

1 LEXINGTON LAW GROUP
Mark N. Todzo, State Bar No. 168389
2 Meredyth L. Merrow, State Bar No. 328337
503 Divisadero Street
3 San Francisco, CA 94117
Telephone: (415) 913-7800
4 Facsimile: (415) 759-4112
5 mtodzo@lexlawgroup.com
mmerrow@lexlawgroup.com

6 Counsel for Plaintiff
7 CENTER FOR ENVIRONMENTAL HEALTH

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11
12 CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG21107796
13 a non-profit corporation,)
14) **[PROPOSED] CONSENT**
Plaintiff,) **JUDGMENT AS TO EVRIHOLDER**
15) **PRODUCTS LLC**
16 vs.)
17 GYMSHARK USA, INC., et al,)
18 Defendants.)
19 _____)

20
21 **1. INTRODUCTION**

22 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
23 Environmental Health (“CEH”) and defendant Evriholder Products, LLC (“Settling Defendant”).
24 CEH and Settling Defendant are referred to collectively as the “Parties.”

25 1.2 Settling Defendant is a corporation that employs ten (10) or more persons and
26 that manufactures, distributes, and/or sells latex resistance bands that contain n-
27 nitrosodiethylamine (“NDEA”) in the State of California or has done so in the past.
28

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 20, 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 to
10 name 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.

28

1 **3. INJUNCTIVE RELIEF**

2 3.1 **Reformulation of Covered Products.** As of the Effective Date, Settling
3 Defendant shall not manufacture, distribute, sell, or offer for sale any Covered Product that
4 contains NDEA in excess of 20 parts per billion (“ppb”) as determined using ISO Standard 19577
5 (the “Test Protocol”) by an independent accredited laboratory that will be sold or offered for sale
6 to California consumers.

7 3.2 **Specification to and Certification from Suppliers.** No more than thirty (30)
8 days after the Effective Date, Settling Defendant shall issue specifications to any suppliers that
9 supply Settling Defendant with Covered Products that will be sold or offered for sale to California
10 consumers requiring that those Covered Products not contain NDEA in excess of 20 ppb, and
11 shall instruct any such supplier to use reasonable efforts to eliminate Covered Products containing
12 NDEA on a nationwide basis. Settling Defendant shall obtain and maintain written certification(s)
13 from any suppliers of Covered Products confirming that all such Covered Products received by
14 Settling Defendant for distribution in California do not contain NDEA in excess of 20 ppb as
15 determined using the Test Protocol by an independent accredited laboratory. Settling Defendant
16 shall not be deemed in violation of the requirements of Section 3.1 for any Covered Product to the
17 extent: (a) it has relied on a written certification from its vendor that supplied a Covered Product
18 that such Covered Product does not contain NDEA in excess of 20 ppb as determined using the
19 Test Protocol by an independent accredited laboratory and such certification has not previously
20 been demonstrated to be invalid, or (b) it has obtained a test result from an independent third
21 party accredited laboratory reporting that the Covered Product does not contain NDEA in excess
22 of 20 ppb as determined using the Test Protocol.

23 **4. ENFORCEMENT**

24 4.1 CEH may, by motion or application for an order to show cause before the
25 Superior Court of the County of Alameda, enforce the terms and conditions contained in this
26 Consent Judgment. Prior to bringing any motion or application to enforce the requirements of
27 Section 3 above, CEH shall provide Settling Defendant with a Notice of Violation setting forth the
28 basis for the alleged violation. The Parties shall then meet and confer regarding the basis for CEH’s

1 anticipated motion or application in an attempt to resolve it informally. Should such attempts at
2 meeting and conferring fail, CEH may file its enforcement motion or application. In ruling on any
3 motion to enforce the terms of this section, the Court may, in addition to ordering compliance with
4 the terms of this Consent Judgment, employ such remedies as necessary to ensure compliance with
5 Proposition 65 including, but not limited to, requiring Settling Defendant to provide warnings.
6 Should CEH prevail on any motion or application to enforce a material violation of this Consent
7 Judgment under this Section, CEH shall be entitled to its reasonable attorneys' fees and costs
8 incurred as a result of such motion or application. Should Settling Defendant prevail on any motion
9 or application under this Section, Settling Defendant may be awarded its reasonable attorneys' fees
10 and costs as a result of such motion or application upon a finding by the court that CEH's
11 prosecution of the motion or application was not in good faith.

12 **5. PAYMENTS**

13 5.1 **Payments by Settling Defendant.** Within fifteen (15) calendar days of the
14 Effective Date, Settling Defendant shall pay the total sum of \$16,000 and no cents as a settlement
15 payment as further set forth in this Section. Any payment by Settling Defendant shall be deemed
16 to be timely and not subject to a late charge and/or other penalty if (1) postmarked (if sent by the
17 United States Postal Service) or (2) delivered to an overnight carrier (e.g. Fed Ex), on or before the
18 deadline set forth in this paragraph.

19 5.2 **Allocation of Payments.** The total settlement amount for Settling Defendant
20 shall be paid in five (5) separate checks in the amounts specified below and delivered as set forth
21 below. Any failure by Settling Defendant to comply with the payment terms herein shall be subject
22 to a joint and several stipulated late fee to be paid by Settling Defendant in the amount of \$100 for
23 each day the full payment is not received after the applicable payment due date set forth in Section
24 5.1. The late fees required under this Section shall be recoverable, together with reasonable
25 attorneys' fees, in an enforcement proceeding brought pursuant to Section 4 of this Consent
26 Judgment. The funds paid by Settling Defendant shall be allocated as set forth below between the
27 following categories and made payable as follows:

28 5.2.1 \$2,100 as a civil penalty pursuant to Health & Safety Code §

1 25249.7(b). The civil penalty payment shall be apportioned in accordance with Health & Safety
2 Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of Environmental Health
3 Hazard Assessment (“OEHHA”)). Accordingly, the OEHHA portion of the civil penalty payment
4 for \$1,575 shall be made payable to OEHHA and associated with taxpayer identification number
5 68-0284486. This payment shall be delivered as follows:

6
7 For United States Postal Service Delivery:

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

13 For Non-United States Postal Service Delivery:

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

19 The CEH portion of the civil penalty payment for \$525 shall be made payable to the Center for
20 Environmental Health and associated with taxpayer identification number 94-3251981. This
21 payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA
22 94117.

23 5.2.2 \$1,500 as an Additional Settlement Payment (“ASP”) to CEH
24 pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, §
25 3204. CEH will use these funds to support CEH programs and activities that seek to educate the
26 public about toxic chemicals, including carcinogenic nitrosamines such as NDEA, work with
27 industries interested in moving toward safer alternatives, advocate with government, businesses
28 and communities for business practices that are safe for human health and the environment, and
thereby reduce the public health impacts and risks of exposure to NDEA and other toxic chemicals
in consumer products sold in California. CEH shall obtain and maintain adequate records to

1 document that ASPs are spent on these activities and CEH agrees to provide such documentation
2 to the Attorney General within thirty (30) days of any request from the Attorney General. The
3 payment pursuant to this Section shall be made payable to the Center for Environmental Health and
4 associated with taxpayer identification number 94-3251981. This payment shall be delivered to
5 Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

6
7 5.2.3 \$12,400 as a reimbursement of a portion of CEH's reasonable
8 attorneys' fees and costs. The attorneys' fees and cost reimbursement shall be made in two separate
9 checks as follows: (a) \$10,300 payable to the Lexington Law Group and associated with taxpayer
10 identification number 94-3317175; and (b) \$2,100 payable to the Center for Environmental Health
11 and associated with taxpayer identification number 94-3251981. Both of these payments shall be
12 delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

13 5.2.4 To summarize, Settling Defendant shall deliver checks made out to
14 the payees and in the amounts set forth below:

15

16 Payee	17 Type	18 Amount	19 Deliver To
20 OEHHA	21 Penalty	22 \$1,575	23 OEHHA per Section 5.2.1
24 Center For Environmental Health	25 Penalty	26 \$525	27 LLG
28 Center For Environmental Health	ASP	\$1,500	LLG
Lexington Law Group	Fee and Cost	\$10,300	LLG
Center For Environmental Health	Fee and Cost	\$2,100	LLG

5.3 Notwithstanding the provisions of the Enforcement of Judgments Law and Code of Civil Procedure § 780.160, in the event that Settling Defendant does not comply fully with its payment obligations under this Section 5, in addition to any other enforcement mechanism available to CEH, CEH may seek an order requiring Settling Defendant to submit a debtor's

1 examination in the Alameda County Superior Court. In the event that Settling Defendant fails to
2 submit to any such debtor’s examination ordered by the Court, CEH may seek an order holding
3 Settling Defendant in contempt of Court.

4 **6. MODIFICATION**

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

8 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
9 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
10 modify the Consent Judgment. The Parties acknowledge and agree that a change in the no
11 significant risk level for NDEA may provide a reason for modification of Sections 3.1 and 3.2 of
12 this Consent Judgment.

13 **7. CLAIMS COVERED AND RELEASED**

14 7.1 This Consent Judgment is a full, final and binding resolution between CEH on
15 behalf of itself and the public interest and Settling Defendant and Settling Defendant’s parents,
16 subsidiaries, affiliated entities that are under common ownership, directors, officers, employees,
17 agents, shareholders, successors, assigns, and attorneys (“Defendant Releasees”), and all entities to
18 which Settling Defendant directly or indirectly distribute or sell Covered Products, including but
19 not limited to distributors, wholesalers, customers, retailers, franchisees, licensors and licensees
20 (“Downstream Defendant Releasees”), of any violation of Proposition 65 based on failure to warn
21 about alleged exposure to NDEA contained in Covered Products that were sold, distributed or
22 offered for sale by Settling Defendant prior to the Effective Date.

23 7.2 CEH, for itself, its agents, successors and assigns, releases, waives, and forever
24 discharges any and all claims against Settling Defendant, Defendant Releasees, and Downstream
25 Defendant Releasees arising from any violation of Proposition 65 or any other statutory or common
26 law claims that have been or could have been asserted by CEH regarding a violation of Proposition
27 65 and/or the failure to warn about exposure to NDEA arising in connection with Covered Products
28 manufactured by or for Settling Defendant prior to the Effective Date .

1 7.3 Compliance with the terms of this Consent Judgment by Settling Defendant
2 shall constitute compliance with Proposition 65 by Settling Defendant, its Defendant Releasees
3 and its Downstream Defendant Releasees with respect to any alleged failure to warn about NDEA
4 in Covered Products manufactured, distributed or sold by Settling Defendant after the Effective
5 Date for as long as Settling Defendant continue testing in accordance with Section 3.2..

6 **8. NOTICE**

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

9 Mark Todzo
10 Lexington Law Group
11 503 Divisadero Street
12 San Francisco, CA 94117
13 mtodzo@lexlawgroup.com

14 8.2 When Settling Defendant is entitled to receive any notice under this Consent
15 Judgment, the notice shall be sent by first class and electronic mail to:

16 Daniel W. Fox
17 K&L Gates LLP
18 Four Embarcadero Center, Suite 1200
19 San Francisco, CA 94111
20 Daniel.Fox@klgates.com

21 8.3 Any Party may modify the person and address to whom the notice is to be sent
22 by sending the other Party notice by first class and electronic mail.

23 **9. COURT APPROVAL**

24 9.1 This Consent Judgment shall become effective upon entry by the Court. CEH
25 shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant
26 shall support entry of this Consent Judgment.

27 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
28 effect and shall never be introduced into evidence or otherwise used in any proceeding for any
purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

1 **10. GOVERNING LAW AND CONSTRUCTION**

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

4 **11. ATTORNEYS' FEES**

5 11.1 Should CEH prevail on any motion, application for an order to show cause, or
6 other proceeding to enforce a violation of this Consent Judgment, CEH shall be entitled to its
7 reasonable attorneys' fees and costs incurred as a result of such motion or application. Should
8 Settling Defendant prevail on any motion or application for an order to show cause or other
9 proceeding to enforce a violation of this Consent Judgment, Settling Defendant may be awarded
10 its reasonable attorneys' fees and costs as a result of such motion or application upon a finding by
11 the Court that CEH's prosecution of the motion or application lacked substantial
12 justification. For purposes of this Consent Judgment, the term substantial justification shall carry
13 the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016,
14 *et seq.*

15 11.2 Except as otherwise provided in this Consent Judgment, each Party shall bear
16 its own attorneys' fees and costs.

17 11.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
18 sanctions pursuant to law.

19 **12. ENTIRE AGREEMENT**

20 12.1 This Consent Judgment contains the sole and entire agreement and
21 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
22 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
23 merged herein and therein. There are no warranties, representations, or other agreements between
24 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
25 implied, other than those specifically referred to in this Consent Judgment have been made by any
26 Party hereto. No other agreements not specifically contained or referenced herein, oral or
27 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
28 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the

1 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
2 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
3 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
4 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof whether
5 or not similar, nor shall such waiver constitute a continuing waiver.

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

7 13.1 For any report or information that Settling Defendant submit to CEH pursuant
8 to this Consent Judgment, Settling Defendant may make such a submission subject to the terms of
9 a protective order.

10 **14. RETENTION OF JURISDICTION**

11 14.1 This Court shall retain jurisdiction of this matter to implement or modify the
12 Consent Judgment.

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

14 15.1 Each signatory to this Consent Judgment certifies that he or she is fully
15 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into
16 and execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

17 **16. NO EFFECT ON OTHER SETTLEMENTS/“MOST FAVORED NATION”**
18 **CLAUSE**

19 16.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
20 against an entity that is not the Settling Defendant (or a Defendant Releasee) on terms that are
21 different than those contained in this Consent Judgment.

22 16.2 If CEH reaches settlements or judgments with other companies for an alleged
23 failure to warn of an alleged exposure to NDEA in latex resistance bands in this action in which it
24 agrees to different injunctive terms, Settling Defendant may seek to modify this Consent Judgment
25 to adopt those injunctive terms and comply with them instead of those presently set forth in Section
26 3. If Settling Defendant seeks to adopt different injunctive terms, it shall provide notice to CEH
27 consistent with Section 6 of this Consent Judgment.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

16.3 If CEH reaches settlements or judgments with other companies in which that entity elects to provide clear and reasonable warnings, Settling Defendant may seek to comply with the warning requirement set forth therein, but must make an additional payment proportional with any additional payment required for the other defendant to avail itself of the warning option in its Consent Judgment shall provide written notice to CEH.

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

IT IS SO STIPULATED:

Dated: February 15, 2022

CENTER FOR ENVIRONMENTAL HEALTH



Michael Green
Chief Executive Officer

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: February 09, 2022

EVRIHOLDER PRODUCTS LLC



Signature

Honeylyn Chang

Printed Name

CFO

Title