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Center for Advanced Public Awareness, Inc. (“CAPA”)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

UNLIMITED JURISDICTION

**CENTER FOR ADVANCED PUBLIC
AWARENESS, INC.,**

Plaintiff,

v.

OMG ACCESSORIES LLC, an Illinois
limited liability company;
NORDSTROM, INC., a Washington
corporation, and DOES 1-25,

Defendants.

CASE NO.: RG18924043

[STIPULATED] CONSENT JUDGMENT

1. INTRODUCTION

1.1 This Consent Judgment is entered into by and between Center for Advanced Public Awareness (“CAPA”) and OMG Accessories LLC (“OMG Accessories”). CAPA and OMG are hereinafter referred to individually as a “Party” or collectively as the “Parties.”

1.2 This matter arises out of the Notice of Violation of California Health & Safety Code section 25249.5, *et seq.* (also known as “Proposition 65”) that CAPA served on OMG Accessories and prosecutors on July 19, 2018 (the “Notice”) with regard to the following product identified below.

1 **1.3** On October 10, 2018, CAPA filed a Complaint for Civil Penalties and Injunctive
2 Relief (“Complaint”) in Alameda County Superior Court, Case No. RG18924043, against OMG
3 Accessories. In this action, CAPA alleges that a certain product manufactured, distributed, or
4 sold by OMG Accessories contains di-(2-ethylhexyl) phthalate (“DEHP”), a chemical listed
5 under Proposition 65 as causing developmental toxicity and male reproductive toxicity, and
6 exposes consumers to this chemical at a level requiring a Proposition 65 warning. This product
7 (referred to hereinafter as the “Covered Product”) includes all forms of packaging and labeling
8 of:

9 (1) **UNICORN COSMETICS CASE**

10
11 **1.4** CAPA is a 501(c)(3) California non-profit corporation dedicated to, among
12 other causes, helping safeguard the public from health hazards by reducing the use and misuse
13 of hazardous and toxic chemicals, facilitating a safe environment for consumers and
14 employees, and encouraging corporate responsibility.

15 **1.5** For purposes of this Consent Judgment, OMG Accessories represents that it has
16 employed ten or more persons at times relevant to this action and qualifies as a “person in the
17 course of doing business” within the meaning of Proposition 65. OMG Accessories has either
18 manufactured, and/or distributed, and/or sold the Covered Product at times relevant to this action.

19 **1.6** CAPA’s Notice alleges that use of the Covered Product exposes persons in
20 California to DEHP without first providing clear and reasonable warnings in violation of
21 California Health and Safety Code section 25249.6. OMG Accessories denies all material
22 allegations contained in the Notice.

23 **1.7** The Parties have entered into this Consent Judgment in order to settle,
24 compromise, and resolve disputed claims and thus avoid prolonged and costly litigation. Nothing
25 in this Consent Judgment, nor in compliance with this Consent Judgment, shall constitute or be
26 construed as an admission against interest by any of the Parties or by any of their respective
27 officers, directors, shareholders, employees, agents, parent companies and subsidiaries thereof,
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1 subsidiaries, or divisions of any fact, issue of law, or violation of law. By execution of this
2 Consent Judgment, OMG Accessories does not admit any facts or conclusions of law, including
3 but not limited to, any facts or conclusions of law suggesting or demonstrating any violation of
4 Proposition 65 or any other statutory, common law, or equitable requirements related to any
5 prohibited substances including but not limited to DEHP in Covered Product, and specifically
6 denies that it has committed any such violation. Nothing in this Consent Judgment shall be
7 construed as an admission by OMG Accessories of any fact, issue of law, or violation of law, nor
8 shall compliance with the Consent Judgment constitute or be construed as an admission by OMG
9 Accessories of any fact, issue of law, or violation of law.

10 **1.8** Except as expressly set forth herein, nothing in this Consent Judgment shall
11 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
12 current or future legal proceeding unrelated to these proceedings.

13 **1.9** The “Effective Date” of this Consent Judgment is the date on which the Court
14 enters judgment in this matter.

15 **2. JURISDICTION AND VENUE**

16 For purposes of this Consent Judgment and any further court action that may become
17 necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter
18 jurisdiction over the allegations of violations contained in the Notice, personal jurisdiction over
19 CAPA and OMG Accessories, that venue is proper, and that this Court has jurisdiction to enter
20 this Consent Judgment as a full and final resolution of all claims up through and including the
21 Effective Date which were or could have been asserted in this action based on the facts alleged in
22 the Notice.

23 **3. INJUNCTIVE RELIEF, TESTING AND WARNINGS**


24 **3.1** Beginning on the Effective Date, OMG Accessories shall be permanently
25 enjoined from manufacturing for sale in the State of California, “Distributing into the State of
26 California” or directly selling in the State of California any Covered Product which exposes an
27 adult to 410 µg/day, infant boys, age (29 days to 24 months), to 58 µg/day and 20 µg/day for
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1 neonatal infant boys (age 0 to 28 days), unless it meets the warning requirements under Section
2 3.2.

3 **3.1.1** As used in this Consent Judgment, the term “Distributing into the State of
4 California” shall mean to directly ship a Covered Product into California for sale in California or
5 to sell a Covered Product to a distributor that OMG Accessories knows will sell the Covered
6 Product in California.

7 **3.2 Clear and Reasonable Warnings**

8 If OMG Accessories is required to provide a warning for any Covered Product distributed
9 into the State of California or sold directly in the State of California, that contains DEHP and
10 constitutes a consumer product exposure to this chemical at a level requiring a Proposition 65
11 warning, warnings substantially identical to the following must be utilized (“Warning”):

12  **WARNING: This product can expose you to chemicals including di-(2-ethylhexyl)**
13 **phthalate (“DEHP”), which is known to the State of California to cause**
14 **developmental toxicity and male reproductive toxicity. For more information go to**
15 **www.P65Warnings.ca.gov; or, in the alternative:**

16  **WARNING: Developmental toxicity and male reproductive toxicity -**
17 **www.P65Warnings.ca.gov.**

18 The Warning shall be securely affixed to or printed upon the container or label of each
19 Covered Product. If the Warning is provided on the label, it must be set off from other
20 surrounding information and enclosed in a box. The Warning on the label shall be at least the
21 same size as other warnings on the Covered Product label so long as it remains clearly visible
22 and readable to the consumer. In addition, for any Covered Product sold over the internet by or
23 through OMG Accessories’ own website, the Warning shall either (a) appear on the product
24 display page on which the Covered Product is identified (but may not be provided via a
25 hyperlink on that product display page) or (b) appear to the purchaser, not via a hyperlink, during
26 the checkout process and prior to completion thereof when a California delivery address is
27 indicated for the purchase of any Covered Product. An asterisk or other method of identifying the
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1 existence of the Warning must be utilized so the purchaser may readily identify the specific
2 Covered Product subject to the Warning.

3 For Covered Products sold over the internet by or through OMG Accessories' own
4 website, the Warning shall be at least the same size as other health or safety warnings also
5 appearing on the product display page on OMG Accessories's website. For all Warnings, the word
6 "WARNING" shall be in all capital letters and in bold print. Statements supplemental to the
7 Warning which are immediately proximate thereto are allowed only to the extent they identify the
8 source of the exposure or provide information on how consumers of the Covered Product may
9 avoid or reduce exposure to the identified chemical or chemicals. Except as set forth in the
10 immediately preceding sentence, no statements shall appear adjacent to the Warning and,
11 specifically, no statements adjacent to the Warning may state that the source of the listed chemical
12 renders the listed chemical non-harmful or healthful.

13 OMG Accessories must display the Warning with such conspicuousness, as compared
14 with other words, statements, or designs on the label or container, or on its website, if applicable,
15 so as to render the Warning likely to be read and understood by an ordinary individual under
16 customary conditions of purchase or use of the Covered Product.

17 **4. SETTLEMENT PAYMENT**

18 **4.1** In full satisfaction of all potential civil penalties, additional settlement payments,
19 attorney's fees, and costs, OMG Accessories shall make a total payment of **\$27,500.00** ("Total
20 Settlement Amount") to CAPA within ten (10) business days of the Effective Date ("Due
21 Date"). OMG Accessories shall make this payment by wire transfer to Aqua Terra Aeris Law
22 Group's ("ATA") client trust account, for which ATA will give OMG Accessories the
23 necessary account information and taxpayer information at least ten (10) business days prior to
24 the Effective Date. The Total Settlement Amount shall be apportioned as follows:

25 **4.2** **\$4,000.00** shall be considered a civil penalty pursuant to California Health and
26 Safety Code section 25249.7, subdivision (b)(1). CAPA shall remit 75% (**\$3,000.00**) of the civil
27 penalty to the Office of Environmental Health Hazard Assessment ("OEHHA") for
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1 deposit in the Safe Drinking Water and Toxic Enforcement Fund in accordance with California
2 Health and Safety Code section 25249.12, subdivision (c). CAPA will retain the remaining
3 25% (\$1,000.00) of the civil penalty.

4 **4.3** \$10,393.00 shall be distributed to CAPA as reimbursement to CAPA for
5 reasonable costs incurred in bringing this action.

6 **4.4** \$13,107.00 shall be distributed to Aqua Terra Aeris Law Group as
7 reimbursement of CAPA's attorney's fees. Except as explicitly provided herein, each Party
8 shall bear its own fees and costs.

9 **4.5** OMG Accessories shall issue separate 1099 forms for each of its payments
10 under this Consent Judgment to the persons identified below:

11 (a) "Center for Advanced Public Awareness, Inc.," whose address and tax
12 identification number shall be furnished after this Consent Judgment has been
13 fully executed by the Parties.

14 (b) "Aqua Terra Aeris Law Group," for attorneys' fees pursuant to Section 4.6.

15 **4.6** In the event that OMG Accessories fails to remit the Total Settlement Amount
16 owed under Section 4 of this Consent Judgment on or before the Due Date, subject to a two (2)
17 business day grace period during which CAPA may provide notice it has not received payment,
18 CAPA shall be deemed to be in material breach of its obligations under this Consent Judgment.
19 CAPA shall provide written notice of the delinquency to OMG Accessories via electronic mail.
20 If OMG Accessories fails to deliver the Total Settlement Amount within five (5) days from the
21 written notice, the Total Settlement Amount shall accrue interest at the statutory judgment
22 interest rate provided in the California Code of Civil Procedure section 685.010. Additionally,
23 OMG Accessories agrees to pay CAPA's reasonable attorney's fees and costs for any efforts to
24 collect the payment due under this Consent Judgment.

25 **5. MODIFICATION OF CONSENT JUDGMENT**

26 **5.1** This Consent Judgment may be modified (except as to the monetary terms)
27 only (i) by written stipulation of the Parties and upon entry by the Court of a modified consent
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1 judgment or (ii) by motion of either Party pursuant to Section 5.3 or 5.4 and upon entry by the
2 Court of a modified consent judgment.

3 **5.2** If any Party seeks to modify this Consent Judgment under Section 5.1, then that
4 Party must provide written notice to the other Party of its intent (“Notice of Intent”). The
5 Parties shall meet and confer in good faith regarding the proposed modification in the Notice of
6 Intent within thirty (30) days of receiving the Notice of Intent. Within thirty (30) days of such
7 meeting, if there remains a dispute as to the proposed modification, the Party disputing the
8 modification shall provide to the other Party a written basis for its position. The Parties shall
9 continue to meet and confer for an additional thirty (30) days in an effort to resolve any
10 remaining disputes. Should it become necessary, the Parties may agree in writing to different
11 deadlines for the meet-and-confer period.

12 **5.3** In the event that OMG Accessories initiates or otherwise requests a modification
13 under Section 5.1, and the meet and confer process leads to a joint motion or unopposed motion
14 or application for a modification of the Consent Judgment, OMG Accessories shall reimburse
15 CAPA its costs and reasonable attorney’s fees for the time spent in the meet-and-confer process
16 and filing and arguing the motion or application. CAPA shall not be reimbursed for costs or
17 attorney’s fees for an uncontested motion, or for a ministerial motion (such as a change in name
18 or contact information) or if CAPA does not expend more than two (2) hours of attorney time
19 on the joint motion.

20 **5.4** Where the meet-and-confer process does not lead to an uncontested motion or to a
21 joint motion or application in support of a modification of the Consent Judgment, then either Party
22 may seek judicial relief on its own.

23 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**
24 **JUDGMENT**

25 **6.1** Pursuant to California Code of Civil Procedure section 664.6, this Court shall
26 retain jurisdiction of this matter to enforce, modify, or terminate this Consent Judgment. This
27 Consent Judgment may be enforced solely by the Parties hereto, including their respective
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1 successors or assigns, provided each Party identifies any such successor or assign in writing to
2 the other Party.

3 **6.2** If CAPA alleges that any Covered Product failed or fails to bear a Warning with
4 respect to DEHP and was manufactured for sale in the State of California, “Distributed into the
5 State of California,” or directly sold in the State of California in violation of this Consent
6 Judgment, then CAPA shall inform OMG Accessories in a reasonably prompt manner of its test
7 results, including information sufficient to permit OMG Accessories to identify the Covered
8 Product at issue, and of CAPA’s DEHP exposure assessment, as applicable. OMG Accessories
9 shall, within thirty (30) days following such notice, provide CAPA with testing information,
10 from an independent third-party laboratory and other relevant information it may wish to
11 present to CAPA, if any, demonstrating OMG Accessories’s compliance with the Consent
12 Judgment, if warranted. The Parties shall first attempt to resolve the matter prior to CAPA
13 taking any further legal action.

14 **7. APPLICATION OF CONSENT JUDGMENT**

15 This Consent Judgment applies to, and is binding upon, and benefits CAPA, acting on its
16 own behalf and in the public interest, and OMG Accessories and its respective officers, directors,
17 shareholders, employees, agents, parent companies and subsidiaries thereof, subsidiaries, partners,
18 affiliates, downstream distributors, wholesalers, customers, retailers, and any other person or entity
19 to whom they directly or indirectly distribute or sell the Covered Product. . This Consent Judgment
20 shall have no application to any Covered Product which is distributed or sold exclusively outside
21 the State of California and which is not used by California consumers.

22 **8. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

23 **8.1** This Consent Judgment is a full, final, and binding resolution between CAPA, in
24 the public interest, and OMG Accessories and its respective officers, directors, shareholders,
25 employees, agents, parent companies and subsidiaries thereof, subsidiaries, partners, affiliates,
26 downstream distributors, wholesalers, customers, retailers, and any other person or entity to
27 whom they directly or indirectly distribute or sell the Covered Product (collectively, “Released
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1 Parties”). CAPA, in the public interest, hereby fully releases and discharges the Released
2 Parties from any and all claims, actions, causes of action, suits, demands, liabilities, damages,
3 penalties, fees, costs, and expenses asserted, or that could have been asserted, from the
4 handling or use of the Covered Product manufactured on or prior to the Effective Date, as to
5 any alleged violation of Proposition 65 or its implementing regulations arising from the failure
6 to provide Proposition 65 warnings on the Covered Product regarding DEHP up to and
7 including the Effective Date.

8 **8.2** CAPA on its own behalf, and on behalf of its past and current agents,
9 representatives, attorneys, successors, and/or assignees, and OMG Accessories on its own
10 behalf only, further waive and release any and all claims they may have against each other or
11 their attorneys for all actions or statements made or undertaken in the course of seeking or
12 opposing enforcement of Proposition 65 in connection with the Notice up through and
13 including the Effective Date, provided, however, that nothing in Section 8 shall affect or limit
14 any Party’s right to seek to enforce the terms of this Consent Judgment.

15 **8.3** It is possible that other claims not known to the Parties, arising out of the facts
16 alleged in the Notice, and relating to the Covered Product, will develop or be discovered.
17 CAPA on behalf of itself only, and OMG Accessories on behalf of itself only, acknowledge
18 that this Consent Judgment is expressly intended to cover and include all such claims up
19 through and including the Effective Date, including all rights of action therefore. CAPA and
20 OMG Accessories acknowledge that the claims released in Sections 8.1 and 8.2 above may
21 include unknown claims, and nevertheless waive California Civil Code section 1542 as to any
22 such unknown claims. California Civil Code section 1542 reads as follows:

23 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
24 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
25 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN
26 BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER
27 SETTLEMENT WITH THE DEBTOR.

1 CAPA on behalf of itself only, and OMG Accessories on behalf of itself only, acknowledge
2 and understand the significance and consequences of this specific waiver of California Civil
3 Code section 1542.

4 **8.4** Compliance with the terms of this Consent Judgment by OMG Accessories shall
5 be deemed to constitute compliance with Proposition 65 by any Released Party regarding
6 alleged exposures to DEHP in the Covered Product as set forth in the Notice and after the
7 Effective Date.

8 **8.5** Nothing in this Consent Judgment is intended to apply to any occupational or
9 environmental exposures arising under Proposition 65.

10 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

11 In the event that any of the provisions of this Consent Judgment are held by a court to be
12 unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.

13 **10. GOVERNING LAW**

14 The terms and conditions of this Consent Judgment shall be governed by and construed in
15 accordance with the laws of the State of California.

16 **11. PROVISION OF NOTICE**

17 All notices required to be given to either Party to this Consent Judgment by the other shall
18 be in writing and sent to the following agents listed below via first-class mail. Courtesy copies via
19 email may also be sent.

20 **FOR CENTER FOR ADVANCED PUBLIC AWARENESS, INC.:**

21 Executive Director
22 2342 Shattuck Ave. #347
23 Berkeley, CA 94704
24 Tel: (540) 907-2520
25 E-mail: linda@capasafe.com

26 With a copy to:

27 Matthew C. Maclear
28 AQUA TERRA AERIS LAW GROUP
490 43rd Street, Suite 108
Oakland, CA 94609

1 Tel: (415) 568-5200
2 E-mail: mcm@atalawgroup.com.

3 **FOR OMG ACCESSORIES:**

4 Title: Chief Executive Officer
5 Address: 10 West 33rd Street, Suite 1224, New York City, NY, 10001
6 Email: ms.omg@omghandbag.com
7 Phone: (212) 643-1589

8 **12. COURT APPROVAL**

9 **12.1** Upon execution of this Consent Judgment by the Parties, CAPA shall notice a
10 Motion for Court Approval. OMG Accessories shall not object to judicial approval of the
11 Consent Judgment in the form it was executed and, upon request of CAPA, shall file a
12 Statement of Non-Opposition to these Consent Judgment terms.

13 **12.2** If the California Attorney General objects to any term in this Consent Judgment,
14 the Parties shall meet and confer with the Attorney General, or with each other, as applicable,
15 to attempt in good faith to resolve the concern in a timely manner, and, if possible, prior to the
16 hearing on the Motion for Court Approval.

17 **12.3** If this Stipulated Consent Judgment is not approved by the Court in the form it
18 was executed within one (1) year of execution by all Parties, it shall be void and have no force
19 or effect.

20 **13. EXECUTION AND COUNTERPARTS**

21 This Consent Judgment may be executed in counterparts, which taken together shall be
22 deemed to constitute one document. A facsimile or Portable Document Format (PDF) signature
23 shall be construed to be as valid as the original signature.

24 **14. DRAFTING**

25 The terms of this Consent Judgment have been reviewed by the respective counsel for each
26 Party prior to its signing, and each Party has had an opportunity to fully discuss the terms and
27 conditions with its legal counsel. The Parties agree that, in any subsequent interpretation and
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1 construction of this Consent Judgment, no inference, assumption, or presumption shall be drawn,
2 and no provision of this Consent Judgment shall be construed against any Party, based on the fact
3 that one of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all or any
4 portion of the Consent Judgment. It is conclusively presumed that all of the Parties participated
5 equally in the preparation and drafting of this Consent Judgment.

6 **15. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

7 If a dispute arises with respect to either Party's compliance with the terms of this Consent
8 Judgment entered by the Court, the Parties shall meet and confer in person, by telephone, and/or in
9 writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be
10 filed in the absence of such a good faith attempt to resolve the dispute beforehand.

11 **16. ENFORCEMENT**

12 This Consent Judgment may be enforced exclusively by the Parties hereto. CAPA may,
13 by motion or order to show cause, enforce the terms and conditions contained in this Consent
14 Judgment. In any action brought by CAPA to enforce this Consent Judgment, CAPA may seek
15 whatever fines, costs, penalties, or remedies as are provided by law for failure to comply with the
16 Consent Judgment.

17 **17. ENTIRE AGREEMENT, AUTHORIZATION**

18 **17.1** This Consent Judgment contains the sole and entire agreement and
19 understanding of the Parties with respect to the entire subject matter herein, and any and all
20 prior discussions, negotiations, commitments, and understandings related hereto. No
21 representations, oral or otherwise, express or implied, other than those contained herein have
22 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to
23 herein, shall be deemed to exist or to bind any Party.

24 **17.2** Each signatory to this Consent Judgment certifies that he or she is fully
25 authorized by the Party he or she represents to stipulate to this Consent Judgment.

26 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
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1 **CONSENT JUDGMENT**

2 This Consent Judgment has come before the Court upon the request of the CAPA. CAPA
3 requests the Court to fully review this Consent Judgment and, being fully informed regarding the
4 matters which are the subject of this action, to:

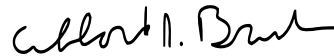
5 (1) Find that the terms and provisions of this Consent Judgment represent a fair and
6 equitable settlement of all matters raised by the allegations of the Notice that the matter has been
7 diligently prosecuted, and that the public interest is served by such settlement; and

8 (2) Make the findings pursuant to California Health and Safety Code section
9 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

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12 **IT IS SO STIPULATED:**

13 Dated: 11/26/18, 2018

CENTER FOR ADVANCED PUBLIC
AWARENESS



By: Clifford Brechner
Title: Executive Director

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17
18 Dated: 11/14/2018, 2018

OMG ACCESSORIES LLC


BY: ANNE HARPER

Title: Chief Executive Officer

ORDER AND JUDGMENT

Based upon the Parties' Stipulation, and good cause appearing, this Consent Judgment is approved and Judgment is hereby entered according to its terms.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: _____

Judge of the Superior Court