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FILED

JAN 28 2015

KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: R. Smith, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MARIN

CENTER FOR ENVIRONMENTAL HEALTH,
a non-profit corporation

Plaintiff,

v.

FABRIC.COM, INC., *et al.*,

Defendants.

) Case No. CIV-1102079

) ^{ROC}
) **[PROPOSED] CONSENT JUDGMENT**
) **AS TO FABRIC.COM, INC.**

1 **1. INTRODUCTION**

2 1.1 The Parties to this Consent Judgment are the Center For Environmental
3 Health, a California non-profit corporation (“CEH”), and Fabric.com, Inc. (“Defendant”), to settle
4 certain claims asserted by CEH against Defendant as set forth in the operative complaint in the
5 matter entitled *Center for Environmental Health v. Fabric.com, Inc., et al.*, Marin County Superior
6 Court Case No. CIV-1102079 (the “Action”).

7 1.2 On February 4, 2011, CEH provided a “Notice of Violation of Proposition
8 65” to the California Attorney General, the District Attorneys of every county in California, the
9 City Attorneys of every California city with a population greater than 750,000, and to Defendant
10 regarding the presence of lead and lead compounds (collectively referred to herein as “Lead”) in
11 vinyl, oilcloth or imitation leather fabric (“Covered Products”).

12 1.3 On April 25, 2011, CEH filed the complaint in the Action against
13 Defendant and others.

14 1.4 Defendant is a corporation that employs 10 or more persons, and that sells
15 Covered Products through the Fabric.com website for delivery to customers located in the State of
16 California.

17 1.5 For purposes of this Consent Judgment only, the Parties stipulate that this
18 Court has jurisdiction over the allegations of violations contained in the Complaint and personal
19 jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper in the
20 County of Marin, and that this Court has jurisdiction to enter this Consent Judgment as a full and
21 final resolution of all claims which were or could have been raised in the Complaint against
22 Defendant based on the facts alleged therein with respect to Covered Products sold by Defendant
23 through the Fabric.com website for delivery to customers located in the State of California.

24 1.6 Nothing in this Consent Judgment is or shall be construed as an admission
25 by the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance
26 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
27 conclusion of law, issue of law, or violation of law. Defendant denies the material, factual and

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1 legal allegations in CEH's Complaint and expressly denies any wrong doing whatsoever. Nothing
2 in this Consent Judgment shall prejudice, waive or impair any right, remedy, argument or defense
3 the Parties may have in any other pending or future legal proceedings. This Consent Judgment is
4 the product of negotiation and compromise and is accepted by the Parties solely for purposes of
5 settling, compromising, and resolving issues disputed in this Action.

6 **2. INJUNCTIVE RELIEF**

7 **2.1 Specification Notice to Vendors of Reformulation Level.** To the extent it
8 has not already done so, no more than thirty (30) days after the date of entry of this Consent
9 Judgment ("Effective Date"), Defendant shall instruct each of its Covered Product suppliers to
10 provide it with Covered Products that do not exceed 300 parts per million ("ppm") Lead by weight
11 ("Reformulation Level"). If during the next three (3) year period, Defendant purchases Covered
12 Products from a third party that it has not previously provided with instructions regarding the
13 Reformulation Levels, Defendant shall provide the Reformulation Levels to the new Covered
14 Product supplier when placing an initial order for Covered Products and instruct the new Covered
15 Product supplier to provide it with Covered Products that do not exceed the Reformulation Levels.
16 Defendant shall retain records of communications sent to and received from suppliers that reflect
17 its compliance with the communication requirements of this Section for a period of three (3) years
18 and shall make such records available to CEH on reasonable request.

19 **3. ENFORCEMENT**

20 **3.1 General Enforcement Provision.** Subject to Section 3.2, prior to bringing
21 any motion or order to show cause to enforce the terms of this Consent Judgment, a Party seeking
22 to enforce shall provide the violating party thirty (30) days advanced written notice of the alleged
23 violation. The Parties shall meet and confer during such thirty (30) day period in an effort to try to
24 reach agreement on an appropriate cure for the alleged violation. After such thirty (30) day
25 period, the Party seeking to enforce may, by new action, motion or order to show cause before the
26 Superior Court of Marin, seek to enforce the terms and conditions contained in this Consent
27 Judgment.

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3.2 Enforcement Regarding Lead Content of Covered Products.

3.2.1 If, on or after the Effective Date, Plaintiff alleges that Defendant has sold or offered a Covered Product for sale to California consumers that contains Lead in excess of 300 ppm, before bringing any enforcement action under Proposition 65 or otherwise against Defendant, Plaintiff shall provide a notice to Defendant that includes a copy of the sales receipt or order confirmation from the Defendant showing the date of purchase and the website from which the Product was purchased, and the identification of the Product, including all product identification number(s). The notice shall provide a copy of all Lead test data obtained by Plaintiff regarding the Covered Product.

3.2.2 Within ten days of receiving a notice from Plaintiff pursuant to Section 3.2.1, unless it contests the claims in the notice, Defendant shall:

3.2.2.1 Notify the vendor of the product that Defendant may not accept any future shipments of the Covered Product for sale through the Fabric.com website for delivery to customers located in California until the vendor has obtained and provided to Defendant testing on current inventory demonstrating the Covered Product contains no more than 300 ppm lead;

3.2.2.2 Cease shipping existing inventory of the Covered Product to customers located in California unless Defendant provides a clear and reasonable warning to such consumers that complies with the provisions of section 3.2.2.3, until such time as it has received a new certification and corresponding test results from the supplier that the Covered Product complies with the Reformulation Level in Section 2.1. A clear and reasonable warning may only be provided for a Covered Product if Defendant has received a notice from Plaintiff under Section 3.2.1 for that Covered Product or if Defendant otherwise has a reasonable basis to believe that the Covered Product does not meet the Lead Limits;

3.2.2.3 A Clear and Reasonable Warning under this Consent Judgment shall state:

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WARNING: This product contains lead, a chemical known to the State of California to cause birth defects or other reproductive harm. Do not allow children to mouth or chew.

This statement shall be prominently displayed on the Covered Product, on the packaging of the Covered Product, or on a placard or sign provided that the statement is displayed with such conspicuousness, as compared with other words, statements or designs as to render it likely to be read and understood by an ordinary individual prior to sale. For internet sales, the warning statement shall: (a) be displayed before a consumer commits to purchasing the Covered Product; (b) be set out in a text, box on a separate line or in a separate paragraph; (c) be displayed in a font size in which the smallest character is no less than the equivalent of the height of the equivalent characters in 12 point arial font; and (d) be displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual. The warning statement shall not be preceded, followed, or surrounded by words, symbols, or other matter that reduces its conspicuousness to an ordinary individual, or that qualifies or interprets the required text, such as "legal notice required by law."

3.2.3 Within fifteen days of receiving an informal notice from Plaintiff pursuant to Section 3.2.1, Defendant shall: (a) certify in writing to Plaintiff that it has complied with this Section 3.2.2, and (b) identify to CEH (by proper name, address of principal place of business and telephone number) the supplier of each Covered Product identified in the informal notice. If Defendant receives new testing from the supplier showing that the supplier's current inventory of Covered Product contains no more than 300 ppm Lead, Defendant shall provide such testing to Plaintiff before it begins to sell or offer for sale the Covered Product in California. Defendant's compliance with this Section 3.2.2 shall constitute compliance with the Consent Judgment, and no further enforcement of this Consent Judgment or of Proposition 65 shall be brought by CEH against Defendant for alleged violations relating to the Covered Product(s) identified in the notice.

1 3.2.4 If Defendant elects to contest the claims in the notice, the Parties shall meet
2 and confer as required by Section 3.1 before CEH may bring any motion, application, or new
3 enforcement action.

4 **4. PAYMENTS**

5 4.1 **Payments by Defendant.** Within five (5) days of the entry of this Consent
6 Judgment, Defendant shall pay the total sum of \$45,000 as a settlement payment.

7 4.2 **Allocation of Payments.** The total settlement amount for Defendant shall
8 be paid in three separate checks delivered to the offices of the Lexington Law Group (Attn:
9 Howard Hirsch), 503 Divisadero Street, San Francisco, California 94117 and made payable and
10 allocated as follows:

11 4.2.1 Defendant shall pay the sum of \$5,930 as a civil penalty pursuant to Health
12 & Safety Code § 25249.7(b). CEH shall apportion this payment in accordance with Health &
13 Safety Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of
14 Environmental Health Hazard Assessment). Accordingly, the civil penalty payment shall be made
15 payable to the “Center for Environmental Health” and associated with taxpayer identification
16 number 94-3251981.

17 4.2.2 Defendant shall pay the sum of \$8,900 as a payment in lieu of civil penalty
18 to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title
19 11, § 3203(b). CEH shall use such funds to continue its work educating and protecting people
20 from exposures to toxic chemicals, including heavy metals. In addition, as part of its Community
21 Environmental Action and Justice Fund, CEH will use four percent of such funds to award grants
22 to grassroots environmental justice groups working to educate and protect people from exposures
23 to toxic chemicals. The method of selection of such groups can be found at the CEH web site at
24 www.ceh.org/justicefund. The payment pursuant to this Section shall be made payable to the
25 Center For Environmental Health and associated with taxpayer identification number 94-3251981.

26 4.2.3 Defendant shall pay the sum of \$30,170 as reimbursement of a portion of
27 CEH’s reasonable attorneys’ fees and costs. The attorneys’ fees and costs reimbursement check

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1 shall be made payable to the Lexington Law Group and associated with taxpayer identification
2 number 94-3317175.

3 **5. MODIFICATION AND DISPUTE RESOLUTION**

4 5.1 **Modification.** This Consent Judgment may be modified from time to time
5 by express written agreement of the Parties, with the approval of the Court, or by an order of this
6 Court upon motion and in accordance with law.

7 5.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent
8 Judgment shall attempt in good faith to meet and confer with all affected Parties prior to filing a
9 motion to modify the Consent Judgment.

10 **6. CLAIMS COVERED AND RELEASE**

11 6.1 This Consent Judgment is a full, final and binding resolution between CEH
12 on behalf of itself and the public interest and Defendant, and Defendant's parents, subsidiaries,
13 affiliated entities that are under common ownership, directors, officers, employees, shareholders
14 and their successors and assigns, and attorneys ("Defendant Releasees"), and all to whom they
15 distribute or sell Covered Products including, but not limited to, distributors, wholesalers,
16 customers, retailers, franchisees, cooperative members, licensors and licensees ("Downstream
17 Defendant Releasees"), of any violation of Proposition 65 based on failure to warn about alleged
18 exposure to Lead contained in Covered Products that were sold by Defendant through the
19 Fabric.com website for delivery to consumers located in California prior to the Effective Date.

20 **7. PROVISION OF NOTICE**

21 7.1 When any Party is entitled to receive any notice under this Consent
22 Judgment, the notice shall be sent by first class and electronic mail as follows:

23 7.1.1 **Notices to Defendant.** The person for Defendant to receive
24 Notices pursuant to this Consent Judgment shall be:

25 General Manager
26 Fabric.com, Inc.
27 2151 Northwest Parkway, Suite 450
28 Marietta, GA 30067
michael.miller@fabric.com

1 With a copy to:

2 Jeffrey B. Margulies
3 Fulbright & Jaworski LLP
4 555 South Flower Street, 41st Floor
5 Los Angeles, CA 90071
6 jeff.margulies@nortonrosefulbright.com

7 7.1.2 Notices to Plaintiff. The person for CEH to receive Notices
8 pursuant to this Consent Judgment shall be:

9 Howard Hirsch
10 Lexington Law Group
11 503 Divisadero Street
12 San Francisco, CA 94117
13 hhirsch@lexlawgroup.com

14 7.2 Any Party may modify the person and address to whom the notice is to be
15 sent by sending the other Party notice by first class and electronic mail.

16 **8. COURT APPROVAL**

17 8.1 This Consent Judgment shall become effective on the Effective Date. CEH
18 shall prepare and file a Motion for Approval of this Consent Judgment and Defendant shall
19 support approval of such Motion.

20 8.2 If this Consent Judgment is not entered by the Court, it shall be of no force
21 or effect and shall not be introduced into evidence or otherwise used in any proceeding for any
22 purpose, other than to allow the Court to determine if there was a material breach of Section 8.1.

23 **9. GOVERNING LAW AND CONSTRUCTION**

24 9.1 The terms of this Consent Judgment shall be governed by the laws of the
25 State of California.

26 **10. ATTORNEYS' FEES**

27 10.1 A Party who unsuccessfully brings or contests an action arising out of this
28 Consent Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and
costs unless the unsuccessful Party has acted with 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, Code of Civil Procedure §§2016.010, *et seq.*

1 10.2 Notwithstanding Section 10.1, a Party who prevails in a contested
2 enforcement action brought pursuant to Section 3 may seek an award of attorneys' fees pursuant to
3 Code of Civil Procedure §1021.5 against a Party that acted with substantial justification. The
4 Party seeking such an award shall bear the burden of meeting all of the elements of §1021.5, and
5 this provision shall not be construed as altering any procedural or substantive requirements for
6 obtaining such an award.

7 10.3 Nothing in this Section 10 shall preclude a party from seeking an award of
8 sanctions pursuant to law.

9 **11. ENTIRE AGREEMENT**

10 11.1 This Consent Judgment contains the sole and entire agreement and
11 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
12 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
13 merged herein and therein. There are no warranties, representations, or other agreements between
14 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
15 implied, other than those specifically referred to in this Consent Judgment have been made by any
16 Party hereto. No other agreements not specifically contained or referenced herein, oral or
17 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
18 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
19 any of the Parties hereto only to the extent that they are expressly incorporated herein. No
20 supplementation, modification, waiver, or termination of this Consent Judgment shall be binding
21 unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of
22 this Consent Judgment shall be deemed or shall constitute a waiver of any of the other provisions
23 hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

24 **12. RETENTION OF JURISDICTION**

25 12.1 This Court shall retain jurisdiction of this matter to implement or modify
26 the Consent Judgment.

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13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT

13.1 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.

14. NO EFFECT ON OTHER SETTLEMENTS

14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim against an entity on terms that are different than those contained in this Consent Judgment.

15. EXECUTION IN COUNTERPARTS

15.1 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: **JAN 28 2015**

ROY CHERNUS

Judge of the Superior Court of the State of California

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IT IS SO STIPULATED:

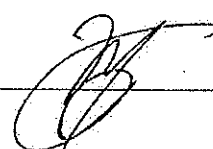
Dated: <u>Nov 17</u> , 2014	CENTER FOR ENVIRONMENTAL HEALTH
	
	CHARLIE PIZARRO
	Printed Name
	ASSOCIATE DIRECTOR
	Title

Dated: _____, 2014	FABRIC.COM, INC.
	Printed Name
	Title

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IT IS SO STIPULATED:

Dated: _____, 2014	CENTER FOR ENVIRONMENTAL HEALTH <hr/> <hr/> Printed Name <hr/> Title
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Dated: <u>11/11</u> , 2014	FABRIC.COM, INC.  <hr/> <hr/> Michael P. Miller Printed Name CEO / General Manager Title
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