgment.

4. PAYMENTS

4.1 **Payments From Defendant.** Within ten (10) days of the entry of this Consent Judgment, Defendant shall pay the total sum of \$15,000 as a settlement payment.

4.2 **Allocation of Payments.** The total settlement amount for Defendant shall be paid in three separate checks delivered to the offices of the Lexington Law Group (Attn: Howard Hirsch), 503 Divisadero Street, San Francisco, California 94117, and made payable and allocated as follows:

4.2.1 Defendant shall pay the sum of \$1,930 as a penalty pursuant to Health &

1 Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with
2 Health & Safety Code § 25249.12. The penalty check shall be made payable to the Center
3 For Environmental Health.

4 4.2.2 Defendant shall pay the sum of \$2,900 as payment to CEH in lieu of
5 penalty pursuant to Health & Safety Code § 25249.7(b), and California Code of
6 Regulations, Title 11, § 3202(b). CEH will use such funds to continue its work educating
7 and protecting people from exposures to toxic chemicals, including heavy metals. CEH
8 may also use a portion of such funds to monitor compliance with the reformulation
9 requirements of this and other similar Consent Judgments and to purchase and test
10 Covered Products to confirm compliance with such reformulation requirements. In
11 addition, as part of its *Community Environmental Action and Justice Fund*, CEH will use
12 four percent of such funds to award grants to grassroots environmental justice groups
13 working to educate and protect people from exposures to toxic chemicals. The method of
14 selection of such groups can be found at the CEH web site at www.ceb.org/justicefund.
15 The payment in lieu of penalty check shall be made payable to the Center for
16 Environmental Health.

17 4.2.3 Defendant shall pay the sum of \$10,170 as reimbursement of reasonable
18 attorneys' fees and costs. The attorneys' fees and cost reimbursement check shall be
19 made payable to the Lexington Law Group.

20 **5. MODIFICATION AND DISPUTE RESOLUTION**

21 5.1 **Modification.** This Consent Judgment may be modified from time-to-time by
22 express written agreement of the Parties, with the approval of the Court, or by an order of this
23 Court upon motion and in accordance with law.

24 5.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
25 shall, after thirty (30) days written notice to any other Party, attempt in good faith to meet and
26 confer with the other Party prior to filing a motion to modify the Consent Judgment.

27 **6. CLAIMS COVERED AND RELEASE**

28 6.1 This Consent Judgment is a full, final, and binding resolution between CEH and

1 Defendant and Defendant's parents, shareholders, divisions, subdivisions, subsidiaries, affiliated
2 entities under common or joint ownership, directors, officers, employees, and their successors and
3 assigns ("**Defendant Releasees**"), and all to whom they directly or indirectly distribute or sell
4 Covered Products including, but not limited to distributors, wholesalers, customers, retailers,
5 franchisees, cooperative members, licensors and licensees ("**Downstream Defendant**
6 **Releasees**"), of any violation of Proposition 65 or any other statutory or common law claims that
7 have been or could have been asserted against Defendant, Defendant Releasees, and/or
8 Downstream Defendant Releasees, based on (a) any exposure to Lead in any Covered Product, or
9 (b) the failure to warn about exposure to Lead arising in connection with any Covered Product
10 manufactured, distributed, or sold by Defendant prior to the Effective Date as set forth in the
11 "Notice of Violation" (collectively the "**CEH Claims**") and CEH expressly releases, waives and
12 forever discharges the Defendant, the Defendant Releasees and the Downstream Defendant
13 Releasees from with respect to all of the CEH Claims.

14 6.2 CEH, for itself and acting in the public interest pursuant to Health & Safety Code
15 § 25249.7(d), releases, waives, and forever discharges any and all claims against Defendant,
16 Defendant Releasees, and Downstream Defendant Releasees through the Effective Date arising
17 from any violation(s) of Proposition 65 that have been or could have been asserted in the public
18 interest regarding any exposure to Lead, including but not limited to violations alleging a failure
19 to warn, arising out of, relating to, or in connection with any Covered Product manufactured,
20 distributed or sold by Defendant prior to the Effective Date as set forth in the "Notice of
21 Violation."

22 6.3 Compliance with the terms of this Consent Judgment by Defendant constitutes
23 compliance with Proposition 65 by Defendant, the Defendant Releasees and their Downstream
24 Defendant Releasees with respect to any alleged failure to warn about any (a) exposures to Lead
25 in any Covered Product, and (b) alleged failure to warn about any exposure to Lead in any
26 Covered Product manufactured, distributed or sold by Defendant after the Effective Date, as set
27 forth in the Notice of Violation.
28

1 **7. PROVISION OF NOTICE**

2 7.1 When any Party is entitled to receive any notice under this Consent Judgment, the
3 notice shall be sent by (a) either certified mail, return receipt requested, or major overnight
4 delivery service, and (b) electronic mail as follows:

5 7.1.1 **Notices to Defendant.** The person for Defendant to receive Notices
6 pursuant to this Consent Judgment shall be:

7 Thomas N. FitzGibbon
8 Pfeiffer Thigpen FitzGibbon & Ziontz LLP
9 233 Wilshire Blvd., Suite 220
10 Santa Monica, California 90401
11 tom@ptfzlaw.com

12 7.1.2 **Notices to Plaintiff.** The person for CEH to receive Notices pursuant to
13 this Consent Judgment shall be:

14 Howard Hirsch
15 Lexington Law Group
16 503 Divisadero Street
17 San Francisco, CA 94117
18 hhirsch@lexlawgroup.com

19 7.2 Any Party may modify the person and address to whom the notice is to be sent by
20 sending the other Party advance written notice by any appropriate verifiable form of written
21 communication.

22 **8. COURT APPROVAL**

23 8.1 This Consent Judgment shall become effective on the date of entry of this Consent
24 Judgment, provided however, that CEH shall prepare and file a Motion for Approval of this
25 Consent Judgment and Defendant shall support approval of such Motion.

26 8.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
27 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
28 purpose.

29 **9. ATTORNEYS' FEES**

30 9.1 A Party who unsuccessfully brings or contests a motion or subsequent action or
31 proceeding based on and/or arising out of this Consent Judgment shall be required to pay the

1 prevailing Party's reasonable attorneys' fees and costs unless the unsuccessful Party has acted
2 with substantial justification. For purposes of this Consent Judgment, the term substantial
3 justification shall carry the same meaning as used in the California Civil Discovery Act in force
4 as of the date of this Consent Judgment.

5 9.2 Notwithstanding Section 9.1, a Party who prevails in a contested enforcement
6 action brought pursuant to this Consent Judgment may seek an award of attorneys' fees pursuant
7 to Code of Civil Procedure Section 1021.5 against a Party that acted with substantial justification.
8 The Party seeking such an award shall bear the burden of meeting all of the elements of Section
9 1021.5, and this provision shall not be construed as altering any procedural or substantive
10 requirements for obtaining such an award.

11 9.2 Nothing in this Section 9 shall preclude a party from seeking an award of sanctions
12 pursuant to law.

13 **10. GOVERNING LAW AND CONSTRUCTION**

14 10.1 The terms of this Consent Judgment shall be governed by the laws of the State of
15 California.

16 **11. ENTIRE AGREEMENT**

17 11.1 This Consent Judgment contains the sole and entire agreement and understanding
18 of the Parties with respect to its subject matter, and any and all prior discussions, negotiations,
19 commitments, or understandings related to it, if any, are merged into this Consent Judgment.
20 There are no warranties, representations, or other agreements between the Parties except as
21 expressly set forth in this Consent Judgment. No representations, oral or otherwise, express or
22 implied, other than those specifically referred to in this Consent Judgment have been made by any
23 Party. No other agreements not specifically contained or referenced in this Consent Judgment,
24 oral or otherwise, shall be deemed to exist or to bind any of the Parties. Any agreements
25 specifically contained or referenced in this Consent Judgment, oral or otherwise, shall be deemed
26 to exist or to bind any of the Parties only to the extent that they are expressly incorporated in this
27 Consent Judgment. No supplementation, modification, waiver, or termination of this Consent
28 Judgment shall be binding unless executed in writing by the Party to be bound. No waiver of any

1 of the provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of
2 the other provisions of this Consent Judgment whether or not similar, nor shall such waiver
3 constitute a continuing waiver.

4 **12. RETENTION OF JURISDICTION**

5 12.1 This Court shall retain jurisdiction of this matter to implement, modify or enforce
6 this Consent Judgment.

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

8 13.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
9 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
10 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

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

12 14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
13 against another entity on terms that are different than those contained in this Consent Judgment.

14 14.2 Nothing in this Consent Judgment shall release, or in any way affect any rights that
15 any Defendant may have against any other person or party to the Action, whether or not that party
16 is a Defendant, or has already entered into a settlement and/or Consent Judgment with CEH.

17 **15. EXECUTION IN COUNTERPARTS**

18 15.1 The stipulations to this Consent Judgment may be executed in counterparts and
19 transmitted by facsimile or electronic mail of an electronic file in portable document format
20 (PDF) to counsel for each Party, which taken together shall be deemed to constitute one
21 document.

22 **16. PREPARATION OF CONSENT JUDGMENT**

23 16.1 The Parties, including their counsel, have participated in the preparation of this
24 Consent Judgment and it is the result of the joint efforts of the Parties. This Consent Judgment
25 was subject to revision and modification by the Parties and has been accepted and approved in its
26 final form by all Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in
27 this Consent Judgment shall not be interpreted against any Party as a result of the manner of the
28 preparation of this Consent Judgment. Each Party to this Consent Judgment agrees that any

1 statute or rule of construction providing that ambiguities are to be resolved against the drafting
2 Party shall not be employed in the interpretation of this Consent Judgment and, in this regard, the
3 Parties waive California Civil Code Section 1654.

4
5 **IT IS SO STIPULATED:**

6
7 Dated: 8/22/12, 2012

CENTER FOR ENVIRONMENTAL HEALTH

8 

9
10 Signature

11
12 MICHAEL GREEN

13 Printed Name

14
15 EXECUTIVE DIRECTOR

16 Title

17
18 Dated: _____, 2012

OSGOOD TEXTILE COMPANY, INC.

19
20
21 By: _____
22 Mayer Kahan
23 Its: Secretary

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

26 Dated:

27 _____
28 JUDGE OF THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

1 statute or rule of construction providing that ambiguities are to be resolved against the drafting
2 Party shall not be employed in the interpretation of this Consent Judgment and, in this regard, the
3 Parties waive California Civil Code Section 1654.
4

5 **IT IS SO STIPULATED:**
6

7 Dated: _____, 2012

CENTER FOR ENVIRONMENTAL HEALTH

9
10 _____
Signature

11
12 _____
Printed Name

13
14 _____
Title

15
16
17
18 Dated: 8/21, 2012

OSGOOD TEXTILE COMPANY, INC.

19
20
21 By: 
Mayer Kahan
22 Its: Secretary

23
24 **IT IS SO ORDERED, ADJUDGED,**
25 **AND DECREED**

26 Dated:

27 _____
JUDGE OF THE SUPERIOR COURT OF THE
28 STATE OF CALIFORNIA