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

CENTER FOR ENVIRONMENTAL HEALTH,)	Case No. RG 10-514803
a non-profit corporation,)	
)	[PROPOSED] CONSENT JUDGMENT
Plaintiffs,)	AS TO SEARS, ROEBUCK AND CO.
)	
VS.)	
)	
AEROPOSTALE, INC., <i>et al.</i> ,)	
)	
Defendants.)	
)	
)	
)	

1. INTRODUCTION

1.1 This Consent Judgment is entered into by the Center for Environmental Health, a California non-profit corporation (“CEH”) and defendant Sears, Roebuck and Co. (“Settling Defendant”), to settle certain claims asserted by CEH against Settling Defendant as set forth in the operative complaint in the matter entitled *Center for Environmental Health v. Aeropostale, Inc., et al.*, Alameda County Superior Court Case No. RG 10-514803.

1.2 On April 21, 2011, CEH served a Notice of Violation under Proposition 65 alleging that Settling Defendant, along with other entities named in the notice, violated Proposition 65 by exposing persons to cadmium contained in jewelry, without first providing a clear and reasonable

1 warning pursuant to Proposition 65.

2 1.3 On April 8, 2011, CEH filed the operative Second Amended Complaint
3 (“Complaint”) in the *CEH v. Aeropostale* action. On July 20, 2011, CEH amended the Complaint
4 to name Settling Defendant as Doe 11.

5 1.4 Settling Defendant is a corporation that employs ten or more persons, and which
6 manufactures, distributes and/or sells Covered Products (as defined herein) in the State of
7 California.

8 1.5 For purposes of this Consent Judgment only, CEH and Settling Defendant (the
9 “Parties”) stipulate that this Court has jurisdiction over the allegations of violations contained in
10 the Complaint and personal jurisdiction over Settling Defendant as to the acts alleged in the
11 Complaint, that venue is proper in the County of Alameda, and that this Court has jurisdiction to
12 enter this Consent Judgment as a full and final resolution of all claims which were or could have
13 been raised in the Complaint based on the facts alleged therein with respect to Covered Products
14 manufactured, distributed, and/or sold by Settling Defendant.

15 1.6 CEH and Settling Defendant enter into this Consent Judgment as a full and final
16 settlement of all claims that were raised in the Complaint, or which could have been raised in the
17 Complaint, arising out of the facts or conduct related to Settling Defendant alleged therein. By
18 execution of this Consent Judgment and agreeing to comply with its terms, the Parties do not
19 admit any facts or conclusions of law including, but not limited to, any facts or conclusions of law
20 suggesting or demonstrating any violations of Proposition 65 (California Health & Safety Code
21 sections 25249.5, *et seq.*) or any other statutory, common law or equitable requirements relating to
22 cadmium in jewelry. Nothing in this Consent Judgment is or shall be construed as an admission
23 by the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance
24 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
25 conclusion of law, issue of law, or violation of law. Settling Defendant denies the material, factual
26 and legal allegations in CEH’s Complaint and expressly denies any wrong doing whatsoever.
27 Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy, argument or
28 defense the Parties may have in this or any other pending or future legal proceeding. This Consent

Judgment is the product of negotiation and compromise and is accepted by the Parties solely for purposes of settling, compromising and resolving issues disputed in this action.

2. DEFINITIONS

2.1 The term “Cadmium Limit” means a concentration of 0.03 percent (300 parts per million (“ppm”)) by weight cadmium in any component of a Covered Product, or in any material used in a Covered Product. The forgoing shall not apply to components of or materials used in Covered Products made from cubic zirconia (sometimes called cubic zirconium, CZ), glass, rhinestones or vitrified ceramics except where the Covered Products in question are subject to California Health & Safety Code section 25214.2(d).

2.2 The term “Covered Product” means (a) the following ornaments worn by a person: an anklet, arm cuff, bracelet, charm, brooch, chain, crown, cuff link, watch (excluding the timepiece itself if removable), decorated hair accessory, earring, necklace, pin, ring; similar clothing or shoe ornaments which are detachable; and body piercing jewelry; or (b) any bead, chain, link, pendant, or other component of such an ornament.

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

3. INJUNCTIVE RELIEF

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

3.1.1 **Specification Compliance Date.** To the extent it has not already done so, no more than 30 days after the Effective Date, Settling Defendant shall provide the Cadmium Limit to its suppliers of Covered Products and shall instruct each supplier to expeditiously provide Covered Products that do not exceed the Cadmium Limit on a nationwide basis.

3.1.2 **Cadmium Limit.** After the Effective Date, Settling Defendant shall not manufacture, purchase, import, sell or offer for sale in California any Covered Product that exceeds the Cadmium Limit.

3.2 **Market Withdrawal of Covered Products.** On or before the Effective Date, Settling Defendant shall: (i) cease shipping the specific products identified as Recall Products next

1 to its name on Exhibit A (the “Recall Products”), to stores and/or customers in California, (ii)
2 withdraw the Recall Products from the market in California, and (iii) if the Recall Products were
3 not withdrawn from sale in California prior to the Effective Date, send instructions to any of its
4 stores and/or customers that offer the Recall Products for sale in California to cease offering such
5 Recall Products for sale and to either return all Recall Products to Settling Defendant for
6 destruction, or to directly destroy the Recall Products. Any destruction of the Recall Products
7 shall be in compliance with all applicable laws. Within 60 days of the Effective Date, Settling
8 Defendant shall certify to CEH that it has complied with this Section 3.2. If there is a dispute over
9 the corrective action, the Parties shall meet and confer before seeking any remedy in court.

10 4. ENFORCEMENT

11 4.1 **General Enforcement Provisions.** CEH may, by motion or application for an
12 order to show cause before this Court, enforce the terms and conditions contained in this Consent
13 Judgment. Any action to enforce alleged violations of the Cadmium Limit by Settling Defendant
14 shall be brought exclusively pursuant to this Section 4.

15 4.2 **Enforcement of Materials Violation.**

16 4.2.1 **Notice of Violation.** In the event that, at any time following the Effective
17 Date, CEH identifies one or more Covered Products manufactured, distributed, or sold by Settling
18 Defendant that CEH believes in good faith exceed the Cadmium Limit, CEH may issue a Notice
19 of Violation pursuant to this Section.

20 4.2.2 **Service of Notice of Violation and Supporting Documentation.**

21 4.2.2.1 The Notice of Violation shall be sent to the person(s) identified in
22 Exhibit A to receive notices for Settling Defendant, and must be served within 75 days of the date
23 the Covered Product at issue was purchased or otherwise acquired by CEH, provided, however,
24 that CEH may have up to an additional 45 days to provide Settling Defendant with the test data
25 required by Section 4.2.2.2 below if it has not yet obtained it from its laboratory.

26 4.2.2.2 The Notice of Violation shall, at a minimum, set forth for each
27 Covered Product: (a) the date the alleged violation was observed, (b) the location at which the
28 Covered Product was offered for sale, (c) a description of the Covered Product giving rise to the

1 alleged violation, and (d) all test data obtained by CEH regarding the Covered Product and
2 supporting documentation sufficient for validation of the test results, including any laboratory
3 reports, quality assurance reports and quality control reports associated with testing of the Covered
4 Products. Such Notice of Violation shall be based upon total acid digest test data from an
5 independent laboratory. Wipe, swipe, and swab testing are not sufficient to support a Notice of
6 Violation.

7 4.2.2.3 CEH shall promptly make available for inspection and/or copying
8 upon request by and at the expense of Settling Defendant, any supporting documentation related to
9 the testing of the Covered Products and associated quality control samples, including chain of
10 custody records, all laboratory logbook entries for laboratory receiving, sample preparation, and
11 instrumental analysis, and all printouts from all analytical instruments relating to the testing of
12 Covered Product samples and any and all calibration tests performed or relied upon in conjunction
13 with the testing of the Covered Products, obtained by or available to CEH that pertains to the
14 Covered Product's alleged exceedance of the Cadmium Limit, and, if available, any exemplars of
15 Covered Products tested.

16 4.2.3 **Notice of Election of Response.** No more than 30 days after service of a
17 Notice of Violation, Settling Defendant shall provide written notice to CEH whether it elects to
18 contest the allegations contained in a Notice of Violation ("Notice of Election"). Failure to
19 provide a Notice of Election within 30 days of service of a Notice of Violation shall be deemed an
20 election to contest the Notice of Violation.

21 4.2.3.1 If a Notice of Violation is contested, the Notice of Election shall
22 include all then-available documentary evidence regarding the alleged violation, including all test
23 data, if any. If Settling Defendant or CEH later acquires additional test or other data regarding the
24 alleged violation, it shall notify the other party and promptly provide all such data or information
25 to the party. Any test data used to contest a Notice of Violation shall meet the criteria of Section
26 4.2.2.2.

27 4.2.4 **Meet and Confer.** If a Notice of Violation is contested, CEH and Settling
28 Defendant shall meet and confer to attempt to resolve their dispute. Within 30 days of serving a

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

11 **4.2.5 Non-Contested Matters.** If Settling Defendant elects not to contest the
12 allegations in a Notice of Violation, it shall undertake corrective action pursuant to Section 4.2.6
13 and shall make any payments required by Section 4.2.7.

14 **4.2.6 Corrective Action in Non-Contested Matters.** If Settling Defendant
15 elects not to contest the allegation, it shall include in its Notice of Election a detailed description
16 with supporting documentation of the corrective action that it has undertaken or proposes to
17 undertake to address the alleged violation. Any such correction shall, at a minimum, provide
18 reasonable assurance that the Covered Product will no longer be offered for sale in California.
19 Corrective action must include instructions to Settling Defendant's stores and/or its customers that
20 offer the Covered Product for sale to consumers to cease offering the Covered Product(s)
21 identified in the Notice of Violation for sale in California as soon as practicable. The Notice of
22 Election shall also include the name, address, telephone number, and other contact information, of
23 Settling Defendant's supplier(s) of each Covered Product identified in the Notice of Violation and
24 any retailers to whom Settling Defendant sold any Covered Product(s) identified in the Notice of
25 Violation. Settling Defendant shall make available to CEH for inspection and/or copying records
26 and correspondence regarding the corrective action. If there is a dispute over the corrective action,
27 the Parties shall meet and confer pursuant to Section 4.2.4 before seeking any remedy in court.
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1 **4.2.7 Payments in Non-Contested Matters.** In addition to the corrective
2 action, Settling Defendant shall be required to make a payment as reimbursement for costs for
3 investigating, preparing, sending and prosecuting Notices of Violation, and to reimburse
4 attorneys' fees and costs incurred in connection with these activities, as specified below:

5 **4.2.7.1** If Settling Defendant previously received a Notice of Violation that
6 was not successfully contested or withdrawn, and Settling Defendant serves a Notice of Election
7 not to contest the allegations in the instant Notice of Violation, it shall be required to make a
8 payment of \$10,000, unless the instant Notice of Violation was issued within one year after the
9 Effective Date, in which case there shall be no mandatory payment under this Section. Any
10 \$10,000 payment shall, however, be reduced to \$5,000 if Settling Defendant produces with its
11 Notice of Election test data showing that the Covered Product that is the subject of the Notice of
12 Violation did not exceed the Cadmium Limit. For purposes of this Section 4.2.7.1 only, "test
13 data" shall mean (i) total cadmium by acid digest performed by an accredited laboratory on the
14 Covered Product alleged to be in violation of the Cadmium Limit where the test was conducted
15 within one year prior to the date the Covered Product that is the subject of the Notice of Violation
16 was purchased or obtained by CEH; or (ii) total cadmium by X-ray fluorescence (XRF) performed
17 on the Covered Product alleged to be in violation of the Cadmium Limit by Settling Defendant
18 pursuant to an existing written screening policy for cadmium in Covered Products where the test
19 was conducted within eighteen months prior to the date the Covered Product that is the subject of
20 the Notice of Violation was purchased or obtained by CEH.

21 **4.2.7.2** The payment shall be made by check payable to the "Lexington Law
22 Group" and shall be paid within 15 days of service of a Notice of Election triggering a payment.

23 **4.2.8 Repeat Violations.** If Settling Defendant has received three or more
24 Notices of Violation that were not successfully contested or withdrawn in any 12-month period
25 then, at CEH's option, CEH may seek whatever fines, costs, penalties, attorneys' fees or other
26 remedies that are provided by law for failure to comply with the Consent Judgment. Prior to
27 seeking such relief, CEH shall meet and confer with Settling Defendant for a period not to exceed
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30 days (unless extended by mutual agreement) to determine if the Parties can agree on measures Settling Defendant can undertake to prevent future violations.

5. PAYMENTS

5.1 Payments From Settling Defendant. Within five (5) days of entry of this Consent Judgment, Settling Defendant shall pay the amount set forth as a settlement payment on Exhibit A, as further specified in Section 5.2 below.

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

5.2.1 Settling Defendant shall pay the amount designated on Exhibit A as a Penalty pursuant to Health & Safety Code §25249.7(b,) to be apportioned in accordance with California Health & Safety Code §25249.12(c) & (d), with 75% of these funds remitted to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to CEH. Accordingly, the penalty payment check for the amount designated on Exhibit A as Civil Penalty shall be made payable to the "Center for Environmental Health" and associated with taxpayer identification number 94-3251981.

5.2.2 Settling Defendant shall also separately pay to CEH the amount designated on Exhibit A as Payment In Lieu of Civil Penalty pursuant to Health & Safety Code §25249.7(b), and California Code of Regulations, Title 11, §3202(b). CEH will restrict the use of such funds to the following purposes: (a) monitoring compliance with the reformulation requirements of this and other similar Consent Judgments; (b) purchasing and testing jewelry; (c) preparing and compiling the information and documentation necessary to support enforcement efforts under this Consent Judgment; (d) contributions to CEH's Community Environmental Action and Justice Fund; and (e) supporting CEH programs and activities that seek to reduce the public health impacts or risks of exposure to heavy metals, including cadmium, known to the State of California to cause cancer or reproductive harm. Such programs and activities currently include (i) CEH's membership on the ASTM toy safety committee and participation in a workgroup that is drafting a

1 standard to limit cadmium and other heavy metals in toys; (ii) CEH's work in support of policy
2 initiatives at the state and federal level to restrict the use of cadmium and other heavy metals in
3 consumer products; and (iii) CEH's advocacy for a reduction in the use of toxic chemicals,
4 including heavy metals such as cadmium, in electronic devices and standards for the
5 disposal/recycling of such products, including CEH's participation in an EPA-sponsored multi-
6 stakeholder workgroup seeking to set standards for the design, manufacture, sale, labeling and
7 disposal of televisions and printers. CEH will maintain records that document how these funds
8 were spent. As part of its Community Environmental Action and Justice Fund, CEH will use four
9 percent of such funds to award grants to grassroots environmental justice groups working to
10 educate and protect people from exposures to toxic chemicals. The method of selection of such
11 groups can be found at the CEH web site at www.ceh.org/justicefund. The payment in lieu of
12 penalty check shall be made payable to the "Center For Environmental Health" and associated
13 with taxpayer identification number 94-3251981.

14 5.2.3 Settling Defendant shall also separately pay to the Lexington Law Group
15 the amount designated for Settling Defendant on Exhibit A as Attorneys' Fees and Costs
16 Reimbursement as reimbursement for a portion of reasonable attorneys' fees and costs. The
17 attorneys' fees and cost reimbursement check shall be made payable to the "Lexington Law
18 Group" and associated with taxpayer identification number 94-3317175.

19 6. MODIFICATION AND DISPUTE RESOLUTION

20 6.1 **Modification.** This Consent Judgment may be modified from time to time by
21 express written agreement of the Parties with the approval of the Court, or by an order of this
22 Court upon motion and in accordance with law.

23 6.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
24 shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
25 modify the Consent Judgment.

26 7. CLAIMS COVERED AND RELEASE

27 7.1 This Consent Judgment is a full, final, and binding resolution between CEH acting
28 in the public interest and Settling Defendant and Settling Defendant's parents, shareholders,

1 subsidiaries and their successors and assigns (“Defendant Releasees”), and all entities other than
2 those entities listed on Exhibit B to whom they distribute or sell Covered Products including, but
3 not limited to, distributors, wholesalers, customers, retailers, franchisees, cooperative members,
4 and licensees (“Downstream Defendant Releasees”), of any violation of Proposition 65 up through
5 the Effective Date based on the failure to warn about exposure to cadmium in the Covered
6 Products manufactured, distributed, or sold by Settling Defendant prior to the Effective Date as set
7 forth in the Notice of Violation.

8 7.2 CEH, for itself releases, waives, and forever discharges any and all claims against
9 Settling Defendant, Defendant Releasees, and Downstream Defendant Releasees arising from any
10 violation of Proposition 65 or any other statutory or common law claims that have been or could
11 have been asserted in the public interest regarding the failure to warn about exposure to cadmium
12 arising in connection with Covered Products manufactured, distributed or sold by Settling
13 Defendant prior to the Effective Date.

14 7.3 Compliance with the terms of this Consent Judgment by Settling Defendant and the
15 Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant, the
16 Defendant Releasees and the Downstream Defendant Releasees with respect to any alleged failure
17 to warn about cadmium in Covered Products manufactured, distributed or sold by Settling
18 Defendant after the Effective Date.

19 8. PROVISION OF NOTICE

20 8.1 When any Party is entitled to receive any notice under this Consent Judgment, the
21 notice shall be sent by first class and electronic mail as follows:

22 8.1.1 **Notices to Settling Defendant.** The person(s) for Settling Defendant to
23 receive Notice pursuant to this Consent Judgment are identified on Exhibit A.

24 8.1.2 **Notices to Plaintiff.** The person for CEH to receive Notices pursuant to
25 this Consent Judgment shall be:

26 Eric S. Somers
27 Lexington Law Group
28 503 Divisadero Street
 San Francisco, CA 94117

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

9. COURT APPROVAL

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

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

10. GOVERNING LAW AND CONSTRUCTION

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

11. ENTIRE AGREEMENT

11.1 This Consent Judgment contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged herein 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, shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto only to the extent that they are expressly incorporated herein. No supplementation, modification, waiver, or termination of this Consent Judgment shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

1 12. RETENTION OF JURISDICTION

2 12.1 This Court shall retain jurisdiction of this matter to implement, enforce or modify
3 the Consent Judgment.

4 13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT

5 13.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
6 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
7 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

8 14. NO EFFECT ON OTHER SETTLEMENTS

9 14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
10 against any other entity on terms that are different than those contained in this Consent Judgment.

11 15. EXECUTION IN COUNTERPARTS

12 15.1 The stipulations to this Consent Judgment may be executed in counterparts and by
13 means of facsimile, which taken together shall be deemed to constitute one document.

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

17 Dated:

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Judge of the Superior Court of the State of California

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20 **IT IS SO STIPULATED:**
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Concepcion Pizarro

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Associate Director

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SEARS, ROEBUCK AND CO.



LANCE FRANKE

Printed Name

Asst. General Counsel

Title

EXHIBIT A

1. Section 3.2 Recall Products:

Canyon River Blues Multi-Strand Necklace, SKU No. 7-98031-18440-9,
Item No. 22255199

Apostrophe Necklace with Green and Brown Beads, SKU No. 8-85043-20219-8,
Item No. 24996199

2. Settling Defendant's Settlement Payment and Allocation:

Total Settlement Payment	\$55,000
Civil Penalty	\$7,270
Payment in Lieu of Civil Penalty	\$10,900
Attorneys' Fees and Costs	\$36,830

3. Person to Receive Notice for Settling Defendant:

Michael J. Steel
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105-2482
msteel@mofo.com

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EXHIBIT B

List of Entities Not Subject to Downstream Release

- Amazon.com, Inc.
- Any Time Costumes.com, Inc.
- Artini Accessories Inc.
- Athenian Fashions, Inc.
- Basic
- Beadniks
- Bien Bien, Inc.
- BuySeasons, Inc.
- C2:8
- California Dream Co., Inc.
- Creativity, Inc. and Creativity Crafts, Inc.
- Crystal Mania
- DCWV Acquisition Corporation
- Fashion Fantasia, Inc.
- Fashion Plaza
- First Fantasies-Costume Cuzzins, Inc.
- Gags and Games, Inc.
- Halloween Express
- Hollywood Accessories
- INVU Accessories
- Joppa, Inc.
- Kerissa Creations, Inc.
- LB's Fashion, Inc.
- Love Culture Inc. and Love Culture LLC
- M&P Central, Inc.

- 1 • Metropark USA, Inc.
- 2 • Michaels Stores, Inc.
- 3 • Nima Accessories, Inc.
- 4 • NY Style
- 5 • Pink Ice, Inc.
- 6 • Saum Accessories Inc.
- 7 • Simply You
- 8 • Toynk Toys, LLC
- 9 • Unbeatable Sale.Com Inc.
- 10 • Urban Brands, Inc.
- 11 • Walgreen Company
- 12 • Wal-Mart Stores Inc.
- 13 • Western Fashion, Inc.
- 14 • Westrim, Inc.
- 15 • Windsor Fashions, Inc.
- 16 • Xpose
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