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11 CENTER FOR ENVIRONMENTAL HEALTH

13 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
14 FOR THE COUNTY OF ALAMEDA

17 CENTER FOR ENVIRONMENTAL
18 HEALTH, a non-profit corporation,
19 Plaintiffs,
20 v.

21 A BABY, INC., et al.
22 Defendants.

Case No. RG-13667688


[PROPOSED] CONSENT
JUDGMENT

ENDORSED
FILED
ALAMEDA COUNTY

JUN 17 2013

CLERK OF THE SUPERIOR COURT
By G. McMullen Deputy

25 1. INTRODUCTION

26 1.1. This Consent Judgment is entered into by Plaintiff Center for
27 Environmental Health, a non-profit corporation ("CEH"), and Defendant Peerless Plastics,
28 Inc. ("Defendant") to settle claims asserted by CEH against Defendant as set forth in the

1 operative Complaint in the matter *Center for Environmental Health v. A Baby Inc., et al.*,
2 Alameda County Superior Court Case No. RG-13667688 (the "Action"). CEH and
3 Defendant are referred to collectively as the "Parties."

4 1.2. On November 20, 2012, CEH served a "Notice of Violation of Safe
5 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65)" (the "Notice"), to
6 Defendant, the California Attorney General, the District Attorneys of every County in the
7 State of California, the City Attorneys for every City in State of California with a population
8 greater than 750,000. The Notice alleges violations of Proposition 65 with respect to the
9 presence of tris (1,3-dichloro-2-propyl) phosphate ("TDCPP") in foam-cushioned pads for
10 children and infants to lie on, such as rest mats manufactured, distributed and/or sold by
11 Defendant.

12 1.3. Defendant is a corporation that employs ten (10) or more persons and that
13 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
14 California.

15 1.4. For purposes of this Consent Judgment only, the Parties stipulate that: (i)
16 this Court has jurisdiction over the allegations of violations contained in the Notice and
17 Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint;
18 (ii) venue is proper in the County of Alameda; and (iii) this Court has jurisdiction to enter
19 this Consent Judgment as a full and final resolution of all claims which were or could have
20 been raised in the Complaint based on the facts alleged in the Notice and Complaint with
21 respect to Covered Products manufactured, distributed, and/or sold by Defendant.

22 1.5. The Parties enter into this Consent Judgment as a full and final settlement
23 of all claims that were or which could have been raised in the Complaint arising out of the
24 facts or conduct related to Defendant alleged therein. By execution of this Consent Judgment
25 and agreeing to comply with its terms, the Parties do not admit any fact, conclusion of law, or
26 violation of law, nor shall compliance with the Consent Judgment constitute or be construed
27 as an admission by the Parties of any fact, conclusion of law, or violation of law. Defendant
28 denies the material, factual and legal allegations in the Notice and Complaint and expressly

1 denies any wrongdoing whatsoever. Except as specifically provided herein, nothing in this
2 Consent Judgment shall prejudice, waive or impair any right, remedy, argument or defense
3 the Parties may have in this or any other pending or future legal proceedings. This Consent
4 Judgment is the product of negotiation and compromise and is accepted by the Parties solely
5 for purposes of settling, compromising and resolving issues disputed in this Action.

6 2. DEFINITIONS

7 2.1. "Chemical Flame Retardant" means any halogenated or phosphorous-
8 based chemical compound used for the purpose of resisting or retarding the spread of fire,
9 including but not limited to the chemical compounds listed on Exhibit A.

10 2.2. "Covered Products" means foam-cushioned pads for children and infants
11 to lie on, such as rest mats manufactured, distributed and/or sold by Defendant in California.

12 2.3. "Effective Date" means the date on which the Court enters this Consent
13 Judgment.

14 2.4. "Treated" means the addition or application of any Chemical Flame
15 Retardant to any polyurethane foam used as filling material in any Covered Product.

16 3. INJUNCTIVE RELIEF

17 3.1. **Reformulation of Covered Products.** Defendant shall comply with the
18 following requirements to reformulate the Covered Products to eliminate exposures to
19 TDCPP arising from the use of the Covered Products:

20 3.1.1 **Sales Compliance Date.** As of the Effective Date, Defendant
21 shall not manufacture, or distribute, sell, or offer for sale in California any Covered Product
22 in which the polyurethane foam has been Treated with TDCPP, and, after the Effective Date,
23 Defendant shall not purchase any polyurethane foam containing any Chemical Flame
24 Retardant, including but not limited to TDCPP, to be used for manufacturing any Covered
25 Product. In addition, after 60-days following the Effective Date, Defendant shall not
26 manufacture, or distribute, sell, or offer for sale in California any Covered Product in which
27 the polyurethane foam has been Treated with any Chemical Flame Retardant, including but
28 not limited to TDCPP.

1 **3.1.2 Compliance Verification.** To ensure compliance with the
2 reformulation provisions of this Consent Judgment, Defendant shall test or cause to be tested
3 (which may include test results from an outside laboratory provided by each supplier) a
4 sample from the initial purchase after the Effective Date of polyurethane foam received from
5 each supplier for the presence of TDCPP and other Chemical Flame Retardants set forth in
6 Exhibit A.

7 **3.1.3 Specification and Certification From Suppliers.** To ensure
8 compliance with the reformulation provisions of this Consent Judgment, Defendant shall
9 issue specifications to its suppliers of polyurethane foam requiring that the polyurethane
10 foam has not been treated with any Chemical Flame Retardant. Defendant shall obtain and
11 maintain written certification from its suppliers of polyurethane foam confirming that all
12 such foam received by Defendant for distribution in California after the Effective Date has
13 not been treated with any Chemical Flame Retardant.

14 **3.2. Market withdrawal of Covered Products.** On or before the Effective
15 Date, Defendant shall have: (i) ceased shipping the Covered Products identified in the Notice
16 as non-exclusive exemplar product ("Noticed Products") to stores in California and/or, and
17 (ii) sent instructions to any customers offering Noticed Products for sale in California to
18 cease doing so and either to return all unsold Noticed Products to Defendant for destruction
19 or disposal or to destroy or dispose of such Noticed Products directly. Any destruction or
20 disposal of Noticed Products shall be in compliance with all applicable laws. Within ninety
21 (90) days after the Effective Date, Defendant shall certify to CEH that it has complied with
22 this section. If there is a dispute over the implementation of these requirements, CEH and
23 Defendants shall meet and confer before seeking any remedy in court.

24 **4. PENALTIES AND PAYMENT**

25 **4.1.** Defendant shall pay to CEH the total sum of twenty-five thousand dollars
26 (\$25,000), which shall be allocated as follows:
27
28

1 4.1.1. \$2,750 shall constitute a penalty pursuant to Cal. Health & Safety
2 Code § 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health &
3 Safety Code § 25249.12.

4 4.1.2. \$3,750 shall constitute a payment in lieu of civil penalty pursuant
5 to Cal. Health & Safety Code § 25249.7(b) and 11 CCR § 3202(b). CEH will use such funds
6 to continue its work of educating and protecting the public from exposures to toxic
7 chemicals, including chemical flame retardants. CEH may also use a portion of such funds
8 to monitor compliance with this Consent Judgment and to purchase and test Defendant's
9 products to confirm compliance. In addition, as part of its Community Environmental Action
10 and Justice Fund, CEH will use four percent (4%) of such funds to award grants to grassroots
11 environmental justice groups working to educate and protect the public from exposures to
12 toxic chemicals. The method of selection of such groups can be found at the CEH website at
13 www.ceh.org/justicefund.

14 4.1.3. \$18,500 shall constitute reimbursement of CEH's reasonable
15 attorneys' fees and costs.

16 4.2. The payment required under this section shall be made in three separate
17 checks. All of the payments shall be sent within 10 days following the Effective Date. The
18 payments required pursuant to Section 4.1.1 and 4.1.2 shall each be made payable to CEH
19 and mailed to CEH at the address set forth in Section 8 below. The payment required
20 pursuant to Section 4.1.3 shall be made payable to Lexington Law Group and mailed to
21 Lexington Law Group at the address set forth in Section 8.

22 **5. ENFORCEMENT OF CONSENT JUDGMENT**

23 5.1 CEH may, by motion or application for an order to show cause before the
24 Superior Court of Alameda County, enforce the terms and conditions contained in this
25 Consent Judgment. Prior to bringing any motion or application to enforce the requirements
26 of Section 3 above, CEH shall provide Defendant with a Notice of Violation and a copy of
27 any test results which purportedly support CEH's Notice of Violation. The Parties shall then
28 meet and confer regarding the basis for CEH's anticipated motion or application in an

1 attempt to resolve it informally. Should such attempts at informal resolution fail, CEH may
2 file its enforcement motion or application. The prevailing party on any motion to enforce
3 this Consent Judgment shall be entitled to its reasonable attorney's fees and costs incurred as
4 a result of such motion or application. This Consent Judgment may only be enforced by the
5 Parties.

6 **6. MODIFICATION OF CONSENT JUDGMENT**

7 6.1 This Consent Judgment may only be modified by written agreement of CEH and
8 Defendant, or upon motion of CEH or Defendant as provided by law.

9 **7. CLAIMS COVERED AND RELEASE**

10 7.1. This Consent Judgment is a full, final, and binding resolution between
11 CEH acting in the public interest and Defendant and Defendant's parents, officers, directors,
12 shareholders, divisions, subdivisions, subsidiaries, partners, affiliated companies and their
13 successors and assigns ("Defendant Releasees") and all entities to whom they distribute or
14 sell Covered Products including, but not limited to, distributors, wholesalers, customers,
15 retailers, franchisees, cooperative members, and licensees ("Downstream Defendant
16 Releasees"), of all claims alleged in the Complaint in this Action arising from any violation
17 of Proposition 65 that have been or could have been asserted in the public interest against
18 Defendants and Downstream Releasees, regarding the failure to warn about exposure to
19 TDCPP in the Covered Products manufactured, distributed, or sold by Defendant prior to the
20 Effective Date.

21 7.2. CEH, for itself releases, waives, and forever discharges any and all claims
22 alleged in the Complaint against Defendant and Downstream Defendant Releasees arising
23 from any violation of Proposition 65 that have been or could have been asserted regarding
24 the failure to warn about exposure to TDCPP in connection with Covered Products
25 manufactured, distributed or sold by Defendants prior to the Effective Date.

26 7.3. Compliance with the terms of this Consent Judgment by Defendant and
27 the Downstream Defendant Releasees shall constitute compliance with Proposition 65 by
28 Defendant and Downstream Defendant Releasees with respect to any alleged failure to warn

1 about TDCPP in Covered Products manufactured, distributed or sold by Defendant after the
2 Effective Date.

3 **8. PROVISION OF NOTICE**

4 8.1. When any Party is entitled to receive any notice under this Consent
5 Judgment, the notice shall be sent by first class and electronic mail as follows:

6 8.1.1. Notices to Defendants. The persons for Defendants to receive
7 Notices pursuant to this Consent Judgment shall be:

8 Peerless Plastics, Inc.
9 c/o William J Brummond, President
10 510 Willow Street
11 Farmington, MN 55024
12 wjbrummond@peerlessplastics.com

13
14 8.1.2. Notices to Plaintiff. The person for CEH to receive Notices
15 pursuant to this Consent Judgment shall be:

16 Rick Franco
17 Center for Environmental Health
18 2201 Broadway, Suite 302
19 Oakland, California 94612
20 rick@ceh.org

21 Mark Todzo
22 Lexington Law Group
23 503 Divisadero Street
24 San Francisco, CA 94117
25 mtodzo@lexlawgroup.com

26 8.2. Any Party may modify the person and address to whom the notice is to be
27 sent by sending the other Parties notice by first class and electronic mail.

28 **9. COURT APPROVAL**

9.1. This Consent Judgment shall become effective on the Effective Date,
provided however, that CEH shall prepare and file a Motion for Approval of this Consent
Judgment and Defendant shall support approval of such Motion.

1 9.2. If this Consent Judgment is not entered by the Court, it shall be of no force
2 or effect and shall not be introduced into evidence or otherwise used in any proceeding for
3 any purpose.

4 **10. GOVERNING LAW AND CONSTRUCTION**

5 10.1. The terms and obligations arising from this Consent Judgment shall be
6 construed and enforced in accordance with the laws of the State of California.

7 **11. ENTIRE AGREEMENT**

8 11.1. This Consent Judgment contains the sole and entire agreement and
9 understanding of CEH and Defendant with respect to the entire subject matter hereof, and
10 any and all prior discussions, negotiations, commitments, or understandings related thereto, if
11 any, are hereby merged herein and therein.

12 11.2. There are no warranties, representations, or other agreements between
13 CEH and Defendant except as expressly set forth herein. No representations, oral or
14 otherwise, express or implied, other than those specifically referred to in this Consent
15 Judgment have been made by any Party hereto.

16 11.3. No other agreements not specifically contained or referenced herein, oral
17 or 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
19 bind any of the Parties hereto only to the extent that they are expressly incorporated herein.

20 11.4. No supplementation, modification, waiver, or termination of this Consent
21 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

22 11.5. No waiver of any of the provisions of this Consent Judgment shall be
23 deemed or shall constitute a waiver of any of the other provisions hereof whether or not
24 similar, nor shall such waiver constitute a continuing waiver.

25 **12. RETENTION OF JURISDICTION**

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

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

1 13.1. Each signatory to this Consent Judgment certifies that he or she is fully
2 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter
3 into and execute the Consent Judgment on behalf of the Party represented and to legally bind
4 that Party.

5 **14. NO EFFECT ON OTHER SETTLEMENTS**

6 14.1. Nothing in this Consent Judgment shall preclude CEH from resolving any
7 claim against another entity on terms that are different than those contained in this Consent
8 Judgment.

9 **15. EXECUTION IN COUNTERPARTS**

10 15.1. The stipulations to this Consent Judgment may be executed in counterparts
11 and by means of facsimile, which taken together shall be deemed to constitute one document.

12 **IT IS SO STIPULATED:**

13
14 Dated: 4/12, 2013

CENTER FOR ENVIRONMENTAL HEALTH



Printed Name

CHARLIE PIZARRO

Title

ASSOCIATE DIRECTOR

23 Dated: 4/12, 2013

PEERLESS PLASTICS, INC.



Printed Name

William J. Brummond

Title

President

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

Dated: JUN 17 2013, 2013

STEVEN A. BRICK

Judge of the Superior Court of the State of
California, County of Alameda

EXHIBIT A

CHEMICAL FLAME RETARDANT	CAS NUMBER
Tris(1,3-dichloro-2-propyl) phosphate (TDCPP)	13674-87-8
tris(2-chloroethyl) phosphate (TCEP)	115-96-8
tris(1-chloro-2-propyl) phosphate (TCPP)	13674-84-5
2-ethylhexyl tetrabromobenzoate (TBB)	183658-27-7
bis(2-ethylhexyl)-2,3,4,5-tetrabromophthalate (TBPH)	26040-51-7
Triphenylphosphate (TPP)	115-86-6
2,2-bis(chloromethyl) trimethylene bis(bis(2-chloroethyl) phosphate) (V6)	38051-10-4
4-(tert-butyl)phenyl diphenyl phosphate (MDPP)	56803-37-3
bis(tert-butylphenyl) phenyl phosphate (DBPP)	65652-41-7
tris(4-tert-butylphenyl) phosphate (TBPP)	78-33-1 28777-70-0
Pentabromodiphenyl ethers	32534-81-9
Octabromodiphenyl ethers	32536-52-0
Decabromobiphenyl ether	1163-19-5