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9 Attorneys for Plaintiff
10 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

AUG 15 2014

CLERK OF THE SUPERIOR COURT
By **YOLANDA ESTRADA**

11
12 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF ALAMEDA
14

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

17 Plaintiff,

18 v.

19
20 A BABY, INC., *et al.*,

21 Defendants.
22

Case No. RG-13667688

~~PROPOSED~~ CONSENT
JUDGMENT

23 **1. INTRODUCTION**

24 1.1. This Consent Judgment is entered into by Plaintiff Center for Environmental
25 Health, a non-profit corporation ("CEH"), and Defendant Munchkin, Inc. ("Defendant") to settle
26 claims asserted by CEH against Defendant as set forth in the operative Complaint in the matter
27 *Center for Environmental Health v. A Baby, Inc., et al.*, Alameda County Superior Court Case
28

1 No. RG-13667688 (the "Action"). CEH and Defendant are referred to collectively as the
2 "Parties".

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

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

13 1.4. Prior to receipt of CEH's notice, Defendant received an order for the Covered
14 Products which it shipped on November 28, 2012. Thereafter, Defendant stopped selling
15 Covered Products into California upon losing its account with its only California retailer. At
16 present, Defendant believes that no Covered Products containing TDCPP remain in any
17 California retailer's inventory.

18 1.5. For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
19 Court has jurisdiction over the allegations of violations contained in the Notice and Complaint
20 and personal jurisdiction over Defendant as to the acts alleged in the Complaint; (ii) venue is
21 proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this Consent
22 Judgment as a full and final resolution of all claims which were or could have been raised in the
23 Complaint based on the facts alleged in the Notice and Complaint with respect to Covered
24 Products manufactured, distributed, and/or sold by Defendant.

25 1.6. The Parties enter into this Consent Judgment as a full and final settlement of all
26 claims which were or could have been raised in the Complaint arising out of the facts or conduct
27 related to Defendant alleged therein. By execution of this Consent Judgment and agreeing to
28 comply with its terms, the Parties do not admit any fact, conclusion of law, or violation of law,

1 nor shall compliance with the Consent Judgment constitute or be construed as an admission by
2 the Parties of any fact, conclusion of law, or violation of law. Defendant denies the material,
3 factual, and legal allegations in the Notice and Complaint and expressly denies any wrongdoing
4 whatsoever. Defendant has provided a Toxicological Risk Assessment (“TRA”) performed by a
5 Board-certified Toxicologist, which concludes that the subject products are not hazardous under
6 Proposition 65. Plaintiff has provided a critique of Defendant’s TRA, calling its assumptions and
7 conclusions into question. Except as specifically provided herein, nothing in this Consent
8 Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense either Party
9 may have in this or any other pending or future legal proceedings. This Consent Judgment is the
10 product of negotiation and compromise and is accepted by the Parties solely for purposes of
11 settling, compromising, and resolving issues disputed in this Action.

12 2. DEFINITIONS

13 2.1. “Chemical Flame Retardant” means any halogenated or phosphorous-based
14 chemical compound used for the purpose of resisting or retarding the spread of fire. “Chemical
15 Flame Retardant” does not include any chemical that has been rated as a Benchmark 4 chemical
16 pursuant to Clean Production Action’s GreenScreen ([http://www.cleanproduction.org/
17 Green.Greenscreen.php](http://www.cleanproduction.org/Green.Greenscreen.php)).

18 2.2. “Covered Products” means foam-cushioned pads for infants and children to lie,
19 rest, or sit upon, or otherwise comes against their body that is manufactured, distributed, and/or
20 sold by Defendant in California.

21 2.3. “Effective Date” means the date that is 10 days after Defendant receives written
22 Notice that the Court enters this Consent Judgment.

23 2.4. “Listed Chemical Flame Retardants” means Tris(1,3-dichloro-2-propyl) phosphate
24 (“TDCPP”), Tris(2-chloroethyl) phosphate (“TCEP”), and Tris(2,3-dibromopropyl)phosphate
25 (“TDBPP”).

26 2.5. “TB 117” means Technical Bulletin No. 117, entitled “Requirements, Test
27 Procedures and Apparatus for Testing the Flame Retardance of Filling Materials Used in
28 Upholstered Furniture,” dated March 2000.

1 2.6. “TB 117-2013” means Technical Bulletin 117-2013, entitled “Requirements, Test
2 Procedures and Apparatus for Testing the Smolder Resistance of Materials Used in Upholstered
3 Furniture,” incorporated by reference into regulatory amendments published on November 21,
4 2013 by the California Bureau of Electronic and Appliance Repair, Home Furnishings and
5 Thermal Insulation.

6 2.7. “TB 117-2013 Effective Date” means the date on which Covered Products offered
7 for sale in are required to meet the fire retardant requirements in TB 117-2013 pursuant to the
8 amendments to Section 1374 of Article 2 of Title 4 of the California Code of Regulations.

9 2.8. “Treated” means the addition or application of any Chemical Flame Retardant to
10 any polyurethane foam used as filling material in any Covered Product.

11 2.9. “Untreated Foam” means polyurethane foam that has not been Treated with any
12 Chemical Flame Retardant.

13 **3. INJUNCTIVE RELIEF**

14 3.1. **Reformulation of Covered Products.** Defendant shall comply with the following
15 requirements to reformulate the Covered Products to eliminate exposures to TDCPP arising from
16 the use of the Covered Products:

17 3.1.1. **Interim Compliance – Listed Chemical Flame Retardants.** Any
18 Covered Products in which the polyurethane foam has been Treated with Listed Chemical Flame
19 Retardants and which is manufactured, or distributed, sold, or offered for sale by Defendant in
20 California after the Effective Date but before the TB 117-2013 Effective Date shall be
21 accompanied by a Clear and Reasonable Warning that complies with Section 3.1.2.

22 3.1.2. **Proposition 65 Warnings.** A Clear and Reasonable Warning under this
23 Consent Judgment shall state:

24 WARNING: This product contains tris(1,3-dichloro-2-propyl)
25 phosphate (“TDCPP”) [and/or tris(2-chloroethyl) phosphate
26 (“TCEP”) and/or tris(2,3-dibromopropyl) phosphate (“TDBPP”)],
a chemical[s] known to the State of California to cause cancer.

27 A Clear and Reasonable Warning shall not be preceded by, surrounded by, or include any
28 additional words or phrases that contradict, obfuscate, or otherwise undermine the warning. The

1 warning statement shall be prominently displayed on the Covered Product or the packaging of the
2 Covered Product with such conspicuousness, as compared with other words, statements, or
3 designs as to render it likely to be read and understood by an ordinary individual prior to sale.
4 For internet, catalog, or any other sale where the consumer is not physically present and cannot
5 see a warning displayed on the Covered Product or the packaging of the Covered Product prior to
6 purchase or payment, the warning statement shall be displayed in such a manner that it is likely to
7 be read and understood prior to the authorization of or actual payment.

8 **3.1.3. Final Compliance – Listed Chemical Flame Retardants.** As of the
9 TB117-2013 Effective Date, Defendant shall not manufacture, or distribute, sell, or offer for sale
10 in California any Covered Product in which the polyurethane foam has been Treated with any
11 Listed Chemical Flame Retardant.

12 **3.1.3.1. Specification To and Certification From Suppliers.** To
13 ensure compliance with the reformulation provisions of this Section 3.1.3, Defendant shall
14 directly or through its supply chain issue specifications to its suppliers of polyurethane foam,
15 cushioning, or padding used as filling material in any Covered Product requiring that the
16 polyurethane foam has not been treated with any Listed Chemical Flame Retardant. Defendant
17 shall obtain and maintain for 3 years thereafter written certification from its suppliers of
18 polyurethane foam confirming that all such foam received by Defendant for distribution in
19 California after the TB 117-2013 Effective Date has not been treated with any Listed Chemical
20 Flame Retardant.

21 **3.2. Optional Additional Reformulation – Use of Untreated Foam.** In order for
22 Defendant to be eligible for a waiver of the additional penalty/payment in lieu of penalty
23 payments set forth in Section 4.2 below, Defendant shall undertake the additional actions to
24 reduce or eliminate the use of Chemical Flame Retardants set forth herein. As of the TB117-2013
25 Effective Date, Defendant shall not manufacture, or distribute, sell, or offer for sale in California
26 any Covered Product that has been Treated with any Chemical Flame Retardant. In order to
27 avoid the additional payments, Defendant must provide written certification to CEH of its use of
28 only Untreated Foam within 30 days following the TB 117-2013 Effective Date.

1 **3.2.1. Specification To and Certification From Suppliers.** To ensure
2 compliance with the provisions of this Section 3.2, to the extent that Defendant opts for additional
3 reformulation, it shall directly or through its supply chain issue specifications to its suppliers of
4 polyurethane foam, cushioning, or padding used as filling material in any Covered Product
5 requiring that such components shall use only Untreated Foam. Defendant shall not be deemed in
6 violation of the requirements of this Section 3.2 for any Covered Product to the extent that: (a)
7 Defendant has relied on a written certification from its vendor that supplied a Covered Product or
8 the polyurethane foam, cushioning, or padding used as filling material in the Covered Product is
9 made with only Untreated Foam, and/or (b) Defendant has obtained a test result from a certified
10 laboratory reporting that the Covered Product’s polyurethane foam, cushioning, or padding used
11 as filling material has been made with Untreated Foam. Defendant shall obtain and maintain for
12 3 years after the TB117-2013 Effective Date written certification(s) from its suppliers of
13 polyurethane foam, cushioning, or padding confirming that all such foam received by Defendant
14 for distribution in California is Untreated Foam.

15 **3.3. Market Withdrawal of Covered Products.** On or before the Effective Date,
16 Defendant shall have ceased shipping the Covered Products identified in the Notice as non-
17 exclusive exemplars (“Noticed Products”) to stores in California, and destroyed or disposed of
18 any such Noticed Products. Any destruction or disposal of Noticed Products shall be in
19 compliance with all applicable laws. Within ninety (90) days after the Effective Date, Defendant
20 shall certify upon request by CEH that it has complied with this section. If there is a dispute over
21 the implementation of these requirements, CEH and Defendant shall meet and confer before
22 seeking any remedy in court

23 **4. PENALTIES AND PAYMENT**

24 4.1. Defendant shall initially pay to CEH the total sum of Twenty thousand dollars
25 (\$20,000), which shall be allocated as follows:

26 4.1.1. \$2,200 shall constitute a penalty pursuant to Cal. Health & Safety Code §
27 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health & Safety Code
28 § 25249.12.

1 4.1.2. \$3,000 shall constitute a payment in lieu of civil penalty pursuant to Cal.
2 Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such funds to
3 continue its work of educating and protecting the public from exposures to toxic chemicals,
4 including chemical flame retardants. CEH may also use a portion of such funds to monitor
5 compliance with this Consent Judgment and to purchase and test Defendant's products to confirm
6 compliance. In addition, as part of its Community Environmental Action and Justice Fund, CEH
7 will use four percent (4%) of such funds to award grants to grassroots environmental justice
8 groups working to educate and protect the public from exposures to toxic chemicals. The method
9 of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

10 4.1.3. \$14,800 shall constitute reimbursement of CEH's reasonable attorneys'
11 fees and costs.

12 4.1.4. The payments required under Sections 4.1.1-4.1.3 shall be made in three
13 separate checks. All of the payments shall be sent within 10 days following the Effective Date.
14 The payments required pursuant to Section 4.1.1 and 4.1.2 shall each be made payable to CEH.
15 The payment required pursuant to Section 4.1.3 shall be made payable to Lexington Law Group.
16 All checks shall be delivered to Mark Todzo at Lexington Law Group at the address set forth in
17 Section 8.

18 4.2. In the event that Defendant elects not to certify its compliance with Section 3.2 in
19 accordance with that Section, within 30 days following the TB 117-2013 Effective Date,
20 Defendant must make an additional payment of \$5,000, which shall be paid in two separate
21 checks, each payable to CEH, to be allocated as follows:

22 4.2.1. \$2,000 shall constitute a penalty pursuant to Cal. Health & Safety Code §
23 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health & Safety Code
24 § 25249.12.

25 4.2.2. \$3,000 shall constitute a payment in lieu of civil penalty pursuant to Cal.
26 Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such funds to
27 continue its work of educating and protecting the public from exposures to toxic chemicals,
28 including chemical flame retardants. CEH may also use a portion of such funds to monitor

1 compliance with this Consent Judgment and to purchase and test Defendant's products to confirm
2 compliance. In addition, as part of its Community Environmental Action and Justice Fund, CEH
3 will use four percent (4%) of such funds to award grants to grassroots environmental justice
4 groups working to educate and protect the public from exposures to toxic chemicals. The method
5 of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

6 **5. ENFORCEMENT OF CONSENT JUDGMENT**

7 5.1. CEH may, by motion or application for an order to show cause before the Superior
8 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.
9 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH
10 shall provide Defendant with a Notice of Violation and a copy of any test results which
11 purportedly support CEH's Notice of Violation. The Parties shall then meet and confer regarding
12 the basis for CEH's anticipated motion or application in an attempt to resolve it informally,
13 including providing Defendant a reasonable opportunity of at least thirty (30) days to cure any
14 alleged violation. Should such attempts at informal resolution fail, CEH may file its enforcement
15 motion or application. The prevailing party on any motion to enforce this Consent Judgment
16 shall be entitled to its reasonable attorney's fees and costs incurred as a result of such motion or
17 application. This Consent Judgment may only be enforced by the Parties.

18 **6. MODIFICATION OF CONSENT JUDGMENT**

19 6.1. This Consent Judgment may only be modified by written agreement of CEH and
20 Defendant, or upon motion of CEH or Defendant as provided by law.

21 **7. CLAIMS COVERED AND RELEASE**

22 7.1. This Consent Judgment is a full, final, and binding resolution between CEH acting
23 in the public interest and Defendant and Defendant's parents, officers, directors, shareholders,
24 divisions, subdivisions, subsidiaries, partners, affiliated companies and their successors and
25 assigns ("Defendant Releasees") and all entities to whom they distribute or sell Covered Products
26 including, but not limited to, distributors, wholesalers, customers, retailers, franchisees,
27 cooperative members, and licensees ("Downstream Defendant Releasees"), of all claims alleged
28 in the Complaint in this Action arising from any violation of Proposition 65 that have been or

1 could have been asserted in the public interest against Defendant Releasees and Downstream
2 Defendant Releasees, regarding the failure to warn about exposure to TDCPP in the Covered
3 Products manufactured, distributed, or sold by Defendant prior to the Effective Date.

4 7.2. CEH, for itself releases, waives, and forever discharges any and all claims alleged
5 in the Complaint against Defendant and Downstream Defendant Releasees arising from any
6 violation of Proposition 65 that have been or could have been asserted regarding the failure to
7 warn about exposure to TDCPP in connection with Covered Products manufactured, distributed,
8 or sold by Defendant prior to the Effective Date.

9 7.3. Compliance with the terms of this Consent Judgment by Defendant and the
10 Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Defendant
11 and Downstream Defendant Releasees with respect to any alleged failure to warn about TDCPP
12 in Covered Products manufactured, distributed, or sold by Defendant after the Effective Date.

13 **8. PROVISION OF NOTICE**

14 8.1. When any Party is entitled to receive any notice under this Consent Judgment, the
15 notice shall be sent by first class and electronic mail as follows:

16 8.1.1. **Notices to Defendant.** The persons for Defendant to receive notices
17 pursuant to this Consent Judgment shall be:

18 Steven B. Dunn
19 Munchkin, Inc.
20 7835 Gloria Avenue
21 Van Nuys, CA 91406
22 steve.dunn@munchkin.com

23 Petty Rader
24 Munchkin, Inc.
25 7835 Gloria Avenue
26 Van Nuys, CA 91406
27 petty.rader@munchkin.com

28 8.1.2. **Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
this Consent Judgment shall be:

Rick Franco
Center for Environmental Health

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2201 Broadway, Suite 302
Oakland, CA 94612
rick@ceh.org

Mark Todzo
Lexington Law Group
503 Divisadero Street
San Francisco, CA 94117
mtodzo@lexlawgroup.com

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

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.

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

10. GOVERNING LAW AND CONSTRUCTION

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

11. ENTIRE AGREEMENT

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

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

1 11.3. No other agreements not specifically contained or referenced herein, oral or
2 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
3 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
4 any of the Parties hereto only to the extent that they are expressly incorporated herein.

5 11.4. No supplementation, modification, waiver, or termination of this Consent
6 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

7 11.5. No waiver of any of the provisions of this Consent Judgment shall be deemed or
8 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
9 such waiver constitute a continuing waiver.

10 **12. RETENTION OF JURISDICTION**

11 12.1. This Court shall retain jurisdiction of this matter to implement or modify the
12 Consent Judgment.

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

14 13.1. Each signatory to this Consent Judgment certifies that he or she is fully authorized
15 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
16 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

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

18 14.1. Nothing in this Consent Judgment shall preclude CEH from resolving any claim
19 against another entity on terms that are different from those contained in this Consent Judgment.

20 **15. EXECUTION IN COUNTERPARTS**

21 15.1. The stipulations to this Consent Judgment may be executed in counterparts and by
22 means of facsimile, which taken together shall be deemed to constitute one document.

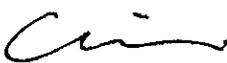
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IT IS SO STIPULATED:

Dated: 15 July, 2014

CENTER FOR ENVIRONMENTAL HEALTH

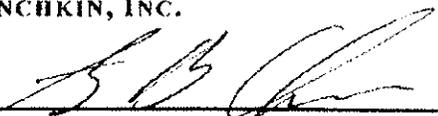


CARMELE PIZARRO
Printed Name

ASSOCIATE DIRECTOR
Title

Dated: May 8, 2014

MUNCHKIN, INC.



Steven B. Dunn
Printed Name

CEO
Title

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

Dated: AUG 15, 2014

GEORGE C. HERNANDEZ, JR.

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