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9 Attorneys for Plaintiff,
10 CONSUMER ADVOCACY GROUP, INC.

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **COUNTY OF LOS ANGELES**

13 CONSUMER ADVOCACY GROUP, INC.,
14 in the public interest,

15 Plaintiff,

16 v.

17 VIVA 99, *et al.*,

18 Defendants.

CASE NO. BC714678

[PROPOSED] CONSENT JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

[Assigned for all Purposes to the Hon.
Laura A. Seigle, Department 48]

Complaint filed: July 18, 2018

19 **1. INTRODUCTION**

20 1.1 This Consent Judgment is entered into by and between Plaintiff, Consumer
21 Advocacy Group, Inc. (referred to as “CAG”) acting on behalf of itself and in the public interest,
22 and Defendant Henan American Machinery, Inc. (“Defendant”) with each a Party to the action
23 and collectively referred to as “Parties.”

24 **1.2 Defendants and Covered Products**

25 1.2.1 CAG alleges that Defendant is a California Corporation which employs ten or
26 more persons. For purposes of this Consent Judgment only, Defendant is deemed a person in the
27 course of doing business in California and subject to the provisions of the Safe Drinking Water
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1 and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 et seq.
2 (“Proposition 65”).

3 1.2.2 CAG alleges that Defendant manufactures, sells, and/or distributes consumer
4 products in California.

5 **1.3 Listed Chemicals**

6 1.3.1 Di (2-ethylhexyl) Phthalate (“DEHP”), also known as Diethyl Hexyl Phthalate
7 and Bis (2-ethylhexyl) Phthalate, has been listed by the State of California as a chemical known
8 to cause cancer and birth defects or other reproductive harm.

9 **1.4 Notices of Violation**

10 1.4.1 On or about December 21, 2017, CAG served a “60-Day Notice of Intent to Sue
11 for Violation of the Safe Drinking Water and Toxic Enforcement Act of 1986” (“AG# 2017-
12 02708”) (“December 21, 2017 Notice”) that provided Defendant with notice of alleged violations
13 of Health & Safety Code § 25249.6 for failing to warn individuals in California of exposures to
14 DEHP contained in certain Bicycle Seat Covers sold, manufacturer, and/or distributed by
15 Defendant in California. No public enforcer has commenced or diligently prosecuted the
16 allegations set forth in the December 21, 2017 Notice.

17 1.4.2 On or about February 20, 2018, CAG served a “60-Day Notice of Intent to Sue for
18 Violation of the Safe Drinking Water and Toxic Enforcement Act of 1986” (“AG# 2018-00253”) (“February 20, 2018 Notice”) that provided Defendant with notice of alleged violations of Health
19 & Safety Code § 25249.6 for failing to warn individuals in California of exposures to DEHP
20 contained in certain Plastic Armbands sold, manufacturer, and/or distributed by Defendant in
21 California. No public enforcer has commenced or diligently prosecuted the allegations set forth
22 in the February 20, 2018 Notice.

24 1.4.3 On or about March 16, 2018, CAG served a “60-Day Notice of Intent to Sue for
25 Violation of the Safe Drinking Water and Toxic Enforcement Act of 1986” (“AG# 2018-00420”) (“March 16, 2018 Notice”) that provided Defendant with notice of alleged violations of Health &
26 Safety Code § 25249.6 for failing to warn individuals in California of exposures to DEHP
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1 contained in certain Mountable Compasses with Suction Cup sold, manufacturer, and/or
2 distributed by Defendant in California. No public enforcer has commenced or diligently
3 prosecuted the allegations set forth in the March 16, 2018 Notice.

4 **1.5 Complaint**

5 1.5.1 On July 18, 2018 CAG filed a Complaint for civil penalties and injunctive relief
6 (“Complaint”) in Los Angeles County Superior Court, Case No. BC714678. The Complaint
7 alleges, among other things, that Proposition 65 was violated for failure to allegedly give clear
8 and reasonable warnings of alleged exposure to DEHP in certain consumer products Defendant
9 distributed and/or sold in California.

10 **1.6 Consent to Jurisdiction**

11 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
12 jurisdiction over the allegations of violations contained in the Complaint, personal jurisdiction
13 over Defendant as to the acts alleged in the Complaint, that venue is proper in the County of Los
14 Angeles, and that this Court has jurisdiction to enter this Consent Judgment as a full settlement
15 and resolution of the allegations against Defendant contained in the Complaint, and of all claims
16 which were or could have been raised by any person or entity based in whole or in part, directly
17 or indirectly, on the facts alleged therein or arising therefrom or related thereto.

18 **1.7 No Admission**

19 This Consent Judgment resolves claims that are denied and disputed. The Parties enter into
20 this Consent Judgment pursuant to a full and final settlement of any and all claims between the
21 Parties for the purpose of avoiding prolonged litigation. Nothing in this Consent Judgment shall
22 be construed as an admission by the Parties of any material allegation in the Notice or the
23 Complaint, or of any fact, conclusion of law, issue of law or violation of law of any kind, including
24 without limitation, any admission concerning any alleged or actual violation of Proposition 65 or
25 any other statutory, regulatory, common law, or equitable doctrine, including but not limited to the
26 meaning of the terms “knowingly and intentionally expose” or “clear and reasonable warning” as
27 used in Health and Safety Code section 25249.6. Nothing in this Consent Judgment, nor
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1 compliance with its terms, shall constitute or be construed as an admission by the Parties of any
2 fact, conclusion of law, issue of law, or violation of law, or of fault, wrongdoing, or liability by
3 Defendant, its officers, directors, employees, or parent, subsidiary or affiliated corporations, or be
4 offered or admitted as evidence in any administrative or judicial proceeding or litigation in any
5 court, agency, or forum. Furthermore, nothing in this Consent Judgment shall prejudice, waive or
6 impair any right, remedy, argument, or defense the Parties may have in any other or future legal
7 proceeding, except as expressly provided in this Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 “Covered Products” means: (1) **Bicycle Seat Covers**, which includes but is not
10 limited to: “New Bicycle seat cover”; “Black Textured Leather Looking Cover,” “54-686713”;
11 “DISTRIBUTED BY: Momentum Brands”; “COMMERCE, CA 90023”; “Made in China”;
12 “1608”; “ITEM#29149”; “UPC: 643117291499” (2) **Plastic Armbands**, which includes but is
13 not limited to: “reflective armband”; “Ideal accessory for improved visibility”; “2 COUNT”;
14 “54-629963”; “REFLECTIVE SAFETY BAND”; “Add instant high visibility and safety when
15 walking, running and biking after dark”; “1512”; “DISTRIBUTED BY: Momentum Brands”;
16 “COMMERCE, CA 90023”; “MADE IN CHINA”; “UPC:643117502205”; and (3) **Mountable**
17 **Compasses with Suction Cup**, which includes but is not limited to: “Compass Windshield &
18 Dashboard Mounted”; “56-658707”; “Suction Cup Included”; “38637”; “Item #29338”;
19 “Distributed by: Tru Forge Maywood, CA 90270”; “Made in China”; “643117293882”.

20 The Covered Products are limited to those sold by or supplied by Defendant.

21 2.2 “Effective Date” means the date that this Consent Judgment is approved by the
22 Court.

23 2.3 “DEHP” means Di (2-ethylhexyl) Phthalate, also known as Diethyl Hexyl
24 Phthalate and Bis (2-ethylhexyl) Phthalate


25 2.4 “Listed Chemicals” means DEHP.

26 2.5 “Notices” means the December 21, 2017 Notice, the February 20, 2018 Notice
27 and the March 16, 2018 Notice.

1 **3. INJUNCTIVE RELIEF/REFORMULATION**

2 3.1 After the Effective Date, Defendant shall not distribute for sale in California,
3 manufacture for sale in California, or offer for sale in California any Covered Products unless the
4 levels of DEHP in the Covered Products do not exceed more than 0.1% (1,000 parts per million)
5 by weight.

6 3.2 For any Covered Products still existing in Defendant’s inventory, Defendant shall
7 place a Proposition 65 compliant warning on them. Any warning provided pursuant to this
8 section shall be affixed to the packaging of, or directly on, the Covered Products, and be
9 prominently placed with such conspicuousness as compared with other words, statements,
10 designs, or devices as to render it likely to be read and understood by an ordinary individual
11 under customary conditions before purchase or use. The equilateral triangle pictogram shall be in
12 yellow with a black exclamation mark; provided however, the pictogram may be in white instead
13 of yellow if the Covered Product label does not contain the color yellow. The warning shall
14 state:

15  **WARNING:** This product can expose you to chemicals including Di(2-
16 ethylhexyl) phthalate (DEHP), which is known to the State of California to cause cancer
17 and birth defects or other reproductive harm. For more information go to
18 www.P65Warnings.ca.gov

19 **4. SETTLEMENT PAYMENT**

20 4.1 **Payment and Due Date:** Within ten (10) days of the Effective Date, Defendant
21 shall pay a total of \$86,500 in full and complete settlement of any and all claims for civil
22 penalties, damages, attorney’s fees, expert fees or any other claim for costs, expenses or
23 monetary relief of any kind for claims that were or could have been asserted in the Notices or
24 Complaint, as follows:

25 4.1.1 **Civil Penalty:** Defendant shall issue two separate checks totaling \$9,500.00 as
26 follows for alleged civil penalties pursuant to Health & Safety Code § 25249.12:
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1 (a) Defendant will issue one check made payable to the State of California's Office of
2 Environmental Health Hazard Assessment ("OEHHA") in the amount of \$7,125.00 representing
3 75% of the total civil penalty and Defendant will issue a second check to CAG in the amount of
4 \$2,375.00 representing 25% of the total civil penalty;

5 (b) Separate 1099s shall be issued for each of the above payments: Defendant will issue a
6 1099 to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the amount of
7 \$7,125.00. Defendant will also issue a 1099 to CAG in the amount of \$2,375.00 and deliver it
8 to CAG c/o Yeroushalmi & Yeroushalmi, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills,
9 California 90212.

10 **4.1.2 Additional Settlement Payments:** Defendant shall issue one check for \$7,000.00
11 to "Consumer Advocacy Group, Inc." pursuant to Health & Safety Code § 25249.7(b) and
12 California Code of Regulations, Title 11 § 3203(d). CAG will use this portion of the Total
13 Settlement Payment as follows, eighty five percent (85%) for fees of investigation, purchasing
14 and testing for the Proposition 65 Listed Chemical in various products, and for expert fees for
15 evaluating exposures through various mediums, including but not limited to consumer product,
16 occupational, and environmental exposures to the Proposition 65 Listed Chemical, and the cost
17 of hiring consulting and retaining experts who assist with the extensive scientific analysis
18 necessary for those files in litigation and to offset the costs of future litigation enforcing
19 Proposition 65 but excluding attorney fees; fifteen percent (15%) for administrative costs
20 incurred during investigation and litigation to reduce the public's exposure to the Proposition 65
21 Listed Chemicals by notifying those persons and/or entities believed to be responsible for such
22 exposures and attempting to persuade those persons and/or entities to reformulate their products
23 or the source of exposure to completely eliminate or lower the level of the Proposition 65 Listed
24 Chemicals including but not limited to costs of documentation and tracking of products
25 investigated, storage of products, website enhancement and maintenance, computer and software
26 maintenance, investigative equipment, CAG's member's time for work done on investigations,
27 office supplies, mailing supplies and postage Within 30 days of a request from the Attorney
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1 General, CAG shall provide to the Attorney General copies of documentation demonstrating how
2 the above funds have been spent. CAG shall be solely responsible for ensuring the proper
3 expenditure of such additional settlement payment. Defendant will also issue a 1099 to CAG in
4 the amount of \$7,000.00 and deliver this payment to CAG c/o Yeroushalmi & Yeroushalmi, 9100
5 Wilshire Boulevard, Suite 240W, Beverly Hills, California 90212.

6 4.1.3 **Reimbursement of Attorney Fees and Costs:** Defendant shall issue a check in
7 the amount of \$70,000.00 payable to “Yeroushalmi & Yeroushalmi” as complete reimbursement
8 for any and all reasonable investigation fees and costs, attorneys’ fees, expert fees, and any and
9 all other costs and expenses incurred as a result of investigating, bringing this matter to the
10 Defendant’s attention, litigating, negotiating a settlement in the public interest, and seeking and
11 obtaining court approval of this Consent Judgment.

12 4.2 Other than the payment to OEHHA described above, all payments referenced in
13 paragraphs 4.1.1, 4.1.2, and 4.1.3 above, shall be delivered to: Reuben Yeroushalmi,
14 Yeroushalmi & Yeroushalmi, 9100 Wilshire Blvd., Suite 240W, Beverly Hills, CA 90212. The
15 payment to OEHHA shall be delivered directly to Office of Environmental Health Hazard
16 Assessment, OEHHA, 1001 I Street, Mail Stop 12-B Sacramento, California 95812, Attn: Mike
17 Gyurics. Defendant shall provide written confirmation to CAG concurrently with payment to
18 OEHHA.

19 **5. MATTERS COVERED BY THIS CONSENT JUDGMENT**

20 5.1 This Consent Judgment is a full, final, and binding resolution between CAG, on
21 behalf of itself and in the public interest, and Defendant and their owners, officers, directors,
22 insurers, employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners,
23 affiliates, sister companies, predecessors, and their successors and assigns (“Defendant
24 Releasees”), and all entities to whom Defendant directly or indirectly distribute or sell Covered
25 Products, including, but not limited to, downstream distributors, downstream wholesalers,
26 customers, retailers, marketplace hosts, franchisees, cooperative members, licensees, and the
27 successors and assigns of any of them, who may use, maintain, distribute or sell Covered
28

1 Products (“Downstream Defendant Releasees”), of all claims for alleged or actual violations of
2 Proposition 65 for alleged exposures to the Listed Chemicals from the Covered Products
3 manufactured, distributed or sold by Defendant up through the Effective Date as set forth in the
4 Notices and Complaint. Defendant’s compliance with this Consent Judgment shall constitute
5 compliance with Proposition 65 with respect to alleged exposures to the Listed Chemicals from
6 the Covered Products sold by Defendant Releasees after the Effective Date. Nothing in this
7 Section affects CAG’s right to commence or prosecute an action under Proposition 65 against
8 any person other than Defendant, Defendant Releasees, or Downstream Defendant Releasees.

9 5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys,
10 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or
11 indirectly, any form of legal action and releases all claims, including, without limitation, all
12 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations,
13 damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation
14 fees, expert fees, and attorneys’ fees) of any nature whatsoever, whether known or unknown,
15 fixed or contingent (collectively “Claims”), against the Released Parties arising from any actual
16 or alleged violation of Proposition 65 or any other statutory or common law claim regarding the
17 Covered Products manufactured, distributed or sold by the Released Parties through the Effective
18 Date regarding any actual or alleged failure to warn about exposure to the Listed Chemicals from
19 the Covered Products. In furtherance of the foregoing, CAG on behalf of itself only, hereby
20 waives any and all rights and benefits which it now has, or in the future may have, conferred
21 upon it with respect to Claims regarding the Covered Products manufactured, distributed or sold
22 by the Released Parties through the Effective Date arising from any violation of Proposition 65
23 or any other statutory or common law regarding the failure to warn about exposure to the Listed
24 Chemicals from the Covered Products by virtue of the provisions of section 1542 of the
25 California Civil Code, which provides as follows:

26 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
27 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
28 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE

1 RELEASE, AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
2 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
3 DEBTOR OR RELEASED PARTY.

4 CAG understands and acknowledges that the significance and consequence of this waiver of
5 California Civil Code section 1542 is that even if CAG suffers future damages arising out of or
6 resulting from, or related directly or indirectly to, in whole or in part, Claims arising from any
7 violation of Proposition 65 or any other statutory or common law regarding the Covered
8 Products manufactured, distributed or sold by the Released Parties through the Effective Date
9 regarding the failure to warn about actual or alleged exposure to the Listed Chemicals from the
10 Covered Products, CAG will not be able to make any claim for those damages, penalties or other
11 relief against the Released Parties. Furthermore, CAG acknowledges that it intends these
12 consequences for any such Claims arising from any violation of Proposition 65 or any other
13 statutory or common law regarding the failure to warn about exposure to the Listed Chemicals
14 from the Covered Products as may exist as of the date of this release but which CAG does not
15 know exist, and which, if known, would materially affect their decision to enter into this Consent
16 Judgment, regardless of whether their lack of knowledge is the result of ignorance, oversight,
17 error, negligence, or any other cause.

17 **6. ENTRY OF CONSENT JUDGMENT**

18 6.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to
19 California Health & Safety Code § 25249.7(f). The Parties agree to act in good faith to obtain
20 Court approval of the Consent Judgment. Upon entry of the Consent Judgment, CAG and
21 Defendant waive their respective rights to a hearing and trial on the allegations in the Notices
22 and Complaint.

23 6.2 If this Consent Judgment is not approved in full by the Court: (a) this Consent
24 Judgment and any and all prior agreements between the Parties merged herein shall terminate
25 and become null and void, and the actions shall revert to the status that existed prior to the
26 execution date of this Consent Judgment; (b) no term of this Consent Judgment or any draft
27 thereof, or of the negotiation, documentation, or other part or aspect of the Parties' settlement
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1 discussions, shall have any effect, nor shall any such matter be admissible in evidence for any
2 purpose in this Action, or in any other proceeding; and (c) the Parties agree to meet and confer to
3 determine whether to modify the terms of the Consent Judgment and to resubmit it for approval.

4 6.3 Upon entry of an order approving this Consent Judgment, the Complaint in this
5 action shall be deemed amended to include the claims raised in the Notices as detailed in Section
6 1.5.

7 **7. MODIFICATION OF JUDGMENT**

8 7.1 This Consent Judgment may be modified only upon written agreement of the
9 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
10 any Party as provided by law and upon entry of a modified Consent Judgment by the Court.

11 7.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to
12 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

13 **8. RETENTION OF JURISDICTION**

14 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the
15 terms of this Consent Judgment under Code of Civil Procedure section 664.6.

16 8.2 CAG may bring an action to enforce any breach of the monetary settlement terms
17 in Section 4.0, above, upon five (5) days written notice by CAG to Settling Defendant of the
18 alleged breach in accordance with the notification requirements set forth in Section 14.0, below.

19 8.3 In any proceeding brought by either Party to enforce this Consent Judgment, the
20 prevailing party shall be entitled to recover its reasonable attorney's fees and costs.

21 **9. SERVICE ON THE ATTORNEY GENERAL**

22 9.1 CAG shall serve a copy of this Consent Judgment, signed by both parties, on the
23 California Attorney General so that the Attorney General may review this Consent Judgment
24 prior to its submittal to the Court for approval. No sooner than forty-five (45) days after the
25 Attorney General has received the aforementioned copy of this Consent Judgment, CAG may
26 then submit it to the Court for approval.

27 **10. ENTIRE AGREEMENT**

1 10.1 This Consent Judgment contains the sole and entire agreement and understanding
2 of the Parties with respect to the entire subject matter hereof and any and all prior discussions,
3 negotiations, commitments and understandings related hereto. No representations, oral or
4 otherwise, express or implied, other than those contained herein have been made by any party
5 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
6 deemed to exist or to bind any of the Parties.

7 **11. ATTORNEY FEES**

8 11.1 Except as specifically provided in Sections 4.1.3 and 8.2, each Party shall bear its
9 own attorneys' fees and costs in connection with the claims resolved in this Consent Judgment.

10 **12. GOVERNING LAW**

11 12.1 The validity, construction, terms, and performance of this Consent Judgment shall
12 be governed by the laws of the State of California, without reference to any conflicts of law
13 provisions of California law.

14 12.2 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
15 inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are
16 rendered inapplicable or are no longer required as a result of any such repeal or preemption, or
17 rendered inapplicable by reason of law generally as to the Covered Products, then Defendant
18 may provide written notice to CAG of any asserted change in the law, and shall have no further
19 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Covered
20 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve
21 Defendant from any obligation to comply with any other pertinent state or federal law or
22 regulation.

23 12.3 The Parties, including their counsel, have participated in the preparation of this
24 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
25 Consent Judgment was subject to revision and modification by the Parties and has been accepted
26 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
27 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
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1 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
2 agrees that any statute or rule of construction providing that ambiguities are to be resolved
3 against the drafting Party should not be employed in the interpretation of this Consent Judgment
4 and, in this regard, the Parties hereby waive California Civil Code section 1654.

5 **13. EXECUTION AND COUNTERPARTS**

6 13.1 This Consent Judgment may be executed in counterparts and by means of
7 facsimile or portable document format (pdf), which taken together shall be deemed to constitute
8 one document and have the same force and effect as original signatures.

9 **14. NOTICES**

10 14.1 Any notices under this Consent Judgment shall be by delivery of First-Class Mail.

11 If to CAG:

12 Reuben Yeroushalmi
13 reuben@yeroshalmi.com
14 Yeroushalmi & Yeroushalmi
15 9100 Wilshire Boulevard, Suite 240W
16 Beverly Hills, CA 90212

17 If to Defendant Henan American Machinery, Inc.:

18 Kenneth I. Gross, Esq.
19 kgross@kigrosslaw.com
20 849 S. Broadway, Suite 504
21 Los Angeles, CA 90014

22 **15. AUTHORITY TO STIPULATE**

23 15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
24 by the Party he or she represents to enter into this Consent Judgment and to execute it on behalf
25 of the Party represented and legally to bind that party.
26
27
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1 AGREED TO:

AGREED TO:

2
3 Date: 6/22/2021, ~~2020~~

Date: 6/22/2021, 2020

4 Michael Marcus

Weiming Li

6
7 Name: Michael Marcus

Name: Weiming Li

8
9 Title: Director

Title: President

10 CONSUMER ADVOCACY GROUP, INC.

HENAN AMERICAN MACHINERY, INC.

11
12 IT IS SO ORDERED.

13
14 Date: _____

15 _____
16 JUDGE OF THE SUPERIOR COURT