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6 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED  
FILED  
San Francisco County Superior Court

NOV 05 2007

GORDON PARK-LI, Clerk  
BY: JOCELYN C. ROQUE  
Deputy Clerk

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SAN FRANCISCO  
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12 CENTER FOR ENVIRONMENTAL HEALTH, )  
13 a non-profit corporation, )

14 Plaintiff, )

15 v. )

16  
17 AMERICAN ART CLAY COMPANY, INC., et )  
18 al; and DEFENDANT DOES 1 through 200, )  
inclusive, )

19 Defendants. )  
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Case No. CGC 07-466897

JCR  
[PROPOSED] CONSENT JUDGMENT  
RE: AMERICAN ART CLAY  
COMPANY, INC.

1           **1. INTRODUCTION**

2           **1.1** On September 5, 2007, plaintiff the Center for Environmental Health  
3 (“CEH”), a non-profit corporation acting in the public interest, filed a complaint titled *Center for*  
4 *Environmental Health v. American Art Clay Company, Inc., et al.*, San Francisco County  
5 Superior Court Case Number CGC 07-466897 (the “CEH Action”), for civil penalties and  
6 injunctive relief pursuant to the provisions of Cal. Health & Safety Code §25249.5 *et seq.*  
7 (“Proposition 65”) naming American Art Clay Company, Inc. (“Defendant”) as a defendant.

8           **1.2** Defendant is a corporation that employs 10 or more persons and  
9 manufactured, distributed and/or sold modeling clay (the “Products”) in the State of California.

10           **1.3** Beginning on or about March 2, 2007, CEH served Defendant and the  
11 appropriate public enforcement agencies with the requisite 60-day notice (the “Notice”) alleging  
12 that Defendant was in violation of Proposition 65. CEH’s Notice and the Complaint in this  
13 Action allege that Defendant exposes people who use or otherwise handle the Products to di-n-  
14 hexyl phthalate (“DnHP”), a chemical known to the State of California to cause birth defects and  
15 other reproductive harm, without first providing clear and reasonable warning to such persons  
16 regarding the reproductive toxicity DnHP. The Notice and Complaint allege that Defendant’s  
17 conduct violates Health & Safety Code §25249.6, the warning provision of Proposition 65.  
18 Defendant disputes such allegations and asserts that all of its products are safe and comply with  
19 all applicable laws.

20           **1.4** Defendant asserts that its supplier of the Products recently stopped  
21 manufacturing and selling Products with DnHP or any other Phthalate. For purposes of this  
22 Consent Judgment, “Phthalate” means “any dialkyl or alkyl aryl esters of 1,2-  
23 benzenedicarboxylic acid.” Defendant further asserts that the levels of DnHP previously  
24 contained in the Products did not cause exposures requiring Proposition 65 warnings, and that no  
25 user of the Products was exposed to unsafe levels of DnHP.

26           **1.5** For purposes of this Consent Judgment only, the parties stipulate that this  
27 Court has jurisdiction over the subject matter of the violations alleged in CEH’s Complaint and  
28 personal jurisdiction over Defendant as to the acts alleged in CEH’s Complaint, that venue is

1 proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent  
2 Judgment as a full and final resolution of all claims which were or could have been raised in the  
3 Complaint based on the facts alleged therein.

4           **1.6** The Parties enter into this Consent Judgment pursuant to a settlement of  
5 certain disputed claims between the Parties as alleged in the Complaint. By executing this  
6 Consent Judgment, the Parties do not admit any facts or conclusions of law. It is the parties'  
7 intent that nothing in this Consent Judgment shall be construed as an admission by the Parties of  
8 any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the  
9 Consent Judgment constitute or be construed as an admission by the Parties of any fact,  
10 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall  
11 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or  
12 any other or future legal proceedings.

## 13           **2. COMPLIANCE - REFORMULATION**

14           **2.1 Removal of DnHP.** After the date this Consent Judgment is entered (the  
15 "Compliance Date"), Defendant shall not distribute, ship, or sell or cause to be distributed or  
16 sold, any Product that is comprised of or contains DnHP into the State of California.

17           **2.2 Proof of reformulation.** Within 30 days of the Compliance Date,  
18 Defendant shall provide test results for two colors (one to be chosen by each of the Parties) of  
19 the Products from an independent laboratory to CEH demonstrating that the Products no longer  
20 contain Phthalates. All testing shall be performed in accordance with both of the following test  
21 protocols: (1) EPA SW8270C; and (2) EPA SW3580A (together referred to as the "Test  
22 Protocols"). The testing obligation required by this section may be satisfied by test results  
23 supplied by the manufacturer of the Products.

24           **2.3 Confirmatory Testing by CEH.** CEH intends to conduct confirmatory  
25 testing of the Products. Any such testing shall be conducted by CEH at an independent  
26 laboratory, in accordance with both of the Test Protocols. Acknowledging that Defendant's  
27 Products have been reformulated, CEH agrees to undertake this confirmatory testing only on  
28 those Products that are reformulated, which can be identified by the letters "PF" as part of their

1 product code. In the event that CEH's testing demonstrates that the Products contain DnHP  
2 subsequent to the Compliance Date, CEH shall inform Defendant of the test results, including  
3 information sufficient to permit Defendant to identify the Product(s). Defendant shall, within 30  
4 days following such notice, provide CEH, at the address listed in Section 12, with an explanation  
5 regarding the presence of DnHP in the Products. Unless Defendant provides CEH with  
6 information sufficient to demonstrate that CEH's test result was incorrect, Defendant shall be  
7 liable for stipulated payments in lieu of penalties for Products for which CEH produces tests  
8 demonstrating the presence of DnHP in the Products. The payments shall be made to CEH and  
9 used for the purposes described in Section 3.1.

10 **2.3.1 Stipulated Payments In Lieu of Penalties.** If stipulated  
11 payments in lieu of penalties are warranted under section 2.4, the stipulated payment amount  
12 shall be as follows for each unit of Product for which CEH produces a test result showing that  
13 Defendant sold a Product containing DnHP after the Compliance Date:

14	First Occurrence:	\$500
15	Second Occurrence:	\$750
16	Third Occurrence:	\$1,000
17	Thereafter:	\$2,500

18 **2.3.2 Products in the stream of commerce.** Defendant's  
19 Products that have been manufactured, shipped, sold, or that otherwise are in the stream of  
20 commerce prior to the Compliance Date shall be released from any claims that were brought or  
21 that could have been brought by CEH in its Complaint, as though they were Covered Claims  
22 within the meaning of Section 7.1, below. As a result, the stipulated payments in section 2.4.1  
23 above do not apply to these Products.

### 24 **3. SETTLEMENT PAYMENTS**

25 **3.1 Monetary Payment in Lieu of Penalty.** Defendant shall pay to CEH  
26 six thousand five hundred dollars (\$6,500) in lieu of any penalty pursuant to Health and Safety  
27 Code §25249.7(b). CEH shall use such funds to continue its work protecting people from  
28 exposures to toxic chemicals. As part of this work, CEH intends to conduct periodic testing of

1 the Products as set forth in section 2.4. The parties acknowledge that the payment in lieu of  
2 penalty provided for in this section has been greatly reduced due to Defendant's prompt  
3 agreement to eliminate phthalates from the Products. The payment required under this section  
4 shall be made payable to CEH.

5 **3.2 Attorneys' Fees and Costs.** Defendant shall pay dollars (\$13,000) to  
6 reimburse CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees,  
7 and any other costs incurred as a result of investigating, bringing this matter to Defendant'  
8 attention, litigating and negotiating a settlement in the public interest. The payment required  
9 under this section shall be made payable to Lexington Law Group, LLP.

10 **3.3 Timing of payments.** The payments required under Sections 3.1 and 3.2  
11 shall be made payable within 10 days of entry of judgment. All of the payments made pursuant  
12 to this Section 3 shall be delivered to the Lexington Law Group, LLP at the address set forth in  
13 section 11.1.

#### 14 **4. MODIFICATION OF CONSENT JUDGMENT**

15 **4.1** This Consent Judgment may be modified by written agreement of  
16 CEH and Defendant, or upon motion of CEH or Defendant as provided by law.

#### 17 **5. ENFORCEMENT OF CONSENT JUDGMENT**

18 **5.1** CEH may, by motion or application for an order to show cause, enforce  
19 the terms and conditions contained in this Consent Judgment. Should CEH prevail on any such  
20 motion, it shall be entitled to recover its reasonable attorneys' fees and costs associated with  
21 enforcing the Consent Judgment.

#### 22 **6. APPLICATION OF CONSENT JUDGMENT**

23 **6.1** This Consent Judgment shall apply to and be binding upon the  
24 parties hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any  
25 of them.

#### 26 **7. CLAIMS COVERED AND RELEASE OF CLAIMS**

27 **7.1** This Consent Judgment is a full, final and binding resolution between  
28

1 CEH and Defendant of any violation of Proposition 65 that was or could have been asserted in  
2 the Complaint against Defendant (including any claims that could be asserted in connection with  
3 any of the Products covered by this Consent Judgment) or its parents, subsidiaries, affiliates,  
4 directors, officers, employees, agents, attorneys, distributors, or customers (collectively,  
5 “Defendant Releasees”) based on failure to warn about alleged exposures to DnHP resulting  
6 from any Products manufactured, distributed or sold by Defendant (“Covered Claims”) on or  
7 prior to the date of entry of this Consent Judgment. CEH, its directors, officers, employees and  
8 attorneys hereby release all Covered Claims against Defendant Releasees. Compliance with the  
9 terms of this Consent Judgment constitutes compliance with Proposition 65 for purposes of  
10 DnHP exposures from the Products.

11 **8. SEVERABILITY**

12 **8.1** In the event that any of the provisions of this Consent Judgment are  
13 held by a court to be unenforceable, the validity of the enforceable provisions shall not be  
14 adversely affected.

15 **9. GOVERNING LAW**

16 **9.1** The terms of this Consent Judgment shall be governed by the laws of  
17 the State of California.

18 **10. RETENTION OF JURISDICTION**

19 **10.1** This Court shall retain jurisdiction of this matter to implement and  
20 enforce the terms this Consent Judgment.

21 **11. PROVISION OF NOTICE**

22 **11.1** All notices required pursuant to this Consent Judgment and  
23 correspondence shall be sent to the following:

24 For CEH:

25 Mark N. Todzo  
26 Lexington Law Group, LLP  
27 1627 Irving Street  
28 San Francisco, CA 94122

1 For Defendant:

2 Ann G. Grimaldi  
3 McKenna Long & Aldridge LLP  
4 101 California Street, Floor 41  
5 San Francisco, CA 94111

6 **12. COURT APPROVAL**

7 **12.1** CEH will comply with the settlement notice provisions of Health and  
8 Safety Code § 25249.7(f) and Title 11 of the California Code of Regulations § 3003.

9 **13. EXECUTION AND COUNTERPARTS**

10 **13.1** The stipulations to this Consent Judgment may be executed in  
11 counterparts and by means of facsimile, which taken together shall be deemed to constitute one  
12 document.

13 **14. AUTHORIZATION**

14 **14.1** Each signatory to this Consent Judgment certifies that he or she is  
15 fully authorized by the party he or she represents to stipulate to this Consent Judgment and to  
16 enter into and execute the Consent Judgment on behalf of the party represented and legally bind  
17 that party. The undersigned have read, understand and agree to all of the terms and conditions of  
18 this Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees  
19 and costs.

20 **AGREED TO:**

21 CENTER FOR ENVIRONMENTAL HEALTH

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23 

Dated: 9/13/07

24 Charlie Pizarro, Associate Director  
25 Center for Environmental Health

1	AMERICAN ART CLAY COMPANY, INC.	
2	<u>William E Berry</u>	Dated: <u>9-12-07</u>
3		
4	<u>WILLIAM E. BERRY</u>	
5	[Name]	
6	<u>President + COO</u>	
7	[Title]	
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**ORDER AND JUDGMENT**

Based upon the stipulated Consent Judgment between CEH and American Art Clay Company, Inc., the settlement is approved and judgment is hereby entered according to the terms herein.

**NOV 05 2007**

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

**PETER J. BUSCH**

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