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

CENTER FOR ENVIRONMENTAL)	Case No. RG 16-837582
HEALTH, a non-profit corporation,)	
)	[PROPOSED] CONSENT JUDGMENT
Plaintiffs,)	AS TO KELLWOOD COMPANY, LLC
)	
VS.)	
)	
KELLWOOD COMPANY, LLC, <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 Kellwood Company, LLC (“Defendant”), to settle certain claims asserted by CEH against Defendant as set forth in the operative complaint in the matter entitled *Center for Environmental Health v. Kellwood Company, LLC, et al.*, Alameda County Superior Court Case No. RG 16-837582.

1.2 On July 27, 2016, CEH served a Notice of Violation under Proposition 65 alleging that Defendant, along with other entities named in the notice, violated Proposition 65 by exposing persons to cadmium contained in necklaces, without first providing a clear and reasonable warning

1 pursuant to Proposition 65.

2 1.3 Defendant is a corporation that employs ten or more persons, and which
3 manufactures, distributes and/or sells Covered Products (as defined herein) in the State of
4 California.

5 1.4 For purposes of this Consent Judgment only, CEH and Defendant (the “Parties”)
6 stipulate that this Court has jurisdiction over the allegations of violations contained in the
7 Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint, that
8 venue is proper in the County of Alameda, and that this Court has jurisdiction to enter this
9 Consent Judgment as a full and final resolution of all claims which were or could have been raised
10 in the Complaint based on the facts alleged therein with respect to Covered Products
11 manufactured, distributed, and/or sold by Defendant.

12 1.5 CEH and Defendant enter into this Consent Judgment as a full and final settlement
13 of all claims that were raised in the Complaint, or which could have been raised in the Complaint,
14 arising out of the facts or conduct related to Defendant alleged therein. By execution of this
15 Consent Judgment and agreeing to comply with its terms, the Parties do not admit any facts or
16 conclusions of law including, but not limited to, any facts or conclusions of law suggesting or
17 demonstrating any violations of Proposition 65 (California Health & Safety Code sections
18 25249.5, *et seq.*) or any other statutory, common law or equitable requirements relating to
19 cadmium in jewelry. Nothing in this Consent Judgment is or shall be construed as an admission
20 by the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance
21 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
22 conclusion of law, issue of law, or violation of law. Defendant denies the material, factual and
23 legal allegations in CEH’s Complaint and expressly denies any wrong doing whatsoever. Nothing
24 in this Consent Judgment shall prejudice, waive or impair any right, remedy, argument or defense
25 the Parties may have in this or any other pending or future legal proceedings. This Consent
26 Judgment is the product of negotiation and compromise and is accepted by the Parties solely for
27 purposes of settling, compromising, and resolving issues disputed in this action.
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1 **2. DEFINITIONS**

2 2.1 The term “Cadmium Limit” means a concentration of 0.01 percent (100 parts per
3 million (“ppm”)) by weight cadmium in any component of a Covered Product, or in any material
4 used in a Covered Product.

5 2.2 The term “Covered Product” means necklaces, whether sold individually or as part
6 of a set with a dress or other piece of clothing.

7 2.3 The term “Effective Date” means the date of entry of this Consent Judgment.

8 **3. INJUNCTIVE RELIEF**

9 3.1 **Reformulation of Covered Products.** Defendant shall comply with the following
10 requirements to achieve expeditious reformulation of the Covered Products to reduce or eliminate
11 exposures to cadmium arising from the Covered Products:

12 3.1.1 **Specification Compliance Date.** To the extent it has not already done so,
13 no more than 30 days after the Effective Date, Defendant shall provide the Cadmium Limit to its
14 vendors of Covered Products and shall instruct each vendor to expeditiously provide Covered
15 Products that do not exceed the Cadmium Limit.

16 3.1.2 **Reformulation Date.** As of the Effective Date, Defendant shall not
17 manufacture, purchase, import, supply, sell or offer to sell any Covered Product that will be sold
18 or offered for sale to California consumers that exceeds the Cadmium Limit.

19 3.2 **Market Withdrawal of Covered Products.** To the extent not already done, on or
20 before the Effective Date, Defendant shall have: (i) ceased shipping the following specific
21 product:

22 My Michelle Big Girls All Over Floral Dress in Charcoal & Champagne, SKU No. 0-
23 30121-50968-7 (the “Recall Products”),

24 to stores and/or customers in California, (ii) withdrawn the Recall Products from the market in
25 California, and (iii) if the Recall Products were not withdrawn from sale in California prior to the
26 Effective Date, sent instructions to any of its stores and/or customers that offer the Recall Products
27 for sale in California to cease offering such Recall Products for sale and to either return all Recall
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1 Products to Defendant for destruction, or to directly destroy the Recall Products. Any destruction
2 of the Recall Products shall be in compliance with all applicable laws.

3 **4. ENFORCEMENT**

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

8 4.2 **Enforcement of Materials Violation.**

9 4.2.1 **Notice of Violation.** In the event that, at any time following the Effective
10 Date, CEH identifies one or more Covered Products manufactured, distributed, or sold by
11 Defendant that CEH believes in good faith exceed the Cadmium Limit, CEH may issue a Notice
12 of Violation pursuant to this Section.

13 4.2.2 **Service of Notice of Violation and Supporting Documentation.**

14 4.2.2.1 The Notice of Violation shall be sent to the person(s) identified in
15 Exhibit A to receive notices for Defendant, and must be served within 75 days of the date the
16 Covered Product at issue was purchased or otherwise acquired by CEH, provided, however, that:
17 (i) CEH may have up to an additional 45 days to provide Defendant with the test data required by
18 Section 4.2.2.3 below if it has not yet obtained it from its laboratory; and (ii) CEH may serve a
19 subsequent Notice of Violation to a supplier of a Covered Product identified in a previous Notice
20 of Violation so long as: (a) the identity of the supplier cannot be discerned from the labeling of the
21 Covered Product; and (b) the Notice of Violation to the supplier is served within 75 days of the
22 date the supplier is identified in writing to CEH by Defendant.

23 4.2.2.2 The Notice of Violation shall, at a minimum, set forth for each
24 Covered Product: (a) the date the alleged violation was observed, (b) the location at which the
25 Covered Product was offered for sale, (c) a description of the Covered Product giving rise to the
26 alleged violation, and (d) all test data obtained by CEH regarding the Covered Product and
27 supporting documentation sufficient for validation of the test results, including any laboratory
28 reports, quality assurance reports and quality control reports associated with testing of the Covered

1 Products. Such Notice of Violation shall be based upon total acid digest test data from an
2 independent laboratory. Wipe, swipe, and swab testing are not sufficient to support a Notice of
3 Violation.

4 **4.2.3 Notice of Election of Response.** No more than 30 days after service of a
5 Notice of Violation, Defendant shall provide written notice to CEH whether it elects to contest the
6 allegations contained in a Notice of Violation (“Notice of Election”). Failure to provide a Notice
7 of Election within 30 days of service of a Notice of Violation shall be deemed an election to
8 contest the Notice of Violation.

9 **4.2.3.1** If a Notice of Violation is contested, the Notice of Election shall
10 include all then-available documentary evidence regarding the alleged violation, including all test
11 data, if any. If Defendant or CEH later acquires additional test or other data regarding the alleged
12 violation, it shall notify the other party and promptly provide all such data or information to the
13 party.

14 **4.2.4 Meet and Confer.** If a Notice of Violation is contested, CEH and
15 Defendant shall meet and confer to attempt to resolve their dispute. Within 30 days of serving a
16 Notice of Election contesting a Notice of Violation, and if no enforcement motion or application
17 has been filed by CEH pursuant to Section 4.1, Defendant may withdraw the original Notice of
18 Election contesting the violation and serve a new Notice of Election conceding the violation,
19 provided however that Defendant shall pay \$5,000 in addition to any payment required under
20 Section 4.2.7. At any time, CEH may withdraw a Notice of Violation, in which case for purposes
21 of this Section 4 the result shall be as if CEH never issued any such Notice of Violation. If no
22 informal resolution of a Notice of Violation results within 30 days of a Notice of Election to
23 contest, CEH may file an enforcement motion or application pursuant to Section 4.1. In any such
24 proceeding, CEH may seek whatever fines, costs, penalties attorneys’ fees or remedies are
25 provided by law for failure to comply with the Consent Judgment.

26 **4.2.5 Non-Contested Matters.** If Defendant elects not to contest the
27 allegations in a Notice of Violation, it shall undertake corrective action pursuant to Section 4.2.6
28 and shall make any payments required by Section 4.2.7.

1 4.2.6 **Corrective Action in Non-Contested Matters.** If Defendant elects not to
2 contest the allegation, it shall include in its Notice of Election a detailed description with
3 supporting documentation of the corrective action that it has undertaken or proposes to undertake
4 to address the alleged violation. Any such correction shall, at a minimum, provide reasonable
5 assurance that the Covered Product will no longer be offered for sale in California. Corrective
6 action must include instructions to Defendant’s stores and/or its customers that offer the Covered
7 Product for sale to consumers to cease offering the Covered Product(s) identified in the Notice of
8 Violation for sale in California as soon as practicable. The Notice of Election shall also include
9 the name, address, telephone number, and other contact information, of Defendant’s supplier(s) of
10 each Covered Product identified in the Notice of Violation. Defendant shall make available to
11 CEH for inspection and/or copying records and correspondence regarding the corrective action. If
12 there is a dispute over the corrective action, the Parties shall meet and confer pursuant to Section
13 4.2.4 before seeking any remedy in court.

14 4.2.7 **Payments in Non-Contested Matters.** In addition to the corrective
15 action, Defendant shall be required to make a payment as reimbursement for costs for
16 investigating, preparing, sending and prosecuting Notices of Violation, and to reimburse
17 attorneys’ fees and costs incurred in connection with these activities, as specified below:

18 4.2.7.1 If Defendant serves a Notice of Election not to contest the
19 allegations in the instant Notice of Violation, it shall be required to make a payment of \$10,000.
20 This payment shall, however, be reduced to \$5,000 if Defendant produces with its Notice of
21 Election test data showing that the Covered Product that is the subject of the Notice of Violation
22 did not exceed the Cadmium Limit. For purposes of this Section 4.2.7.1 only, “test data” shall
23 mean total cadmium by acid digest performed by an accredited laboratory on the Covered Product
24 alleged to be in violation of the Cadmium Limit where the test was conducted within one year
25 prior to the date the Covered Product that is the subject of the Notice of Violation was purchased
26 or obtained by CEH.

27 4.2.7.2 The payment shall be made by check payable to the Lexington Law
28 Group and shall be paid within 15 days of service of a Notice of Election triggering a payment.

1 4.2.8 **Repeat Violations.** If Defendant has received three or more Notices of
2 Violation that were not successfully contested or withdrawn in any 12-month period then, at
3 CEH’s option, CEH may seek whatever fines, costs, penalties, attorneys’ fees or other remedies
4 that are provided by law for failure to comply with the Consent Judgment. Prior to seeking such
5 relief, CEH shall meet and confer with Defendant for a period not to exceed 30 days (unless
6 extended by mutual agreement) to determine if the parties can agree on measures Defendant can
7 undertake to prevent future violations.

8 **5. PAYMENTS**

9 5.1 **Payments From Defendant.** Within five (5) days of entry of this Consent
10 Judgment, Defendant shall pay the total sum of \$39,000, as further specified in Section 5.2 below.
11 Any failure by Defendant to fully comply with the payment terms herein shall be subject to a
12 stipulated late payment fee of \$100 per day, which amount shall be recoverable by CEH, together
13 with its reasonable attorneys’ fees and costs, in an enforcement proceeding brought under this
14 Consent Judgment.

15 5.2 **Allocation of Payments.** The total settlement amount for Defendant shall be paid
16 in five separate checks made payable, allocated and delivered as follows:

17 5.2.1 Defendant shall pay the sum of \$5,072 as a civil penalty pursuant to Health
18 & Safety Code § 25249.7(b). The civil penalty payment shall be apportioned in accordance with
19 Health & Safety Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of
20 Environmental Health Hazard Assessment (“OEHHA”)). Accordingly, the OEHHA portion of the
21 civil penalty payment in the amount of \$3,804 shall be made payable to OEHHA and associated
22 with taxpayer identification number 68-0284486. This payment shall be delivered as follows:

23 For United States Postal Service Delivery:

24 Attn: Mike Gyurics
25 Fiscal Operations Branch Chief
26 Office of Environmental Health Hazard Assessment
27 P.O. Box 4010, MS #19B
28 Sacramento, CA 95812-4010

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For Non-United States Postal Service Delivery:

Attn: Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street, MS #19B
Sacramento, CA 95814

The CEH portion of the civil penalty payment in the amount of \$1,268 shall be made payable to the Center for Environmental Health and associated with taxpayer identification number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

5.2.2 Defendant shall pay the sum of \$3,800 as an Additional Settlement Payment (“ASP”) in lieu of civil penalty to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3204. CEH intends to place these funds in CEH’s Toxics and Youth Fund and use them to support CEH programs and activities that seek to educate the public about lead and other toxic chemicals in consumer products that are marketed to youth, work with industries that market products to youth to reduce exposure to lead and other toxic chemicals, and thereby reduce the public health impacts and risks of exposure to lead and other toxic chemicals in consumer products that are marketed to youth in California. CEH shall obtain and maintain adequate records to document that ASPs are spent on these activities and CEH agrees to provide such documentation to the Attorney General within thirty days of any request from the Attorney General. The payment pursuant to this Section shall be made payable to the Center for Environmental Health and associated with taxpayer identification number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

5.2.3 Defendant shall pay the sum of \$30,128 as reimbursement of reasonable attorneys’ fees and costs. The attorneys’ fees and cost reimbursement shall be made in two separate checks as follows: (a) \$25,670 payable to the Lexington Law Group and associated with taxpayer identification number 94-3317175; and (b) \$4,458 payable to the Center For Environmental Health and associated with taxpayer identification number 94-3251981. These

1 payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA
2 94117.

3 **6. MODIFICATION AND DISPUTE RESOLUTION**

4 6.1 **Modification.** This Consent Judgment may be modified from time to time by
5 express written agreement of the Parties with the approval of the Court, or by an order of this
6 Court upon motion and in accordance with law.

7 6.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
8 shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
9 modify the Consent Judgment.

10 **7. CLAIMS COVERED AND RELEASE**

11 7.1 This Consent Judgment is a full, final, and binding resolution between CEH and
12 Defendant and Defendant's parents, shareholders, divisions, subdivisions, subsidiaries, partners,
13 sister companies and their successors and assigns ("Defendant Releasees"), and all entities to
14 whom they distribute or sell Covered Products including, but not limited to, distributors,
15 wholesalers, customers, retailers, franchisees, cooperative members, and licensees ("Downstream
16 Defendant Releasees"), of any violation of Proposition 65 that have been or could have been
17 asserted in the public interest against Defendant, Defendant Releasees, and Downstream
18 Defendant Releasees, regarding the failure to warn about exposure to cadmium arising in
19 connection with Covered Products manufactured, distributed, or sold by Defendant prior to the
20 Effective Date.

21 7.2 CEH, for itself and acting on behalf of the public interest pursuant to Health &
22 Safety Code § 25249.7(d), releases, waives, and forever discharges any and all claims against
23 Defendant, Defendant Releasees, and Downstream Defendant Releasees arising from any violation
24 of Proposition 65 or any other statutory or common law claims that have been or could have been
25 asserted in the public interest regarding the failure to warn about exposure to cadmium arising in
26 connection with Covered Products manufactured, distributed or sold by Defendant prior to the
27 Effective Date.

28 7.3 Compliance with the terms of this Consent Judgment by Defendant and the

1 Defendant Releasees shall constitute compliance with Proposition 65 by Defendant, the Defendant
2 Releasees and the Downstream Defendant Releasees with respect to any alleged failure to warn
3 about cadmium in Covered Products manufactured, distributed or sold by Defendant after the
4 Effective Date.

5 **8. PROVISION OF NOTICE**

6 8.1 When any Party is entitled to receive any notice under this Consent Judgment, the
7 notice shall be sent by first class and electronic mail as follows:

8 8.1.1 **Notices to Defendant.** The person for Defendant to receive Notice
9 pursuant to this Consent Judgment shall be:

10 Tom S. Lee
11 Bryan Cave LLP
12 Three Embarcadero Center, 7th Floor
13 San Francisco, CA 94111-4070
14 (415) 675-3447
15 tom.lee@bryancave.com

16 8.1.2 **Notices to Plaintiff.** The person for CEH to receive Notices pursuant to
17 this Consent Judgment shall be:

18 Eric S. Somers
19 Lexington Law Group
20 503 Divisadero Street
21 San Francisco, CA 94117
22 esomers@lexlawgroup.com

23 8.2 Any Party may modify the person and address to whom the notice is to be sent by
24 sending the other Party notice by first class and electronic mail.

25 **9. COURT APPROVAL**

26 9.1 This Consent Judgment shall become effective on the Effective Date, provided
27 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
28 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.

1 **10. GOVERNING LAW AND CONSTRUCTION**

2 10.1 The terms of this Consent Judgment shall be governed by the laws of the State of
3 California.

4 **11. ENTIRE AGREEMENT**

5 11.1 This Consent Judgment contains the sole and entire agreement and understanding
6 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
7 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
8 and therein. There are no warranties, representations, or other agreements between the Parties
9 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
10 other than those specifically referred to in this Consent Judgment have been made by any Party
11 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
12 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
13 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
14 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
15 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
16 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
17 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
18 whether or not similar, nor shall such waiver constitute a continuing waiver.

19 **12. RETENTION OF JURISDICTION**

20 12.1 This Court shall retain jurisdiction of this matter to implement, enforce or modify
21 the Consent Judgment.

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

23 13.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
24 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
25 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

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

27 14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
28 against any other entity on terms that are different than those contained in this Consent Judgment.

1 **15. EXECUTION IN COUNTERPARTS**

2 15.1 The stipulations to this Consent Judgment may be executed in counterparts and by
3 means of facsimile, which taken together shall be deemed to constitute one document.

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5 **IT IS SO ORDERED, ADJUDGED,
6 AND DECREED**

6

7 Dated:

Judge of the Superior Court of the State of California

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IT IS SO STIPULATED:

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Dated: March __, 2017	<p>CENTER FOR ENVIRONMENTAL HEALTH</p> <p>_____</p> <p>_____</p> <p>Printed Name</p> <p>_____</p> <p>Title</p>
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1 **15. EXECUTION IN COUNTERPARTS**

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3 means of facsimile, which taken together shall be deemed to constitute one document.

4
5 **IT IS SO ORDERED, ADJUDGED,
6 AND DECREED**

7 Dated: _____
8 Judge of the Superior Court of the State of California

9
10 **IT IS SO STIPULATED:**

<p>12 Dated: March 6, 2017</p>	<p>CENTER FOR ENVIRONMENTAL HEALTH</p> <p>14 </p> <hr/> <p>16 <i>CHRISTINE PIZZANO</i></p> <hr/> <p>17 Printed Name</p> <hr/> <p>19 <i>Associate Director</i></p> <hr/> <p>20 Title</p>
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Dated: March 20, 2017

KELLWOOD COMPANY, LLC

David Falwell

DAVID FALWELL
Printed Name

CEO
Title