

ENDORSED
FILED
San Francisco County Superior Court

MAR 15 2011

CLERK OF THE COURT
BY: MARJORIE SCHWARTZ-SCOTT
Deputy Clerk

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3 Howard Hirsch, State Bar No. 213209
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5 1627 Irving Street
6 San Francisco, CA 94122
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9 Attorneys for Plaintiff
10 CENTER FOR ENVIRONMENTAL
11 HEALTH

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN FRANCISCO

14 CENTER FOR ENVIRONMENTAL
15 HEALTH, a non-profit corporation,

16 Plaintiff,

17 vs.

18 ATICO INTERNATIONAL USA, INC.,
19 and Defendant DOES 1 through 200,
20 inclusive,

21 Defendants.

Case No. CGC-09-493291

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 1.1 On October 8, 2009, plaintiff Center for Environmental Health
3 (“CEH”), a non-profit corporation acting in the public interest, filed a complaint entitled
4 Center for *Environmental Health v. Atico International USA, Inc., et al.*, San Francisco
5 County Superior Court Case Number CGC-09-493291 (the “CEH Action”), for civil penalties
6 and injunctive relief pursuant to the provisions of Cal. Health & Safety Code § 25249.5, et
7 seq. (“Proposition 65”) and on January 22, 2010 CEH filed a First Amended Complaint
8 (“Complaint”).

9 1.2 Defendant Atico International USA, Inc. (“Defendant”) is a corporation
10 that employs 10 or more persons and manufactured, distributed and/or sold vinyl lounge
11 chairs (the “Covered Products”) in the State of California.

12 1.3 More than 60 days prior to filing the CEH Action, CEH served
13 Defendant and the appropriate public enforcement agencies with the requisite 60-day Notices
14 alleging that Defendant is in violation of Proposition 65. CEH’s Notices and the Complaint
15 in the CEH Action allege that Defendant exposes people who use or otherwise handle the
16 Covered Products to di(2-ethylhexyl) phthalate (“DEHP”), a chemical known to the State of
17 California to cause cancer, birth defects and other reproductive harm, without first providing
18 clear and reasonable warning to such persons regarding the carcinogenicity and reproductive
19 toxicity of DEHP. The Notice and Complaint allege that Defendant’s conduct violates Health
20 & Safety Code § 25249.6, the warning provision of Proposition 65. Defendant disputes such
21 allegations and asserts that all of its products are safe and comply with all applicable laws.

22 1.4 For purposes of this Consent Judgment only, CEH and Defendant (the
23 “Parties”) stipulate that this Court has jurisdiction over the subject matter of the violations
24 alleged in CEH’s Complaint and personal jurisdiction over Defendant as to the acts alleged in
25 CEH’s Complaint, that venue is proper in the County of San Francisco, and that this Court
26 has jurisdiction to enter this Consent Judgment as a full and final resolution of all claims
27 which were or could have been raised in the Complaint based on the facts alleged therein with
28 regard to Covered Products.

1 1.5 The Parties enter into this Consent Judgment pursuant to a settlement of
2 certain disputed claims between the Parties as alleged in the Complaint. By executing this
3 Consent Judgment, the Parties do not admit any facts or conclusions of law. It is the Parties'
4 intent that nothing in this Consent Judgment shall be construed as an admission by the Parties
5 of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
6 Consent Judgment constitute or be construed as an admission by the Parties of any fact,
7 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
8 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in
9 this or any other or future legal proceedings.

10 **2. COMPLIANCE – REFORMULATION**

11 2.1 **Reformulation Standard – Removal of DEHP.** As of 30 days
12 following the entry of this Consent Judgment (the “Compliance Date”), Defendant shall not
13 purchase, import, manufacture, or supply to an unaffiliated third party any Covered Product
14 that will be sold or offered for sale to California consumers, any Covered Product that
15 contains in excess of trace amounts of DEHP. For purposes of this Consent Judgment only,
16 “in excess of trace amounts” is more than 1,000 parts per million (“ppm”). In reformulating
17 the Covered Products to remove DEHP, Defendant may not use butyl benzyl phthalate
18 (“BBP”), di-n-hexyl phthalate (“DnHP”), di-n-butyl phthalate (“DBP”) or di-isodecyl
19 phthalate (“DIDP”) in excess of trace amounts. DEHP, BBP, DnHP, DBP and DIDP are
20 together referred to herein as “Listed Phthalate(s).”

21 2.2 **Specifications to Manufacturers and Suppliers.** Defendant shall
22 issue specifications to its manufacturers and suppliers requiring that Covered Products that
23 will be sold or offered for sale to California consumers shall not contain any Listed Phthalate
24 in excess of trace amounts.

25 2.3 **Defendant’s Testing.** In order to ensure compliance with the
26 requirements of Section 2.1, Defendant shall cause to be conducted testing to confirm that
27 Covered Products that will be sold or offered for sale to California consumers do not contain
28 in excess of trace amounts of DEHP. Testing shall be conducted in compliance with Section

1 2.1. All testing pursuant to this section shall be performed by an independent laboratory in
2 accordance with both of the following test protocols: (1) EPA SW8270C; and (2) EPA
3 SW3580A (together referred to as the "Test Protocols").

4 **2.3.1 Testing Frequency.** For each of the first five orders of Covered
5 Products purchased from each of Defendant's suppliers after the Compliance Date, Defendant
6 shall randomly select and test the greater of 0.1% (one-tenth of one percent) or two, but in no
7 case more than four, of the total Covered Products purchased from each supplier of Covered
8 Products that will be sold or offered for sale to California consumers.

9 **2.3.2 Products That Contain DEHP Pursuant to Defendant's**
10 **Testing.** If the results of the testing required pursuant to Section 2.3 show DEHP in excess of
11 trace amounts in a Covered Product, Defendant shall: (1) refuse to accept all of the Covered
12 Products that were purchased under the particular purchase order that will be sold or offered
13 for sale to California consumers; and (2) send a notice to the supplier explaining that such
14 Covered Products do not comply with Defendant's specifications for DEHP.

15 **2.4 Confirmatory Testing by CEH.** CEH intends to
16 conduct confirmatory testing of the Covered Products. Any such testing shall be conducted
17 by CEH at an independent laboratory, in accordance with both of the Test Protocols. In the
18 event that CEH's testing demonstrates that the Covered Products shipped by Defendant
19 subsequent to the Compliance Date contain Listed Phthalates in excess of trace amounts,
20 CEH shall inform Defendant of the test results, including information sufficient to permit
21 Defendant to identify the Covered Product(s). Within 30 days of service of a Notice of
22 Violation, CEH and Defendant shall meet and confer to attempt to resolve their dispute.
23 Should such attempts at meeting and conferring fail, CEH may file an enforcement motion or
24 application pursuant to Section 5.

25 **3. SETTLEMENT PAYMENTS**

26 **3.1 Penalty.** Defendant shall pay \$1,500 as a civil penalty pursuant to
27 Health and Safety Code § 25249.7(b). The penalty shall be made payable to CEH, which will
28 apportion the penalty in accordance with Health and Safety Code § 25249.12. The payment

1 required under this Section shall be made by separate check payable to CEH.

2 **3.2 Monetary Payment in Lieu of Penalty.** Defendant shall pay \$9,350 to
3 CEH in lieu of any additional penalty pursuant to California Health & Safety Code
4 §25249.7(b), and California Code of Regulations, Title 11, §3203(b), which sets forth criteria
5 for such payments. CEH will use such funds to continue its work educating and protecting
6 people from exposures to toxic chemicals, including heavy metals. In addition, as part of its
7 Community Environmental Action and Justice Fund, CEH will use four percent of such funds
8 to award grants to grassroots environmental justice groups working to educate and protect
9 people from exposures to toxic chemicals. The method of selection of such groups can be
10 found at the CEH web site at www.ceh.org/justicefund. The payment required under this
11 Section shall be made by separate check payable to CEH.

12 **3.3 Attorneys' Fees and Costs.** Defendant shall pay \$19,150 to reimburse
13 CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and
14 any other costs incurred as a result of investigating, bringing this matter to Defendant's
15 attention, litigating and negotiating a settlement in the public interest. The payment required
16 under this section shall be made by separate check payable to Lexington Law Group.

17 **3.4 Delivery of Payments.** All payments made pursuant to this Section 3
18 shall be delivered to the Lexington Law Group at the address set forth in Section 11.1 and
19 shall be delivered within 20 days of entry of this Consent Judgment. Any failure by
20 Defendant to comply with the payment terms herein shall be subject to a stipulated late fee in
21 the amount of \$50 for each day after the delivery date the payment is received. The late fees
22 required under this section shall be recoverable, together with reasonable attorneys' fees, in
23 an enforcement proceeding brought pursuant to section 5 of this Consent Judgment.

24 **4. MODIFICATION OF CONSENT JUDGMENT**

25 **4.1** This Consent Judgment may be modified by written agreement of CEH
26 and Defendant, or upon motion of CEH or Defendant as provided by law.

27 **5. ENFORCEMENT OF CONSENT JUDGMENT**

28 **5.1** The Parties may, by motion or application for an order to show cause,

1 enforce the terms and conditions contained in this Consent Judgment. Should the moving
2 party prevail on any such motion, it shall be entitled to recover its reasonable attorneys' fees
3 and costs associated with enforcing the Consent Judgment.

4 **6. APPLICATION OF CONSENT JUDGMENT**

5 **6.1** This Consent Judgment shall apply to and be binding upon the Parties
6 hereto, their parents, divisions, subdivisions and subsidiaries, and the successors or assigns of
7 any of them.

8 **7. CLAIMS COVERED AND RELEASE OF CLAIMS**

9 **7.1** This Consent Judgment is a full, final and binding resolution between
10 CEH and Defendant of any violation of Proposition 65 that was or could have been asserted
11 in the Complaint against Defendant or its parents, division, subdivisions, subsidiaries,
12 directors, officers, employees, downstream chain of distribution including distributors,
13 wholesalers, and retailers, including specifically and without limitation, Walgreen Co., Rite
14 Aid, and any of Defendant's other customers ("Releasees"), based on failure to warn about
15 alleged exposures to DEHP resulting from any Covered Products manufactured, distributed or
16 sold by Defendant on or prior to the date of entry of this Consent Judgment. Compliance
17 with the terms of this Consent Judgment by Defendant and the Releasees constitutes
18 compliance with Proposition 65 by Defendant and the Releasees for purposes of exposures to
19 the Listed Phthalates from Covered Products manufactured, distributed or sold by Defendant.
20 This release does not limit or affect the rights or obligations of any party created under this
21 Consent Judgment.

22 **8. SEVERABILITY**

23 **8.1** In the event that any of the provisions of this Consent Judgment are held
24 by a court to be unenforceable, the validity of the enforceable provisions shall not be
25 adversely affected.

26 **9. GOVERNING LAW**

27 **9.1** The terms of this Consent Judgment shall be governed by the laws of
28 the State of California.

1 **10. RETENTION OF JURISDICTION**

2 **10.1** This Court shall retain jurisdiction of this matter to implement and
3 enforce the terms this Consent Judgment.

4 **11. PROVISION OF NOTICE**

5 **11.1** All notices required pursuant to this Consent Judgment and
6 correspondence shall be sent by electronic and first class mail to the following:

7
8 For CEH:

9 Howard Hirsch
10 Lexington Law Group
11 1627 Irving Street
12 San Francisco, CA 94122
13 hhirsch@lexlawgroup.com

14 For Defendant:

15 Renee D. Wasserman
16 Rogers Joseph O'Donnell
17 Robert Dollar Building, 10th Fl.
18 311 California Street
19 San Francisco, CA 94104-2695
20 rwasserman@rjo.com

21 **12. COURT APPROVAL**

22 **12.1** If this Consent Judgment is not approved by the Court, it shall be of no
23 further force or effect. The Parties agree to support a Motion for Approval of this Consent
24 Judgment.

25 **13. EXECUTION AND COUNTERPARTS**

26 **13.1** The stipulations to this Consent Judgment may be executed in
27 counterparts and by means of facsimile, which taken together shall be deemed to constitute
28 one document.

29 **14. AUTHORIZATION**

30 **14.1** Each signatory to this Consent Judgment certifies that he or she is fully
31 authorized by the party he or she represents to stipulate to this Consent Judgment and to enter
32 into and execute the Consent Judgment on behalf of the party represented and legally bind
33 that party. The undersigned have read, understand and agree to all of the terms and

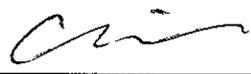
1 conditions of this Consent Judgment. Except as explicitly provided herein, each party is to
2 bear its own fees and costs.

3 **AGREED TO:**

4 CENTER FOR ENVIRONMENTAL HEALTH

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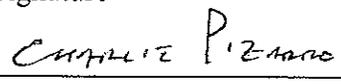
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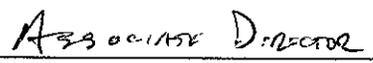
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Printed Name

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Title

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ATICO INTERNATIONAL USA, INC.

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Signature

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Printed Name

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Title

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2 bear its own fees and costs.

3 **AGREED TO:**

4 CENTER FOR ENVIRONMENTAL HEALTH

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12 ATICO INTERNATIONAL USA, INC.

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ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between CEH and Defendant Atico International USA, Inc., the settlement is approved and the clerk is directed to enter judgment in accordance with the terms herein.

Dated: MAR 15 2011

PETER J. BUSCH
Judge, Superior Court of the State of California
PETER J. BUSCH