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10 CENTER FOR ENVIRONMENTAL HEALTH

11 **ENDORSED**
12 **FILED**
13 **ALAMEDA COUNTY**

14 SEP - 1 2015

15 CLERK OF THE SUPERIOR COURT
16 By A. Tummony Deputy

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

CENTER FOR ENVIRONMENTAL
HEALTH, a non-profit corporation,

Plaintiff,

v.

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

Defendants.

Case No. RG-13667688

**[PROPOSED] CONSENT
JUDGMENT RE: MAN WAH USA,
INC.**

1. INTRODUCTION

1.1. This Consent Judgment is entered into by Plaintiff Center for Environmental Health, a non-profit corporation ("CEH"), and Defendant Man Wah USA, Inc. ("Defendant") to settle claims asserted by CEH against Defendant as set forth in the operative Complaint in the matter *Center for Environmental Health v. A Baby, Inc., et al.*, Alameda County Superior Court Case No. RG-13667688 (the "Action"). CEH and Defendant are referred to collectively as the "Parties."

1 1.2. On February 15, 2013, CEH served a “Notice of Violation” (the “Notice”) relating
2 to the California Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition 65”) on
3 Defendant, the California Attorney General, the District Attorneys of every County in the State of
4 California, and the City Attorneys for every City in State of California with a population greater
5 than 750,000. The Notice alleges violations of Proposition 65 with respect to the presence of tris
6 (1,3-dichloro-2-propyl) phosphate (“TDCPP”) in foam-cushioned upholstered furniture
7 manufactured, distributed, and/or sold by Defendant.

8 1.3. Defendant is a corporation that manufactures, distributes, and/or sells Covered
9 Products (as defined herein) in the State of California. Defendant contends that that it employs
10 fewer than ten (10) persons, and CEH disputes this contention. However, in the interest of
11 resolving the Proposition 65 claims asserted by CEH without need for further litigation as to this
12 issue, Defendant stipulates, for purposes of this Consent Judgment only, that it employs ten (10)
13 or more persons.

14 1.4. For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
15 Court has jurisdiction over the allegations of violations contained in the Notice and Complaint
16 and personal jurisdiction over Defendant as to the acts alleged in the Complaint; (ii) venue is
17 proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this Consent
18 Judgment as a full and final resolution of all claims which were or could have been raised in the
19 Complaint based on the facts alleged in the Notice and Complaint with respect to Covered
20 Products manufactured, distributed, and/or sold by Defendant.

21 1.5. The Parties enter into this Consent Judgment as a full and final settlement of all
22 claims which were or could have been raised in the Complaint arising out of the facts or conduct
23 related to Defendant alleged therein. By execution of this Consent Judgment and agreeing to
24 comply with its terms, the Parties do not admit any fact, conclusion of law, or violation of law,
25 nor shall compliance with the Consent Judgment constitute or be construed as an admission by
26 the Parties of any fact, conclusion of law, or violation of law. Defendant denies the material,
27 factual, and legal allegations in the Notice and Complaint and expressly denies any wrongdoing
28 whatsoever. Except as specifically provided herein, nothing in this Consent Judgment shall

1 prejudice, waive, or impair any right, remedy, argument, or defense either Party may have in this
2 or any other pending or future legal proceedings. This Consent Judgment is the product of
3 negotiation and compromise and is accepted by the Parties solely for purposes of settling,
4 compromising, and resolving issues disputed in this Action.

5 2. DEFINITIONS

6 2.1. "Chemical Flame Retardant" means any halogenated or phosphorous-based
7 chemical compound used for the purpose of resisting or retarding the spread of fire. "Chemical
8 Flame Retardant" does not include any chemical that has been rated as a Benchmark 4 chemical
9 pursuant to Clean Production Action's GreenScreen for Safer Chemicals
10 (<http://www.greenscreenchemicals.org/>).

11 2.2. "Covered Products" means foam-cushioned upholstered furniture manufactured,
12 distributed, and/or sold by Defendant in California.

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

14 2.4. "Listed Chemical Flame Retardants" means Tris(1,3-dichloro-2-propyl) phosphate
15 ("TDCPP"), Tris(2-chloroethyl) phosphate ("TCEP"), and Tris(2,3-dibromopropyl) phosphate
16 ("TDBPP").

17 2.5. "Manufacture Date" means the date the Covered Product was manufactured and
18 as may be indicated on a tag attached to the Covered Product.

19 2.6. "TB 117" means Technical Bulletin No. 117, entitled "Requirements, Test
20 Procedures and Apparatus for Testing the Flame Retardance of Filling Materials Used in
21 Upholstered Furniture," dated March 2000.

22 2.7. "TB 117-2013" means Technical Bulletin 117-2013, entitled "Requirements, Test
23 Procedures and Apparatus for Testing the Smolder Resistance of Materials Used in Upholstered
24 Furniture," approved on November 21, 2013 by the California Bureau of Electronic and
25 Appliance Repair, Home Furnishings and Thermal Insulation.

26 2.8. "TB 117-2013 Effective Date" means the date on which filling materials and cover
27 fabrics in upholstered furniture are required to meet the fire retardant requirements in TB 117-

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1 2013 pursuant to the amendments to Section 1374 of Article 2 of Title 4 of the California Code of
2 Regulations.

3 2.9. "Treated" means the addition or application of any Chemical Flame Retardant to
4 any polyurethane foam, cushioning, or padding used as filling material in any Covered Product.

5 2.10. "Untreated Foam" means polyurethane foam that has not been Treated with any
6 Chemical Flame Retardant.

7 **3. INJUNCTIVE RELIEF**

8 3.1. **Reformulation of Covered Products.** Defendant shall comply with the following
9 requirements to reformulate the Covered Products to eliminate exposures to TDCPP and other
10 Listed Chemical Flame Retardants arising from the use of the Covered Products:

11 3.1.1. **Listed Chemical Flame Retardants – All Covered Products.** As of the
12 Effective Date, Defendant shall not distribute, sell, or offer for sale in California any Covered
13 Product that has been Treated with any Listed Chemical Flame Retardant and which has a
14 Manufacture Date that is on or later than the Effective Date.

15 3.1.1.1. **Specification To and Certification From Suppliers.** To
16 ensure compliance with the reformulation provisions of Section 3.1.1, following the Effective
17 Date, Defendant shall directly or through its supply chain issue specifications to its suppliers of
18 polyurethane foam, cushioning, or padding used as filling material in any Covered Product
19 requiring that such components have not been Treated with Listed Chemical Flame Retardants in
20 accordance with the requirements of Section 3.1.1. Defendant shall obtain and maintain written
21 certification(s) from its suppliers of polyurethane foam, cushioning, or padding confirming that
22 all such foam received by Defendant for distribution in California has not been Treated with
23 Listed Chemical Flame Retardants. Defendant shall not be deemed in violation of the
24 requirements of Section 3.1.1 for any Covered Product to the extent: (a) it has relied on a written
25 certification from its vendor that supplied a Covered Product or the polyurethane foam,
26 cushioning, or padding used as filling material in the Covered Product that such Covered Product,
27 foam, cushioning, or padding is made with only Untreated Foam, and/or, if such certification is
28 not relied on or has previously been demonstrated to be invalid, (b) it has obtained a test result

1 from an independent third party certified laboratory reporting that the Covered Product's
2 polyurethane foam, cushioning, or padding used as filling material has been made with no Listed
3 Chemical Flame Retardants.

4 **3.1.2. Interim Compliance – All Covered Products.** Any Covered Products in
5 which the polyurethane foam has been Treated with Listed Chemical Flame Retardants and which
6 is distributed, sold, or offered for sale by Defendant in California after the Effective Date shall be
7 accompanied by a Clear and Reasonable Warning that complies with Section 3.1.4.

8 **3.1.3. Warnings for Products in the Stream of Commerce.** In an effort to
9 ensure that consumers receive clear and reasonable warnings in compliance with Proposition 65
10 for Covered Products that have not been reformulated pursuant to Section 3.1.1 or labeled in
11 accordance with Section 3.1.2, within 30 days following the Effective Date, Defendant shall
12 provide warning materials by certified mail to each of its California retailers or distributors to
13 whom Defendant reasonably believes it sold Covered Products that contained or may have
14 contained TDCPP on or after October 31, 2011. Such warning materials shall include a
15 reasonably sufficient number of hang tags in order to permit the retailer or distributor to place a
16 warning tag on each Covered Product such customer has purchased from Defendant. The hang
17 tags shall contain the warning language set forth in Section 3.1.4. The warning materials shall
18 also include a letter of instruction for the placement of the hang tags, and a Notice and
19 Acknowledgment postcard.

20 **3.1.4. Proposition 65 Warnings.** A Clear and Reasonable Warning under this
21 Consent Judgment shall state:

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

26 A Clear and Reasonable Warning shall not be preceded by, surrounded by, or include any
27 additional words or phrases that contradict, obfuscate, or otherwise undermine the warning. The
28 warning statement shall be prominently displayed on the Covered Product or the packaging of the
Covered Product with such conspicuousness, as compared with other words, statements, or

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

6 **3.2. Optional Additional Reformulation – Use of Untreated Foam.** In order for
7 Defendant to be eligible for a waiver of the additional penalty/payment in lieu of penalty
8 payments set forth in Section 4.1.5 below, Defendant shall undertake the additional actions to
9 reduce or eliminate the use of Chemical Flame Retardants set forth herein. As of the TB117-2013
10 Effective Date, Defendant shall not manufacture, or distribute, sell, or offer for sale in California
11 any Covered Product that has been Treated with any Chemical Flame Retardant. In order to
12 avoid the additional payments, Defendant must provide written certification to CEH of its use of
13 only Untreated Foam within 30 days following the Effective Date.

14 **3.2.1. Specification To and Certification From Suppliers.** To ensure
15 compliance with the reformulation provisions of Section 3.2, to the extent that Defendant opts for
16 additional reformulation, it shall directly or through its supply chain issue specifications to its
17 suppliers of polyurethane foam, cushioning, or padding used as filling material in any Covered
18 Product requiring that such components shall use only Untreated Foam. Defendant shall not be
19 deemed in violation of the requirements of Section 3.2 for any Covered Product to the extent: (a)
20 it has relied on a written certification from its vendor that supplied a Covered Product or the
21 polyurethane foam, cushioning, or padding used as filling material in the Covered Product is
22 made with only Untreated Foam, and/or (b) has obtained a test result from a certified laboratory
23 reporting that the Covered Product's polyurethane foam, cushioning, or padding used as filling
24 material has been made with Untreated Foam. Defendant shall obtain and maintain written
25 certification(s) from its suppliers of polyurethane foam, cushioning, or padding confirming that
26 all such foam received by Defendant for distribution in California is Untreated Foam.

1 **4. PENALTIES AND PAYMENT**

2 4.1. Defendant shall initially pay to CEH the total sum of fifty eight thousand five
3 hundred dollars (\$58,500), which shall be allocated as follows:

4 4.1.1. \$6,435 shall constitute a penalty pursuant to Cal. Health & Safety Code §
5 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health & Safety Code
6 § 25249.12.

7 4.1.2. \$8,775 shall constitute a payment in lieu of civil penalty pursuant to Cal.
8 Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such funds to
9 continue its work of educating and protecting the public from exposures to toxic chemicals,
10 including chemical flame retardants. CEH may also use a portion of such funds to monitor
11 compliance with this Consent Judgment and to purchase and test Defendant's products to confirm
12 compliance. In addition, as part of its Community Environmental Action and Justice Fund, CEH
13 will use four percent (4%) of such funds to award grants to grassroots environmental justice
14 groups working to educate and protect the public from exposures to toxic chemicals. The method
15 of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

16 4.1.3. \$43,290 shall constitute reimbursement of CEH's reasonable attorneys'
17 fees and costs.

18 4.1.4. The payments required under Sections 4.1.1-4.1.3 shall be made in three
19 separate checks, all to be delivered within 10 days following the Effective Date. The payments
20 required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable CEH. The payment
21 required pursuant to Section 4.1.3 shall be made payable to Lexington Law Group. All checks
22 shall be delivered to Mark Todzo at Lexington Law Group at the address set forth in Section 8.

23 4.1.5. In the event that Defendant elects not to certify its compliance with Section
24 3.2 in accordance with that Section, within 30 days following the Effective Date, Defendant must
25 make an additional payment of \$22,750, which shall be paid in two separate checks, each payable
26 to CEH, to be allocated as follows:

1 4.1.5.1. \$9,100 shall constitute a penalty pursuant to Cal. Health &
2 Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health
3 & Safety Code § 25249.12.

4 4.1.5.2. \$13,650 shall constitute a payment in lieu of civil penalty
5 pursuant to Cal. Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such
6 funds 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 to
8 monitor compliance with this Consent Judgment and to purchase and test Defendant's products to
9 confirm compliance. In addition, as part of its Community Environmental Action and Justice
10 Fund, CEH will use four percent (4%) of such funds to award grants to grassroots environmental
11 justice groups working to educate and protect the public from exposures to toxic chemicals. The
12 method of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

13 **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

25 **6. MODIFICATION OF CONSENT JUDGMENT**

26 6.1. This Consent Judgment may only be modified by written agreement of CEH and
27 Defendant, or upon motion of CEH or Defendant as provided by law.

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1 **7. CLAIMS COVERED AND RELEASE**

2 7.1. This Consent Judgment is a full, final, and binding resolution between CEH acting
3 in the public interest and Defendant and Defendant’s parents, officers, directors, shareholders,
4 divisions, subdivisions, subsidiaries, and their respective successors and assigns (“Defendant
5 Releasees”) and all entities to whom they distribute or sell or have distributed or sold Covered
6 Products including, but not limited to, distributors, wholesalers, customers, retailers, franchisees,
7 cooperative members, and licensees (“Downstream Defendant Releasees”), of all claims alleged
8 in the Complaint in this Action arising from any violation of Proposition 65 that have been or
9 could have been asserted in the public interest against Defendant and Downstream Defendant
10 Releasees, regarding the failure to warn about exposure to TDCPP in the Covered Products
11 manufactured, distributed, or sold by Defendant prior to the Effective Date.

12 7.2. CEH, for itself releases, waives, and forever discharges any and all claims alleged
13 in the Complaint against Defendant and Downstream Defendant Releasees arising from any
14 violation of Proposition 65 that have been or could have been asserted regarding the failure to
15 warn about exposure to TDCPP in connection with Covered Products manufactured, distributed,
16 or sold by Defendant prior to the Effective Date.

17 7.3. Compliance with the terms of this Consent Judgment by Defendant and the
18 Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Defendant
19 and Downstream Defendant Releasees with respect to any alleged failure to warn about any
20 Listed Chemical Flame Retardants in Covered Products manufactured, distributed, or sold by
21 Defendant after the Effective Date.

22 **8. PROVISION OF NOTICE**

23 8.1. When any Party is entitled to receive any notice under this Consent Judgment, the
24 notice shall be sent by first class and electronic mail as follows:

25 **8.1.1. Notices to Defendant.** The persons for Defendant to receive notices
26 pursuant to this Consent Judgment shall be:
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David S. Poole
Samuel R.W. Price
POOLE & SHAFFERY, LLP
25350 Magic Mountain Parkway, 2nd Floor
Santa Clarita, California 91355
dpoole@pooleshaffery.com
sprice@pooleshaffery.com

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

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.

1 11.2. There are no warranties, representations, or other agreements between CEH and
2 Defendant except as expressly set forth herein. No representations, oral or otherwise, express or
3 implied, other than those specifically referred to in this Consent Judgment have been made by any
4 Party hereto.

5 11.3. No other agreements not specifically contained or referenced herein, oral or
6 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
7 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
8 any of the Parties hereto only to the extent that they are expressly incorporated herein.

9 11.4. No supplementation, modification, waiver, or termination of this Consent
10 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

11 11.5. No waiver of any of the provisions of this Consent Judgment shall be deemed or
12 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
13 such waiver constitute a continuing waiver.

14 **12. RETENTION OF JURISDICTION**

15 12.1. This Court shall retain jurisdiction of this matter to implement or modify the
16 Consent Judgment.

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

18 13.1. Each signatory to this Consent Judgment certifies that he or she is fully authorized
19 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
20 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

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

22 14.1. Nothing in this Consent Judgment shall preclude CEH from resolving any claim
23 against another entity on terms that are different from those contained in this Consent Judgment.

24 **15. EXECUTION IN COUNTERPARTS**

25 15.1. The stipulations to this Consent Judgment may be executed in counterparts and by
26 means of facsimile, which taken together shall be deemed to constitute one document.

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IT IS SO STIPULATED:

Dated: July 1, 2015

CENTER FOR ENVIRONMENTAL HEALTH

[Handwritten Signature]

Christina Pizarro

Printed Name

Account Director

Title

Dated: _____, 2015

MAN WAH USA, INC.

Printed Name

Title

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

Dated: _____, 2015

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

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IT IS SO STIPULATED:

Dated: _____, 2015

CENTER FOR ENVIRONMENTAL HEALTH

Printed Name

Title

Dated: July 8, 2015

MAN WAH USA, INC.

William RAY

Printed Name

PRESIDENT

Title

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

Dated: September 1, 2015

GEORGE C. HERNANDEZ, JR.

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