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5 Attorney for Plaintiff  
Safe Products for Californians, LLC

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8 **SUPERIOR COURT OF CALIFORNIA**  
9 **COUNTY OF SANTA CLARA**

10 SAFE PRODUCTS FOR CALIFORNIANS, )  
11 LLC, )

No. 18CV323650

12 Plaintiff,

**[PROPOSED] CONSENT JUDGMENT**

13 vs.

(Health & Safety Code § 25249.5, *et seq.*)

14 ORIENTAL TRADING COMPANY, INC.;

15 et al.;

16 Defendants.  
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**[PROPOSED] CONSENT JUDGMENT**

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**1. INTRODUCTION**

**1.1 Parties**

This Consent Judgment is entered into by and between plaintiff Safe Products for Californians, LLC (“SPFC”) and defendants Oriental Trading Company, Inc. (“OTC”), and Fun Express LLC (“Fun Express”) with SPFC, OTC and Fun Express each referred to individually as a “Party” and collectively as the “Parties.”

**1.2 Plaintiff**

SPFC is a limited liability California company with its principal place of business within the State of California, County of Santa Clara, who seeks to promote awareness of exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful substances contained in consumer and commercial products.

**1.3 Defendants**

OTC is a Delaware corporation and employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code section 25249.5 *et seq.* (“Proposition 65”).

Fun Express is a Nebraska limited liability company and employs ten or more persons and is a person in the course of doing business for purposes of Proposition 65.

**1.4 General Allegations**

SPFC alleges that OTC and Fun Express manufactured, distributed, sold, and/or offered for sale in California products that cause exposure to di(2-ethylhexyl)phthalate (“DEHP”) without providing a health hazard warning that SPFC alleges is required by Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the state of California to cause cancer, birth defects, and other reproductive harm.

**1.5 Notices of Violation**

On or about August 10, 2017, SPFC served Fun Express and the requisite public enforcement agencies with a 60-Day Notice of Violation (“August Notice”), alleging that Fun Express manufactured, imported, distributed, sold, and/or offered for sale in California clear

1 vinyl storage bags, identified as, *Set of 3 Clear Vinyl Storage Bags with Handle (Medium)*  
2 *UPC# 886102994467*, which expose customers to DEHP without requisite warnings in  
3 violation of Proposition 65.

4 On or about December 11, 2017, SPFC served OTC and Fun Express and the requisite  
5 public enforcement agencies with a supplemental 60-Day Notice of Violation (“Supplemental  
6 Notice”), alleging that OTC and Fun Express manufactured, imported, distributed, sold, and/or  
7 offered for sale in California clear vinyl storage bags, identified as *Set of 3 Clear Vinyl Storage*  
8 *Bags with Handle (Medium) UPC# 886102994467*, and *Clear Vinyl Backpack Book Bag 3 pc*  
9 *UPC# 889070001441*, which expose customers to DEHP without requisite warnings in  
10 violation of Proposition 65.

11 To the best of the Parties’ knowledge, no public enforcer has commenced and is  
12 diligently prosecuting an action to enforce the allegations set forth in the August Notice or  
13 Supplemental Notice.

14 The August Notice and the Supplemental Notice are collectively referred to as the  
15 “Notices.”

#### 16 **1.6 Covered Products**

17 The products and product categories identified in the Notices are the products covered  
18 by this Consent Judgment, hereinafter the “Products.”

#### 19 **1.7 Complaint**

20 On February 16, 2018, SPFC commenced the instant action, naming OTC and Fun  
21 Express as defendants for the alleged violations of Proposition 65 that are the subject of the  
22 Notices (“Complaint”). In filing the Complaint, SPFC is acting in the interest of the general  
23 public of the state of California.

#### 24 **1.8 No Admission**

25 OTC and Fun Express deny the material, factual, and legal allegations contained in the  
26 Notice and Complaint, and maintain that all of the products that they have manufactured,  
27 imported, distributed, sold, and/or offered for sale in California, including the Products, have  
28 been, and are, in compliance with all laws, including Proposition 65.

1 To avoid prolonged and costly litigation, the Parties therefore enter into this Consent  
2 Judgment to resolve and settle all Proposition 65 claims concerning the Products, including  
3 without limitation any disputes, obligations, claims, and/or causes of action that were or could  
4 have been asserted by SPFC with respect to such matters.

5 This Consent Judgment is the direct result of a compromise of disputed allegations and  
6 claims. As such, it is the Parties' intent that nothing in this Consent Judgment shall be  
7 construed as an admission by OTC and Fun Express of any fact, finding, conclusion of law,  
8 issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or  
9 be construed as an admission by OTC or Fun Express of any fact, finding, conclusion of law,  
10 issue of law, or violation of law.

11 Except as otherwise provided herein, nothing in this Consent Judgment shall prejudice,  
12 waive or impair any right, remedy, argument or defense either Party may have in any other  
13 legal proceeding.

#### 14 **1.9 Jurisdiction and Venue**

15 For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
16 jurisdiction over OTC and Fun Express as to the allegations contained in the Complaint, that  
17 venue is proper in the County of Santa Clara, and that the Court has jurisdiction to enter and  
18 enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil  
19 Procedure section 664.6.

#### 20 **1.10 Effective Date**

21 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date  
22 that the Court grants and enters this Consent Judgment.

### 23 **2. INJUNCTIVE RELIEF**

#### 24 **2.1 Commitment to Cease Sales, Reformulate or Warn**

25 Commencing on the Effective Date and continuing thereafter, OTC and Fun Express  
26 shall not directly sell, or ship for sale in California any Products, unless such Products are  
27 either (a) "Reformulated Products" as defined by Section 2.2 below, or (b) Products that bear a  
28 clear and reasonable warning pursuant to Section 2.3, below.

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**2.2 Reformulation**

For the purposes of this Consent Judgment, "Reformulated Products" are defined as Products that contain DEHP in concentrations that do not exceed 1,000 parts per million (0.1%) when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or equivalent methodologies utilized by state or federal agencies for the purpose of determining DEHP content in a solid substance.

**2.3 Clear and Reasonable Warnings**

For any Products directly sold or offered for sale in California by OTC and Fun Express that are not Reformulated Products, OTC and Fun Express agree to only sell or offer for sale in California Products with a clear and reasonable warning in accordance with Proposition 65 warning requirements.

**3. MONETARY SETTLEMENT TERMS**

**3.1** In full and complete satisfaction of all civil penalties and reasonable attorney's fees and costs incurred by SPFC and its counsel that have or could have been claimed in connection with this action, OTC and Fun Express shall pay the total sum of thirty-seven thousand one hundred seventy-nine dollars (\$37,179) as further allocated in Sections 3.2 and 3.3 below. Payment shall be made within fifteen (15) calendar days after the Effective Date in two separate checks made payable to "Mission Law Firm, A.P.C., Trust Account," with one check indicating the amount in Section 3.2, and the other check indicating the amount in Section 3.3. Both checks shall be delivered to the address provided in Section 3.4, below.

**3.2 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

Pursuant to Health and Safety Code section 25249.7(b)(2), and in full and complete satisfaction of all the claims referred to in this Consent Judgment, OTC and Fun Express shall pay two thousand dollars (\$2,000) in civil penalties in accordance with this Section. The penalty payment will be allocated in accordance with California Health & Safety Code § 25249.12(c)(l) & (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to SPFC. SPFC and its counsel shall be responsible for remitting the penalty payment

1 under this Consent Judgment to OEHHA, and for sending a copy of such remittance to counsel  
2 for OTC and Fun Express.

3 **3.3 Reimbursement of Attorney's Fees and Costs**

4 The Parties acknowledge that SPFC and its counsel offered to resolve this dispute  
5 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby  
6 leaving the issue to be resolved after the material terms of the agreement had been settled.  
7 Shortly after the other settlement terms had been finalized, the Parties then negotiated a  
8 resolution of the compensation due to SPFC and its counsel under general contract principles  
9 and the private attorney general doctrine codified at California Code of Civil Procedure §  
10 1021.5. For all work performed to resolve this dispute, OTC and Fun Express shall reimburse  
11 SPFC and its counsel thirty-five thousand one hundred seventy-nine dollars (\$35,179).

12 **3.4 Payment Procedures**

13 All payments pursuant to Section 3 shall be delivered to the following payment  
14 address:

Mission Law Firm, A.P.C.  
Attn: Proposition 65 (SPFC)  
332 North Second Street  
San Jose, California 95112

18 If for any reason, other than the fault of SPFC or its counsel, this Consent Judgment is  
19 not entered by the Court within nine (9) months of the date the Consent Judgment is executed  
20 by all Parties, SPFC shall meet and confer with OTC and Fun Express about mutually  
21 agreeable steps the Parties can take to enter the Consent Judgment. If such steps cannot be  
22 agreed among the Parties, SPFC shall promptly return to OTC and Fun Express any and all  
23 monies paid by OTC and Fun Express herein under Section 3 upon OTC's and Fun Express'  
24 written request.

25 **4. CLAIMS COVERED AND RELEASED**

26 **4.1 SPFC's Release of Proposition 65 Claims**

27 SPFC, acting on its own behalf and in the public interest, releases (i) OTC and Fun  
28 Express and their respective shareholders, members, parents, divisions, subdivisions,

1 subsidiaries, partners, and affiliated entities under common ownership, and each of their  
2 respective directors, officers, employees, and attorneys and any and all successors and assigns  
3 (collectively, "Releasees"); and (ii) each entity to whom the Releasees directly or indirectly  
4 distribute or sell the Products, or have directly or indirectly distributed or sold the Products,  
5 including, but not limited to, distributors, wholesalers, customers, retailers (including, without  
6 limitation, Amazon, Inc., and any third party resellers of the Products), franchisees,  
7 cooperative members, licensors and licensees (collectively, "Downstream Releasees") for any  
8 violations arising under Proposition 65 that have or could have been asserted against Releasees  
9 and Downstream Releasees for unwarned exposures to DEHP from the Products manufactured,  
10 imported, distributed, sold or offered for sale by Releasees or Downstream Releasees prior to  
11 the Effective Date of this Consent Judgment.

12         The Parties agree that material compliance with the terms of this Consent Judgment  
13 constitutes compliance with Proposition 65 by any Releasee or Downstream Releasee with  
14 respect to the alleged or actual failure to warn about exposures to DEHP from Products  
15 manufactured, imported, distributed, sold, and/or offered for sale by OTC and Fun Express  
16 after the Effective Date.

17             **4.2 SPFC's Individual Release of Claims**

18         SPFC, in its own capacity only and *not* in its representative capacity, also  
19 provides a release to OTC and Fun Express, Releasees, and Downstream Releasees, which  
20 shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of  
21 action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and  
22 demands of SPFC of any nature, character or kind, whether known or unknown, suspected or  
23 unsuspected, arising out of alleged or actual exposures to DEHP in Products manufactured,  
24 imported, distributed or sold by OTC and Fun Express before the Effective Date.

25             **4.3 OTC and Fun Express's Release of SPFC**

26         OTC and Fun Express, on their own behalf and on behalf of their past and current  
27 agents, representatives, attorneys, successors and/or assignees, hereby waive any and all claims  
28 against SPFC and its attorneys and other representatives, for any and all actions taken or

1 statements made (or those that could have been taken or made) by SPFC and its attorneys and  
2 other representatives in the course of investigating claims, seeking to enforce Proposition 65  
3 against it in this matter, or with respect to the Products.

4 **5. COURT APPROVAL**

5 This Consent Judgment is not effective until it is approved and entered by the Court  
6 and shall be null and void if, for any reason, it is not approved and entered by the Court within  
7 one year after it has been fully executed by all Parties. SPFC and OTC and Fun Express agree  
8 to support the entry of this agreement as a judgment, and to obtain the Court's approval of their  
9 settlement in a timely manner. The Parties acknowledge that, pursuant to California Health and  
10 Safety Code section 25249.7(f), a noticed motion is required for judicial approval of this  
11 Consent Judgment, which motion SPFC shall draft and file and OTC and Fun Express shall  
12 support, appearing at the hearing if so required.

13 **6. ENFORCEMENT AND PREVAILING PARTY**

14 This Consent Judgment may only be enforced by the Parties.

15 **7. SEVERABILITY**

16 If, subsequent to the Court's approval and entry of this Consent Judgment as a  
17 judgment, any provision of this Consent Judgment is held by a court to be unenforceable, the  
18 validity of the remaining provisions shall not be adversely affected.

19 **8. GOVERNING LAW**

20 The terms of this Consent Judgment shall be governed by the laws of the State of  
21 California and apply within the State of California. In the event that Proposition 65 is repealed,  
22 preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the  
23 Products, then OTC and Fun Express may provide SPFC with written notice of any asserted  
24 change in the law, and shall have no further obligations pursuant to this Consent Judgment,  
25 with respect to, and to the extent that, the Products are so affected. Nothing in this Consent  
26 Judgment shall be interpreted to relieve OTC and Fun Express from their obligation to comply  
27 with any pertinent state or federal law or regulation.

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1     **9. NOTICE**

2             Unless specified herein, all correspondence and notices required by this Consent  
3 Judgment shall be in writing and sent by: (i) personal delivery, (ii) first-class registered or  
4 certified mail, return receipt requested; or (iii) a recognized overnight courier to any Party by  
5 the other at the following addresses:

6     To OTC and Fun Express:

          To SPFC:

7     Robert Siffring  
8     Vice President and General Counsel  
9     Oriental Trading Company, Inc.  
10    5455 S. 90th Street  
11    Omaha, Nebraska 68127

          Mission Law Firm, A.P.C.  
          Attn: Proposition 65 (SPFC)  
          332 North Second Street  
          San Jose, California 95112

12    With a copy to:

13    Malcolm Weiss, Esq.  
14    Hunton Andrews Kurth LLP  
15    550 South Hope Street, Suite 200  
16    Los Angeles, California 90071

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

19     **10. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

20             This Consent Judgment may be executed in counterparts and by facsimile or portable  
21 document format (pdf) signature, each of which shall be deemed an original and, all of which,  
22 when taken together, shall constitute one and the same document.

23     **11. COMPLIANCE WITH REPORTING REQUIREMENTS**

24             SPFC and its counsel agree to comply with the reporting form requirements referenced  
25 in California Health and Safety Code section 25249.7(f).

26     **12. MODIFICATION**

27             This Consent Judgment may be modified only by: (i) a written agreement of the Parties  
28 and the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful  
motion of any party and the entry of a modified Consent Judgment by the Court thereon.

1 **13. OTHER TERMS**

2 **13.1** This Consent Judgment contains the sole and entire agreement and understanding  
3 of the Parties with respect to the entire subject matter set forth in this Consent Judgment, and  
4 any and all prior discussions, negotiations, commitments, or understandings related thereto, if  
5 any, are deemed merged. There are no warranties, representations, or other agreements  
6 between the Parties except as expressly set forth in this Consent Judgment. No representations,  
7 oral or otherwise, express or implied, other than those specifically referred to in this Consent  
8 Judgment have been made by any Party. No other agreements not specifically contained or  
9 referenced in this Consent Judgment, oral or otherwise, shall be deemed to exist or to bind any  
10 of the Parties. No supplementation, modification, waiver, or termination of this Consent  
11 Judgment shall be binding unless executed in writing by the Party to be bound. No waiver of  
12 any of the provisions of this Consent Judgment shall be deemed or shall constitute a waiver of  
13 any of the other provisions whether or not similar, nor shall such waiver constitute a continuing  
14 waiver. Nothing in this Consent Judgment shall release, or in any way affect any rights that  
15 OTC and Fun Express might have against any other party.

16 **13.2** The Parties, including their counsel, have participated in the preparation of this  
17 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.  
18 This Consent Judgment was subject to revision and modification by the Parties and has been  
19 accepted and approved as to its final form by all Parties and their Counsel. Accordingly, any  
20 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any  
21 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this  
22 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are  
23 to be resolved against the drafting Party should not be employed in the interpretation of this  
24 Consent Judgment and, in this regard the Parties hereby waive California Civil Code section  
25 1654.

1 **14. SUCCESSORS AND ASSIGNS**

2 This Consent Judgment shall be binding upon and inure to the benefit of the Parties  
3 hereto and their respective divisions, subdivisions, and subsidiaries, and the successors or  
4 assigns of any of them.

5 **16. AUTHORIZATION**

6 The undersigned are authorized to execute this Consent Judgment on behalf of their  
7 respective Parties and have read, understood, and agree to all of the terms and conditions of  
8 this Consent Judgment.

10 **AGREED TO:**

11  
12 Dated: \_\_\_\_\_

13  
14 By: \_\_\_\_\_

15 Randy Moore  
16 Operating Manager  
17 Safe Products for Californians, LLC

10 **AGREED TO:**

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12 Dated: 4/13/18

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14 By: MPL

15 Matt Novak  
16 Vice President  
17 Oriental Trading Company, Inc.

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19 **AGREED TO:**

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21 Dated: 4/13/18

22  
23 By: MPL

24 Matt Novak  
25 President  
26 Fun Express LLC

1 **14. SUCCESSORS AND ASSIGNS**

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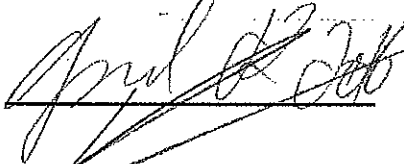
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**AGREED TO:**

**AGREED TO:**

Dated:   
By: \_\_\_\_\_

Dated: \_\_\_\_\_  
By: \_\_\_\_\_

Randy Moore  
Operating Manager  
Safe Products for Californians, LLC

Matt Novak  
Vice President  
Oriental Trading Company, Inc.

**AGREED TO:**

Dated: \_\_\_\_\_

By: \_\_\_\_\_

Matt Novak  
President  
Fun Express LLC