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16 Attorneys for Defendant  
17 KERUSSO ACTIVEWEAR, INC.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF CONTRA COSTA  
UNLIMITED CIVIL JURISDICTION

WHITNEY R. LEEMAN, Ph.D.,

Plaintiff,

v.

KERUSSO ACTIVEWEAR, INC., and DOES 1-  
150, inclusive,

Defendants.

Case No. C14-00853

**[PROPOSED]**  
**CONSENT JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Whitney R. Leeman, Ph.D.  
4 (“Leeman”), and defendant, Kerusso Activewear, Inc. (“Kerusso”), with Leeman and Kerusso each  
5 referred to individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Leeman is an individual residing in California who seeks to promote awareness of exposures  
8 to toxic chemicals and improve human health by reducing or eliminating hazardous substances  
9 contained in consumer products.

10 **1.3 Defendant**

11 Kerusso employs ten or more persons and is a person in the course of doing business for  
12 purposes of The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &  
13 Safety Code § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Leeman alleges that Kerusso has manufactured, imported, distributed, sold and/or offered for  
16 sale in California, keycovers with vinyl/PVC materials containing di(2-ethylhexyl)phthalate  
17 (“DEHP”). DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California  
18 to cause birth defects and other reproductive harm. Kerusso denies Leeman’s claims and maintains  
19 that Proposition 65 warnings are not required for the Products (as hereinafter defined).

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as keycovers with  
22 vinyl/PVC materials including, but not limited to, *Kerusso Two-Sided Keycovers, Smile, KEYC102,*  
23 *UPC #6 12978 91480 9, #6 12978 80399 8, and Guitar, KEYC108, UPC #6 12978 91480 9, #6*  
24 *12978 80399 8, manufactured, imported, distributed, sold and/or offered for sale by Kerusso in*  
25 *California, hereinafter “Products.”*

26 **1.6 Notice of Violation**

27 On December 30, 2013, Leeman served Kerusso and various public enforcement agencies  
28 with a document entitled “60-Day Notice of Violation” (“Notice”) that provided the recipients with

1 notice of the claim that Kerusso was in violation of California Health & Safety Code § 25249.6 for  
2 failing to warn consumers that its Products exposed users in the State of California to DEHP. No  
3 public enforcer has diligently prosecuted the allegations set forth in the Notice.

#### 4 **1.7 Complaint**

5 On May 14, 2014, Leeman filed a First Amended Complaint in the above captioned action  
6 (“Complaint”) against Kerusso for the alleged violations of Health & Safety Code § 25249.6 that are  
7 the subject of the Notice.

#### 8 **1.8 No Admission**

9 Kerusso denies the material, factual, and legal allegations contained in the Notice and  
10 Complaint, and maintains that all of the products that it has sold in California, including the Products,  
11 have been, and are, in compliance with all federal, state, or local laws. Nothing in this Consent  
12 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or  
13 violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an  
14 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This section shall  
15 not, however, diminish or otherwise affect Kerusso’s obligations, responsibilities, and duties under  
16 this Consent Judgment.

#### 17 **1.9 Consent to Jurisdiction**

18 For purposes of this Consent Judgment only, the Parties stipulate that the Court has  
19 jurisdiction over Kerusso as to the allegations in the Complaint, that venue is proper in Contra Costa  
20 County, and that the Court has jurisdiction to enter and enforce the provisions of this Consent  
21 Judgment.

#### 22 **1.10 Execution Date**

23 For purposes of this Consent Judgment, the term “Execution Date” shall mean the date the  
24 Consent Judgment is signed by all Parties.

#### 25 **1.11 Effective Date**

26 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date the  
27 Consent Judgment is approved by the Court.  
28

1 **2. INJUNCTIVE RELIEF: REFORMULATION**

2 Commencing on the Effective Date, any Products that Kerusso sells in California, distributes  
3 for sale in California, or ships to California shall be Reformulated Products as defined in Section  
4 2.1.

5 **2.1 Reformulation Standards**

6 Reformulated Products are defined as Products containing concentrations less than 0.1 percent  
7 (1000 parts per million) of DEHP, di-n-butyl (“DBP”) and butyl benzyl phthalate (“BBP”) when  
8 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and  
9 8270C, or equivalent methodologies utilized by federal or state agencies for the purpose of  
10 determining phthalate content in a solid substance. By entering into this Consent Judgment, the  
11 Parties do not intend to expand or restrict any obligations or responsibilities that may be imposed  
12 upon Kerusso by laws other than Proposition 65, nor do the Parties intend this Consent Judgment to  
13 affect any defenses available to Kerusso under laws other than Proposition 65.

14 **2.2 Vendor Notification Requirement**

15 If Kerusso distributes or sells in California any Products after the Execution Date, prior to  
16 such sale or distribution, Kerusso shall provide the reformulation standards specified in section 2.1  
17 for Reformulated Products to any and all of its vendors of Products. For purposes of this Settlement  
18 Agreement, the term “Vendor(s)” means a person or entity that manufactures, imports, distributes,  
19 sells, or otherwise supplies the Products or component parts of the Products to Kerusso, its parents,  
20 assignees, subsidiaries and/or affiliated entities under common ownership.

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1 **3. MONETARY PAYMENTS**

2 **3.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

3 In settlement of all the claims referred to in this Consent Judgment, Kerusso shall pay a total  
4 of \$19,500 in civil penalties in accordance with this Section. Each penalty payment will be allocated  
5 in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds  
6 remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the  
7 remaining 25% of the penalty remitted to Leeman, as follows:

8 3.1.1 **Initial Civil Penalty.** Within five (5) days of the Effective Date, Kerusso shall  
9 pay an initial civil penalty in the amount of \$4,500, in two separate checks made payable as follows:

10 (a) “OEHHA” in the amount of \$3,375; and (b) “Whitney Leeman, Client Trust Account” in the  
11 amount of \$1,125. All penalty payments shall be delivered to the addresses listed in Section 3.3  
12 below.

13 3.1.2 **Final Civil Penalty.** On or before November 1, 2014, or within five (5) days  
14 of the Effective Date, whichever is later, Kerusso shall pay a final civil penalty of \$15,000, in two  
15 separate checks for made payable as follows: (a) “OEHHA” in the amount of \$11,250; and (b)  
16 “Whitney Leeman, Client Trust Account” in the amount of \$3,750. The final civil penalty shall be  
17 waived in its entirety, however, if, no later than October 15, 2014, an officer of Kerusso provides  
18 Leeman with written certification that, as of the Execution Date and continuing into the future,  
19 Kerusso has complied with the requirements of Section 2.1 above. The certification in lieu of a final  
20 civil penalty payment provided by this Section is a material term, and time is of the essence.

21 **3.2 Reimbursement of Leeman’s Fees and Costs**

22 The Parties acknowledge that Leeman and her counsel offered to resolve this dispute without  
23 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue  
24 to be resolved after the material terms of the agreement had been settled. Shortly after all other  
25 settlement terms had been finalized, the Parties then attempted to (and did) reach an accord on the  
26 compensation due Leeman and her counsel under general contract principles and the private attorney  
27 general doctrine codified at California Code of Civil Procedure § 1021.5 for all work performed in  
28 this matter exclusive of fees and costs incurred on appeal, if any. Under these legal principles,

1 Kerusso shall pay \$29,000 for fees and costs incurred investigating, litigating, and enforcing this  
2 matter, including the fees and costs incurred (and to be incurred) drafting, negotiating, and obtaining  
3 the Court’s approval of this Consent Judgment in the public interest. Kerusso shall deliver the  
4 payment required in this Section 3.2 within five (5) days after the Effective Date to the address  
5 listed in Section 3.3.1(a) below, and the payment shall be made payable to The Chanler Group.

6 **3.3 Payment Procedures**

7 **3.3.1 Issuance of Payments.**

8 (a) All payments owed to Plaintiff and her counsel, pursuant to Sections  
9 3.1 and 3.2 shall be delivered to the following payment address:

10 The Chanler Group  
11 Attn: Proposition 65 Controller  
12 2560 Ninth Street  
13 Parker Plaza, Suite 214  
14 Berkeley, CA 94710

15 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to  
16 Sections 3.1 and 3.2 shall be delivered directly to OEHHA (Memo line “Prop 65 Penalties”) at one of  
17 the following addresses, as appropriate:

18 For United States Postal Service Delivery:

19 Mike Gyurics  
20 Fiscal Operations Branch Chief  
21 Office of Environmental Health Hazard Assessment  
22 P.O. Box 4010  
23 Sacramento, CA 95812-4010

24 For Non-United States Postal Service Delivery:

25 Mike Gyurics  
26 Fiscal Operations Branch Chief  
27 Office of Environmental Health Hazard Assessment  
28 1001 I Street  
Sacramento, CA 95814

3.3.2 Proof of Payment to OEHHA. A copy of each check payable to OEHHA shall  
be mailed, simultaneous with payment, to The Chanler Group at the address set forth in Section  
3.3.1(a) above, as proof of payment to OEHHA.

1 **5. CLAIMS COVERED AND RELEASED**

2 **5.1 Leeman’s Release of Proposition 65 Claims**

3 This Consent Judgment is a full, final and binding resolution as set forth in this Section 5.  
4 Leeman on behalf of herself, her past and current agents, representatives, attorneys, successors,  
5 and/or assignees, and acting in a representative capacity in the public interest pursuant to Health &  
6 Safety Code § 25249.7(d), releases and waives all claims, causes of actions suits, liabilities,  
7 demands, obligations, damages, costs, fines, penalties, expenses (including, but not limited to,  
8 investigation fees, and attorneys’ fees) or losses (collectively, “Claims”) against Kerusso and its  
9 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,  
10 attorneys, and each person or entity to whom Kerusso distributes or sells the Products, including,  
11 but not limited to, Kerusso’s downstream distributors, wholesalers, customers, retailers (including,  
12 but not limited to, Six Flags Theme Parks, Inc.) franchisors, franchisees, cooperative members,  
13 licensors, and licensees (collectively, “Releasees”) arising under Proposition 65 based on alleged  
14 exposures to DEHP from Products sold or distributed by Kerusso before the Effective Date as set  
15 forth in the Notice. Compliance with the terms of this Consent Judgment constitutes compliance  
16 with Proposition 65 with respect to exposures to DEHP from the Products sold or distributed by  
17 Kerusso after the Effective Date.

18 Leeman, in her individual capacity on behalf of herself, her past and current agents,  
19 representatives, attorneys, successors, and/or assignees, and *not* in her representative capacity, also  
20 releases and waives all Claims against Releasees which shall be effective as a full and final accord  
21 and satisfaction as a bar to all Claims of Leeman of any nature, character or kind, whether known or  
22 unknown, suspected or unsuspected, arising out of alleged or actual exposures to DEHP, DBP or  
23 BBP in the Products imported, manufactured, sold or distributed for sale by Kerusso before the  
24 Effective Date.

25 **5.2 Kerusso’s Release of Leeman**

26 Kerusso on behalf of itself, its past and current agents, representatives, attorneys, successors,  
27 and/or assignees, hereby waives any and all claims against Leeman, her attorneys and other  
28 representatives, for any and all actions taken or statements made (or those that could have been

1 taken or made) by Leeman and her attorneys and other representatives, whether in the course of  
2 investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with  
3 respect to the Products.

4 **6. COURT APPROVAL**

5 This Consent Judgment is not effective until it is approved and entered by the Court and shall  
6 be null and void if, for any reason, it is not approved and entered by the Court within one year after it  
7 has been fully executed by all Parties. In the event that the Consent Judgment is not approved and  
8 entered by the Court as specified in this Section, Leeman shall return all settlement payments made  
9 by Kerusso within fifteen (15) days' written notice by Kerusso.

10 **7. SEVERABILITY**

11 If, subsequent to the execution of this Consent Judgment, any provision is Leeman by a court  
12 to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

13 **8. GOVERNING LAW**

14 The terms of this Consent Judgment shall be governed by the laws of the State of California  
15 and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise  
16 rendered inapplicable by reason of law generally, or if any of the provisions of this Settlement  
17 Agreement are rendered inapplicable or no longer required as a result of any such repeal or  
18 preemption or rendered inapplicable by reason of law generally as to the Products, then Kerusso shall  
19 provide written notice to Leeman of any asserted change in the law, and shall have no further  
20 obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products  
21 are so affected.

22 **9. NOTICES**

23 Unless specified herein, all correspondence and notices required to be provided pursuant to  
24 this Settlement Agreement shall be in writing and (i) personally delivered, (ii) sent by first-class  
25 (registered or certified mail) return receipt requested, or (iii) sent by overnight courier, to one Party  
26 by the other Party at the following addresses:  
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1 For Kerusso:

For Leeman:

2 Victor Kennett, President  
3 Kerusso Activewear, Inc.  
4 402 Highway 62 Spur  
Berryville, AR 72616

Proposition 65 Coordinator  
The Chanler Group  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710-2565

5 With a copy on behalf of Kerusso to:

6 Sarah Esmaili  
7 Arnold & Porter LLP  
Three Embarcadero Center, 10th Floor  
San Francisco, CA 94111

8 Any Party, from time to time, may specify in writing to the other Party a change of address to which  
9 all notices and other communications shall be sent.

10 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

11 This Consent Judgment may be executed in counterparts and by facsimile or pdf signature,  
12 each of which shall be deemed an original, and all of which, when taken together, shall constitute one  
13 and the same document.

14 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

15 Leeman agrees to comply with the reporting form requirements referenced in California  
16 Health & Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to California  
17 Health & Safety Code § 25249.7(f)(4), a noticed motion by Leeman is required to obtain judicial  
18 approval of the settlement. In furtherance of obtaining such approval, Leeman and Kerusso agree to  
19 mutually employ their best efforts, and those of their counsel, to support the entry of this agreement  
20 as a Consent Judgment and to obtain judicial approval of the settlement in a timely manner. For  
21 purposes of this section, “best efforts” shall include, at a minimum, cooperating on the drafting and  
22 filing of the necessary moving papers and supporting the motion for judicial approval.

23 **11. MODIFICATION**

24 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and  
25 upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or  
26 application of any Party and the entry of a modified consent judgment by the Court.

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**12. AUTHORIZATION**

The undersigned are authorized to execute this Consent Judgment and have read, understood, and agree to all of the terms and conditions contained herein.

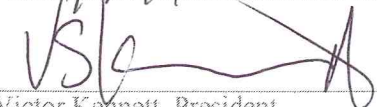
**AGREED TO:**

Date: 9/2/14

By:   
Whitney R. Letman, Ph.D.

**AGREED TO:**

Date: 9/4/14

By:   
Victor Kennett, President  
Kerusso Activewear, Inc.