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11 CENTER FOR ENVIRONMENTAL HEALTH

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 COUNTY OF ALAMEDA

14 CENTER FOR ENVIRONMENTAL HEALTH, ) Case No. RG21107796  
15 a non-profit corporation, )  
16 )  
17 Plaintiff, ) **[PROPOSED] CONSENT**  
18 ) **JUDGMENT AS TO MERRITHEW**  
19 vs. ) **INTERNATIONAL INC.**  
20 GYMSHARK USA, INC., *et al.*; and DOES 1 )  
21 through 200, inclusive, )  
22 )  
23 Defendants. )  
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29 **1. INTRODUCTION**

30 **1.1** The parties to this Consent Judgment (“Parties”) are the Center for  
31 Environmental Health (“CEH”) and defendant Merrithew International, Inc. (“Settling  
32 Defendant”). CEH and Settling Defendant are referred to collectively as the “Parties.”

33 **1.2** Settling Defendant is a corporation that employs ten (10) or more persons and  
34 that manufactures, distributes, and/or sells latex resistance bands that contain n-  
35 nitrosodiethylamine (“NDEA”) in the State of California or has done so in the past.

1           **1.3**           On April 14, 2021, CEH served a 60-Day Notice of Violation under  
2 Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health  
3 & Safety Code § 25249.5, *et seq.*) (“Notice”) on Settling Defendant, the California Attorney  
4 General, the District Attorneys of every County in the State of California, and the City Attorneys  
5 for every City in the State of California with a population greater than 750,000. The Notice  
6 alleges violations of Proposition 65 with respect to the presence of NDEA in latex resistance  
7 bands that are manufactured, distributed, and/or sold by Settling Defendant.

8           **1.4**           On July 22, 2021, CEH filed the above-captioned action in the Superior Court  
9 of California for Alameda County. On September 30, 2021, CEH amended the complaint naming  
10 Settling Defendant as a defendant in this action.

11           **1.5**           For purposes of this Consent Judgment only, the Parties stipulate that: (i) this  
12 Court has jurisdiction over the allegations of violations contained in the operative Complaint in  
13 the above-captioned action (“Complaint”) and personal jurisdiction over Settling Defendant as to  
14 the acts alleged in the Complaint; (ii) venue is proper in the County of Alameda; and (iii) this  
15 Court has jurisdiction to enter this Consent Judgment.

16           **1.6**           Nothing in this Consent Judgment is, or shall be construed as, an admission by  
17 the Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall compliance  
18 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,  
19 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall  
20 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any  
21 other legal proceeding. This Consent Judgment is the product of negotiation and compromise and  
22 is accepted by the Parties for purposes of settling, compromising, and resolving issues disputed in  
23 this action.

24 **2.     DEFINITIONS**

25           **2.1**           “Covered Products” means latex resistance bands.

26           **2.2**           “Effective Date” means the date on which this Consent Judgment is entered by  
27 the Court.

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1       **3.       INJUNCTIVE RELIEF**

2               **3.1               Reformulation of Covered Products.** Settling Defendant has until up to six  
3 (6) months from the Effective Date to reformulate the Covered Product (the “Reformulation  
4 Date”). After the Reformulation Date, Settling Defendant shall not manufacture, distribute, sell,  
5 or offer for sale any Covered Product that contains NDEA in excess of 20 parts per billion  
6 (“ppb”) as determined using a modified version of ISO 19577-2019 (the “Test Protocol”) by an  
7 independent accredited laboratory that will be sold or offered for sale to California consumers. In  
8 the event that CEH enters into a consent decree or out-of-court settlement agreement with a party  
9 other than Settling Defendant in this lawsuit or in a different lawsuit regarding latex resistance  
10 bands that are similar to the Covered Products, and in so doing agrees to injunctive relief  
11 permitting a higher maximum level of NDEA in the covered products, then CEH agrees to  
12 provide Settling Defendant notice of the higher maximum within ten (10) business days of the  
13 grant of the higher maximum to the other party and Settling Defendant shall have ten (10)  
14 business days to notify CEH if Settling Defendant desires to be granted the higher maximum by  
15 CEH. In the event that Settling Defendant makes such election, it shall prepare a modified  
16 Consent Judgment and obtain court approval thereof in accordance with Section 6.1 below.

17               **3.2               Specification to and Certification from Suppliers.** Following the Effective  
18 Date, Settling Defendant shall issue specifications to its suppliers of Covered Products requiring  
19 that Covered Products not contain NDEA in excess of 20 ppb. No later than the Reformulation  
20 Date, for any sales thereafter of Covered Products in California, Settling Defendant shall obtain  
21 and maintain written certification(s) from its suppliers of Covered Products confirming that all  
22 such Covered Products received by Settling Defendant for distribution in California do not  
23 contain NDEA in excess of 20 ppb as determined using the Test Protocol by an independent  
24 accredited laboratory. Settling Defendant shall not be deemed in violation of the requirements of  
25 Section 3.1 for any Covered Product to the extent: (a) it has relied on a written certification from  
26 its vendor that supplied a Covered Product that such Covered Product does not contain NDEA in  
27 excess of 20 ppb as determined using the Test Protocol by an independent accredited laboratory  
28 and such certification has not previously been demonstrated to be invalid, or (b) it has obtained a

1 test result from an independent third party accredited laboratory reporting that the Covered  
2 Product does not contain NDEA in excess of 20 ppb as determined using the Test Protocol.

### 3 **3.3 Clear and Reasonable Warnings.**

4 3.3.1 **Election to Warning.** If Settling Defendant is unable to comply with the  
5 Reformulation provision set forth in Section 3.1 or otherwise elects to permanently avail itself of  
6 the warning option provided by this Section 3.3, Settling Defendant shall provide written notice  
7 to CEH prior to the Reformulation Date, and Settling Defendant concurrently shall make the  
8 additional payment specified in Section 5.2.5 below. Settling Defendant shall then provide Clear  
9 and Reasonable Warnings for each Covered Product sold in California. A Clear and Reasonable  
10 Warning under this Agreement shall state:



11 **WARNING:** This product can expose you to chemicals including N-  
12 Nitrosodiethylamine (NDEA), which is known to the State of California to  
13 cause cancer. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

14 The word “**WARNING**” shall be displayed in all capital letters and bold print and shall be  
15 preceded by the yellow warning triangle symbol depicted above, provided however, the  
16 symbol may be printed in black and white if the Covered Product label is produced without  
17 using the color yellow. This warning statement shall be prominently displayed on the outer  
18 packaging of the Covered Product and shall be displayed with such conspicuousness, as  
19 compared with other words, statements or designs as to render it likely to be seen, read and  
20 understood by an ordinary individual prior to sale. For internet, catalog or any other sale  
21 where the consumer is not physically present, the warning statement shall be displayed in  
22 such a manner that it is likely to be read and understood by an ordinary individual prior to the  
23 authorization of or actual payment.

## 24 **4. ENFORCEMENT**

25 **4.1** CEH may, by motion or application for an order to show cause before the  
26 Superior Court of the County of Alameda, enforce the terms and conditions contained in this  
27 Consent Judgment. Prior to bringing any motion or application to enforce the requirements of  
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1 Section 3 above, CEH shall provide Settling Defendant with a Notice of Violation setting forth  
2 the basis for the alleged violation. The Parties shall then meet and confer regarding the basis for  
3 CEH's anticipated motion or application in an attempt to resolve it informally. Should such  
4 attempts at meeting and conferring fail, CEH may file its enforcement motion or application. In  
5 ruling on any motion to enforce the terms of this section, the Court may, in addition to ordering  
6 compliance with the terms of this Consent Judgment, employ such remedies as necessary to  
7 ensure compliance with Proposition 65 including, but not limited to, requiring Settling Defendant  
8 to provide warnings. Should CEH prevail on any motion or application to enforce a material  
9 violation of this Consent Judgment under this Section, CEH shall be entitled to its reasonable  
10 attorneys' fees and costs incurred as a result of such motion or application. Should Settling  
11 Defendant prevail on any motion or application under this Section, Settling Defendant may be  
12 awarded its reasonable attorneys' fees and costs as a result of such motion or application upon a  
13 finding by the court that CEH's prosecution of the motion or application was not in good faith.

14 **5. PAYMENTS**

15 **5.1 Payments by Settling Defendant.** Within fifteen (15) calendar days of the  
16 Effective Date, Settling Defendant shall pay the total sum of \$20,000.00 as a settlement payment  
17 as further set forth in this Section. Any payment by Settling Defendant shall be deemed to be  
18 timely and not subject to a late charge and/or other penalty if (1) postmarked (if sent by the  
19 United States Postal Service) or (2) delivered to an overnight carrier (e.g. Fed Ex), on or before  
20 the deadline set forth in this paragraph.

21 **5.2 Allocation of Payments.** The total settlement amount for Settling Defendant  
22 shall be paid in five (5) separate checks in the amounts specified below and delivered as set forth  
23 below. Any failure by Settling Defendant to comply with the payment terms herein shall be  
24 subject to a joint and several stipulated late fee to be paid by Settling Defendant in the amount of  
25 \$100 for each day the full payment is not received after the applicable payment due date set forth  
26 in Section 5.1. The late fees required under this Section shall be recoverable, together with  
27 reasonable attorneys' fees, in an enforcement proceeding brought pursuant to Section 4 of this  
28 Consent Judgment. The funds paid by Settling Defendant shall be allocated as set forth below

1 between the following categories and made payable as follows:

2 5.2.1 \$2,700 as a civil penalty pursuant to Health & Safety Code §  
3 25249.7(b). The civil penalty payment shall be apportioned in accordance with Health & Safety  
4 Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of Environmental  
5 Health Hazard Assessment (“OEHHA”). Accordingly, the OEHHA portion of the civil penalty  
6 payment for \$2,025 shall be made payable to OEHHA and associated with taxpayer identification  
7 number 68-0284486. This payment shall be delivered as follows:

8 For United States Postal Service Delivery:

9 Attn: Mike Gyurics  
10 Fiscal Operations Branch Chief  
11 Office of Environmental Health Hazard Assessment  
12 P.O. Box 4010, MS #19B  
13 Sacramento, CA 95812-4010

14 For Non-United States Postal Service Delivery:

15 Attn: Mike Gyurics  
16 Fiscal Operations Branch Chief  
17 Office of Environmental Health Hazard Assessment  
18 1001 I Street, MS #19B  
19 Sacramento, CA 95814

20 The CEH portion of the civil penalty payment for \$675 shall be made payable to the Center for  
21 Environmental Health and associated with taxpayer identification number 94-3251981. This  
22 payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA  
23 94117.

24 5.2.2 \$1,900 as an Additional Settlement Payment (“ASP”) to CEH  
25 pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, §  
26 3204. CEH will use these funds to support CEH programs and activities that seek to educate the  
27 public about toxic chemicals, including carcinogenic nitrosamines such as NDEA and NDMA,  
28 work with industries interested in moving toward safer alternatives, advocate with government,  
businesses, and communities for business practices that are safe for human health and the

1 environment, and thereby reduce the public health impacts and risks of exposure to NDEA,  
2 NDMA, and other toxic chemicals in consumer products sold in California. CEH shall obtain and  
3 maintain adequate records to document that ASPs are spent on these activities and CEH agrees to  
4 provide such documentation to the Attorney General within thirty (30) days of any request from  
5 the Attorney General. The payment pursuant to this Section shall be made payable to the Center  
6 for Environmental Health and associated with taxpayer identification number 94-3251981. This  
7 payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA  
8 94117.

9  
10 5.2.3 \$15,400 as a reimbursement of a portion of CEH's reasonable  
11 attorneys' fees and costs. The attorneys' fees and cost reimbursement shall be made in two  
12 separate checks as follows: (a) \$13,000 payable to the Lexington Law Group and associated with  
13 taxpayer identification number 94-3317175; and (b) \$2,400 payable to the Center for  
14 Environmental Health and associated with taxpayer identification number 94-3251981. Both of  
15 these payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco,  
16 CA 94117.

17 5.2.4 To summarize, Settling Defendant shall deliver checks made out to  
18 the payees and in the amounts set forth below:

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20 <b>Payee</b>	<b>Type</b>	<b>Amount</b>	<b>Deliver To</b>
21 OEHHA	Penalty	\$2,025	OEHHA per Section 22 5.2.1
23 Center For Environmental Health	Penalty	\$675	LLG
24 Center For Environmental Health	ASP	\$1,900	LLG
25 Lexington Law Group	Fee and Cost	\$13,000	LLG
26 Center For Environmental Health	Fee and Cost	\$2,400	LLG

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1                   5.2.5 If Settling Defendant avails itself of the permanent warning option  
2 provided for by Section 3.3, Settling Defendant shall make an additional payment of \$5,000.00 to  
3 be split between a civil penalty and ASP as set forth herein, concurrently with its written notice as  
4 provided in Section 3.2. Of the additional payment, \$2,860 shall be a civil penalty, apportioned  
5 in accordance with Health & Safety Code § 25249.12 (25% to CEH and 75% to the State of  
6 California’s Office of Environmental Health Hazard Assessment (“OEHHA”)). Accordingly, the  
7 OEHHA portion of the civil penalty payment of \$2,145 shall be made payable to OEHHA,  
8 associated with taxpayer identification number 68-0284486, and sent to the OEHHA address set  
9 forth in section 5.2.1 above. The CEH portion of the additional civil penalty payment of \$715  
10 shall be made payable to the Center for Environmental Health and associated with taxpayer  
11 identification number 94-3251981. The remaining \$2,140 of the additional payment shall be  
12 made payable to the Center for Environmental Health and associated with taxpayer identification  
13 number 94-3251981 and shall be used as set forth in Section 5.2.2 above. Both payments to CEH  
14 shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

15                   **5.3** Notwithstanding the provisions of the Enforcement of Judgments Law and Code of  
16 Civil Procedure § 780.160, in the event that Settling Defendant does not comply fully with its  
17 payment obligations under this Section 5, in addition to any other enforcement mechanism  
18 available to CEH, CEH may seek an order requiring Settling Defendant to submit a debtor’s  
19 examination in the Alameda County Superior Court. In the event that Settling Defendant fails to  
20 submit to any such debtor’s examination ordered by the Court, CEH may seek an order holding  
21 Settling Defendant in contempt of Court.

22                   **6. MODIFICATION**

23                   **6.1 Written Consent.** This Consent Judgment may be modified from time to  
24 time by express written agreement of the Parties with the approval of the Court, or by an order of  
25 this Court upon motion and in accordance with law.

26                   **6.2 Meet and Confer.** Any Party seeking to modify this Consent Judgment shall  
27 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to  
28 modify the Consent Judgment. The Parties acknowledge and agree that a change in the no



1 significant risk level for NDEA may provide a reason for modification of Sections 3.1, 3.2 and  
2 3.3 of this Consent Judgment.

3 **7. CLAIMS COVERED AND RELEASED**

4 **7.1** This Consent Judgment is a full, final and binding resolution between CEH on  
5 behalf of itself and the public interest and Settling Defendant and Settling Defendant's parents,  
6 subsidiaries, affiliated entities that are under common ownership, directors, officers, employees,  
7 agents, shareholders, successors, assigns, and attorneys ("Defendant Releasees"), and all entities  
8 to which Settling Defendant directly or indirectly distribute or sell Covered Products, including  
9 but not limited to Dick's Sporting Goods, Inc., and other distributors, wholesalers, customers,  
10 retailers, franchisees, licensors and licensees ("Downstream Defendant Releasees"), of any  
11 violation of Proposition 65 based on failure to warn about alleged exposure to NDEA contained  
12 in Covered Products that were sold, distributed or offered for sale by Settling Defendant prior to  
13 the Effective Date.

14 **7.2** CEH, for itself, its agents, successors and assigns, releases, waives, and  
15 forever discharges any and all claims against Settling Defendant, Defendant Releasees, and  
16 Downstream Defendant Releasees arising from any violation of Proposition 65 or any other  
17 statutory or common law claims that have been or could have been asserted by CEH regarding a  
18 violation of Proposition 65 and/or the failure to warn about exposure to NDEA arising in  
19 connection with Covered Products manufactured by or for Settling Defendant prior to the  
20 Effective Date .

21 **7.3** Compliance with the terms of this Consent Judgment by Settling Defendant  
22 shall constitute compliance with Proposition 65 by Settling Defendant, its Defendant Releasees  
23 and its Downstream Defendant Releasees with respect to any alleged failure to warn about NDEA  
24 in Covered Products manufactured, distributed or sold by Settling Defendant after the Effective  
25 Date for as long as Settling Defendant continue testing in accordance with Section 3.2.

26 **8. NOTICE**

27 **8.1** When CEH is entitled to receive any notice under this Consent Judgment, the  
28 notice shall be sent by electronic mail to:

1 Mark Todzo  
2 Lexington Law Group  
3 [mtodzo@lexlawgroup.com](mailto:mtodzo@lexlawgroup.com)

4 **8.2** When Settling Defendant is entitled to receive any notice under this Consent  
5 Judgment, the notice shall be sent by electronic mail to:

6 James Colopy  
7 Farella Braun + Martel  
8 [jcolopy@fbm.com](mailto:jcolopy@fbm.com)

9 **8.3** Any Party may modify the person and address to whom the notice is to be sent  
10 by sending the other Party notice by first class and electronic mail.

## 11 **9. COURT APPROVAL**

12 **9.1** This Consent Judgment shall become effective upon entry by the Court. CEH  
13 shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant  
14 shall support entry of this Consent Judgment.

15 **9.2** If this Consent Judgment is not entered by the Court, it shall be of no force or  
16 effect and shall never be introduced into evidence or otherwise used in any proceeding for any  
17 purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

## 18 **10. GOVERNING LAW AND CONSTRUCTION**

19 **10.1** The terms of this Consent Judgment shall be governed by the laws of the State  
20 of California.

## 21 **11. ATTORNEYS' FEES**

22 **11.1** Should CEH prevail on any motion, application for an order to show cause, or  
23 other proceeding to enforce a violation of this Consent Judgment, CEH shall be entitled to its  
24 reasonable attorneys' fees and costs incurred as a result of such motion or application. Should  
25 Settling Defendant prevail on any motion application for an order to show cause or other  
26 proceeding, Settling Defendant may be awarded its reasonable attorneys' fees and costs as a result  
27 of such motion or application upon a finding by the Court that CEH's prosecution of the motion  
28 or application lacked substantial justification. For purposes of this Consent Judgment, the term  
substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986,

1 Code of Civil Procedure §§ 2016, *et seq.*

2 **11.2** Except as otherwise provided in this Consent Judgment, each Party shall bear  
3 its own attorneys' fees and costs.

4 **11.3** Nothing in this Section 10 shall preclude a Party from seeking an award of  
5 sanctions pursuant to law.

6 **12. ENTIRE AGREEMENT**

7 **12.1** This Consent Judgment contains the sole and entire agreement and  
8 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior  
9 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby  
10 merged herein and therein. There are no warranties, representations, or other agreements between  
11 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or  
12 implied, other than those specifically referred to in this Consent Judgment have been made by any  
13 Party hereto. No other agreements not specifically contained or referenced herein, oral or  
14 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements  
15 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind  
16 any of the Parties hereto only to the extent that they are expressly incorporated herein. No  
17 supplementation, modification, waiver, or termination of this Consent Judgment shall be binding  
18 unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions  
19 of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other  
20 provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

21 **13. SUBMISSION OF REPORTS AND DATA TO CEH**

22 **13.1** For any report or information that Settling Defendant submit to CEH pursuant  
23 to this Consent Judgment, Settling Defendant may make such a submission subject to the terms of  
24 a protective order.

25 **14. RETENTION OF JURISDICTION**

26 **14.1** This Court shall retain jurisdiction of this matter to implement or modify the  
27 Consent Judgment.

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**15. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

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

**16. NO EFFECT ON OTHER SETTLEMENTS**

**16.1** Nothing in this Consent Judgment shall preclude CEH from resolving any claim against an entity that is not the Settling Defendant (or a Defendant Releasee) on terms that are different than those contained in this Consent Judgment.

**17. EXECUTION IN COUNTERPARTS**

**17.1** The stipulations to this Consent Judgment may be executed in counterparts and by means of facsimile or portable document format (pdf), which taken together shall be deemed to constitute one document.

**IT IS SO ORDERED, ADJUDGED, AND DECREED:**

Dated: \_\_\_\_\_, 2022

\_\_\_\_\_  
Judge of the Superior Court of the State of California

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**IT IS SO STIPULATED:**

Dated: March 29, 2022

**CENTER FOR ENVIRONMENTAL HEALTH**



\_\_\_\_\_  
Michael Green  
Chief Executive Officer

Dated: March 24, 2022

**MERRITHEW INTERNATIONAL INC.**



\_\_\_\_\_  
Signature  
Lindsay G Merrithew

\_\_\_\_\_  
Printed Name  
CEO

\_\_\_\_\_  
Title