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CENTER FOR ENVIRONMENTAL HEALTH

FILED

SEP 17 2014

KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Chen, Deputy

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

12 CENTER FOR ENVIRONMENTAL HEALTH,)
a non-profit corporation,)

13 Plaintiff,)

14 vs.)

15 FABRIC.COM, INC., et al.,)

16 Defendants.)

Case No. CIV-1102079

[PROPOSED] CONSENT JUDGMENT
AS TO PLASTEX INTERNATIONAL,
INC.

19 **1. INTRODUCTION**

20 1.1 This Consent Judgment is entered into by the Center For Environmental
21 Health, a California non-profit corporation ("CEH") on the one hand, and Plastex International,
22 Inc. ("Defendant") on the other hand, to settle certain claims asserted by CEH against Defendant
23 as set forth in the operative complaint in the matter entitled *Center for Environmental Health v.*

24 *Fabric.com, Inc., et al.*, Marin County Superior Court Case No. CIV-1102079 (the "Action").

25 CEH and Defendant are referred to collectively as the "Parties."

26 1.2 On April 22, 2013, CEH provided a "Notice of Violation of Proposition 65" to
27 the California Attorney General, the District Attorneys of every county in California, the City

1 Attorneys of every California city with a population greater than 750,000, and to Defendant
2 regarding the presence of lead and lead compounds (collectively referred to herein as "Lead") in
3 vinyl, oilcloth or imitation leather fabric ("Covered Products").

4 1.3 On July 19, 2013, CEH amended the operative complaint in the Action to
5 name Defendant as a party.

6 1.4 Defendant is a corporation that employs 10 or more persons, and that
7 manufactures, distributes and/or sells Covered Products in the State of California.

8 1.5 For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
9 Court has jurisdiction over the allegations of violations contained in the operative Complaint
10 applicable to Defendant (the "Complaint") and personal jurisdiction over Settling Defendant as to
11 the acts alleged in the Complaint; (ii) that venue is proper in the County of Marin; and (iii) that
12 this Court has jurisdiction to enter this Consent Judgment.

13 1.6 Nothing in this Consent Judgment is or shall be construed as an admission by
14 the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance
15 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
16 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
17 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
18 other legal proceeding. This Consent Judgment is the product of negotiation and compromise and
19 is accepted by the Parties for purposes of settling, compromising and resolving issues disputed in
20 this action.

21 2. INJUNCTIVE RELIEF

22 2.1 **Reformulation of Covered Products.** As of the date of entry of this Consent
23 Judgment (the "Effective Date"), Defendant shall not manufacture, distribute, sell or offer for sale
24 any Covered Product that Defendant knows or has reason to believe will be sold or offered for
25 sale to California consumers unless such Covered Product complies with the following Lead
26 Limits:

27 2.1.1 "Paint or other Surface Coatings" as that term is defined in 16 C.F.R.
28 § 1303.2(b): no more than 0.009 percent Lead by weight (90 parts per million ("ppm")).

1 2.1.2 Polyvinyl Chloride: no more than .02 percent Lead by weight (200 ppm).

2 2.1.3 All other materials: no more than .03 percent Lead by weight (300 ppm).

3 2.2 For the purposes of this section, if Defendant gives notice to a customer that a
4 Covered Product is not for resale in California, Defendant will be deemed to have no knowledge
5 or reason to believe that the Covered Product will be sold or offered for sale to California
6 consumers.

7 2.3 **Specification to Suppliers.** To the extent it has not already done so, no more
8 than 30 days after the Effective Date, Defendant shall provide the Lead Limits to its suppliers of
9 Covered Products and shall instruct each supplier to use reasonable efforts to provide Covered
10 Products that comply with the Lead Limits on a nationwide basis.

11 2.4 **Market Withdrawal of Covered Products.** On or before the Effective Date,
12 Defendant shall cease shipping the Patent Leather Vinyl in Red, Item No. UI-359, as identified in
13 CEH's pre-suit Notice of Violation to Defendant (the "Recall Covered Products"), to stores
14 and/or customers in California, and Defendant shall withdraw the Recall Covered Products from
15 the market in California. No more than 15 days after the Effective Date, Defendant shall, at a
16 minimum, send instructions to any of its stores and/or customers that Defendant knows or has
17 reason to believe offers the Recall Covered Products for sale in California to cease offering such
18 Recall Covered Products for sale in California, and those stores and/or customers may return all
19 Recall Covered Products to Defendant for destruction, or directly destroy the Recall Covered
20 Products. Any destruction of the Recall Covered Products shall be in compliance with all
21 applicable laws. Defendant shall keep and make available to CEH for inspection and copying
22 records and correspondence regarding the market withdrawal and destruction of the Recall
23 Covered Products. If there is a dispute over the corrective action, the Parties shall meet and
24 confer before seeking any remedy in court.

25 **3. ENFORCEMENT**

26 3.1 CEH may, by motion or application for an order to show cause before the
27 Superior Court of Marin County, enforce the terms and conditions contained in this Consent
28 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 2

1 above, CEH shall provide Defendant with a Notice of Violation and a copy of any test results
2 from SGS which purportedly support CEH's Notice of Violation. The Parties shall meet and
3 confer during the thirty (30) day period after CEH provides a Notice of Violation in an effort to
4 try to reach agreement on an appropriate cure for the alleged violation. After such thirty (30) day
5 period, CEH may, by new action, motion or order to show cause before the Superior Court of
6 Marin, seek to enforce the terms and conditions contained in this Consent Judgment.

7 3.2 CEH shall not bring any motion, application, or further enforcement action
8 against Defendant regarding an alleged violation of Section 2 if, within thirty (30) days of a
9 Notice of Violation from CEH, Defendant: (i) demonstrates to CEH that Defendant complied
10 with Section 2.2 with respect to the supplier of the Covered Product identified in the Notice of
11 Violation; (ii) provides CEH with a detailed description of corrective action that Defendant has
12 undertaken or proposes to undertake to address the alleged violation; and (iii) identifies to CEH
13 (by proper name, address of principal place of business and telephone number) the supplier of
14 each Covered Product identified in the Notice of Violation. Any such corrective action shall
15 include, at a minimum: (i) reasonable assurance that the Covered Product(s) identified in the
16 Notice of Violation will no longer be offered by Defendant for direct sale in California; and (ii)
17 sending instructions to any of Defendant's direct customers that Defendant knows or has reason
18 to believe offers the Covered Product(s) for sale in California to cease offering such Covered
19 Product(s) for sale in California. If there is a dispute over the sufficiency of the proposed
20 corrective action or its implementation, CEH shall promptly notify Defendant and the Parties
21 shall meet and confer before seeking the intervention of the Court to resolve the dispute. Nothing
22 in this Section 3 affects CEH's right to commence or prosecute an action under Proposition 65
23 against any supplier for any alleged violations of Proposition 65.

24 **4. PAYMENTS**

25 4.1 **Payments From Defendant.** Within five (5) days of the entry of this Consent
26 Judgment, Defendant shall pay the total sum of \$27,000 as a settlement payment. Any failure by
27 Defendant to comply with the payment terms herein shall be subject to a stipulated late fee to be
28 paid by Defendant in the amount of \$100 for each day the full payment is not received after the

1 due date. The late fees required under this Section shall be recoverable, together with reasonable
2 attorneys' fees, in an enforcement proceeding brought pursuant to Section 3 of this Consent
3 Judgment.

4 4.2 **Allocation of Payments.** The total settlement amount for Defendant shall be
5 paid in three separate checks delivered to the offices of the Lexington Law Group (Attn: Howard
6 Hirsch), 503 Divisadero Street, San Francisco, California 94117, and made payable and allocated
7 as follows:

8 4.2.1 Defendant shall pay the sum of \$3,530 as a civil penalty pursuant to Health
9 & Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with Health &
10 Safety Code § 25249.12. The civil penalty check shall be made payable to the Center For
11 Environmental Health.

12 4.2.2 Defendant shall pay the sum of \$5,300 as payment in lieu of penalty to
13 CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title
14 11, § 3203(b). CEH will use such funds to continue its work educating and protecting people
15 from exposures to toxic chemicals. CEH may also use a portion of such funds to monitor
16 compliance with this Consent Judgment and to purchase and test Defendant's products to confirm
17 compliance. In addition, as part of its Community Environmental Action and Justice Fund, CEH
18 will use four percent (4%) of such funds to award grants to grassroots environmental justice
19 groups working to educate and protect people from exposures to toxic chemicals. The method of
20 selection of such groups can be found at the CEH web site at www.ceh.org/justicefund. The
21 payment pursuant to this Section shall be made payable to the Center For Environmental Health.

22 4.2.3 Defendant shall pay the sum of \$18,170 as reimbursement of a portion of
23 CEH's reasonable attorneys' fees and costs. The attorneys' fees and cost reimbursement check
24 shall be made payable to the Lexington Law Group.

1 **5. MODIFICATION**

2 5.1 **Written Consent.** This Consent Judgment may be modified from time to
3 time by express written agreement of the Parties with the approval of the Court, or by an order of
4 this Court upon motion and in accordance with law.

5 5.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
6 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
7 modify the Consent Judgment.

8 **6. CLAIMS COVERED AND RELEASE**

9 6.1 This Consent Judgment is a full, final and binding resolution between CEH on
10 behalf of itself and the public interest and Defendant, and its parents, subsidiaries, affiliated
11 entities that are under common ownership, directors, officers, employees, and attorneys
12 (“Defendant Releasees”), and each entity to whom they directly or indirectly distribute or sell
13 Covered Products, including but not limited to distributors, wholesalers, customers, retailers,
14 franchisees, cooperative members, licensors and licensees (“Downstream Defendant Releasees”) of
15 any violation of Proposition 65 that was or could have been asserted in the Complaint against
16 Defendant, Defendant Releasees, and Downstream Defendant Releasees, based on failure to warn
17 about alleged exposure to Lead contained in Covered Products that were manufactured,
18 distributed, or sold by Defendant prior to the Effective Date.

19 6.2 Compliance with the terms of this Consent Judgment by Defendant shall
20 constitute compliance with Proposition 65 by Defendant, the Defendant Releasees and the
21 Downstream Defendant Releasees with respect to any alleged failure to warn about Lead in
22 Covered Products manufactured, distributed, or sold by Defendant after the Effective Date.

23 6.3 Nothing in this Section 6 affects CEH’s right to commence or prosecute an
24 action under Proposition 65 against any person other than Defendant, Defendant Releasees, or
25 Downstream Defendant Releasees.

26 **7. PROVISION OF NOTICE**

27 7.1 When any Party is entitled to receive any notice under this Consent Judgment,
28 the notice shall be sent by first class and electronic mail as follows:

1 7.1.1 **Notices to Defendant.** The person for Defendant to receive Notices
2 pursuant to this Consent Judgment shall be:

3 Steven H. Bovarnick
4 John A. Lofton
5 Leland, Parachini, Steinberg, Matzger & Melnick, LLP
6 199 Fremont Street, 21st Floor
7 San Francisco, CA 94105
8 sbovarnick@lpplaw.com
9 jlofton@lpplaw.com

10 7.1.2 **Notices to Plaintiff.** The person for CEH to receive Notices pursuant to
11 this Consent Judgment shall be:

12 Howard Hirsch
13 Lexington Law Group
14 503 Divisadero Street
15 San Francisco, CA 94117
16 hhirsch@lexlawgroup.com

17 7.2 Any Party may modify the person and address to whom the notice is to be sent
18 by sending the other Party notice by first class and electronic mail.

19 **8. COURT APPROVAL**

20 8.1 This Consent Judgment shall become effective on the Effective Date, provided
21 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
22 Defendant shall support approval of such Motion.

23 8.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
24 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
25 purpose.

26 **9. ATTORNEYS' FEES**

27 9.1 Should any Party prevail on any motion, application for an order to show
28 cause or other proceeding to enforce a violation of this Consent Judgment, that Party shall be
entitled to its reasonable attorneys' fees and costs incurred as a result of such motion or
application.

 9.2 Except as otherwise provided in this Consent Judgment, each Party shall bear
its own attorneys' fees and costs.

 9.3 Nothing in this Section 9 shall preclude a Party from seeking an award of

1 sanctions pursuant to law.

2 **10. OTHER TERMS**

3 10.1 The terms of this Consent Judgment shall be governed by the laws of the State
4 of California.

5 10.2 This Consent Judgment shall apply to and be binding upon CEH and
6 Defendant, and its respective divisions, subdivisions, and subsidiaries, and the successors or
7 assigns of any of them.

8 10.3 This Consent Judgment contains the sole and entire agreement and
9 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
10 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
11 merged herein and therein. There are no warranties, representations, or other agreements between
12 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
13 implied, other than those specifically referred to in this Consent Judgment have been made by any
14 Party hereto. No other agreements not specifically contained or referenced herein, oral or
15 otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation,
16 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
17 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
18 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
19 whether or not similar, nor shall such waiver constitute a continuing waiver.

20 10.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
21 that Defendant might have against any other party.

22 10.5 This Court shall retain jurisdiction of this matter to implement or modify the
23 Consent Judgment.

24 10.6 The stipulations to this Consent Judgment may be executed in counterparts
25 and by means of facsimile or portable document format (pdf), which taken together shall be
26 deemed to constitute one document.

27 10.7 Each signatory to this Consent Judgment certifies that he or she is fully
28 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into

1 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
2 Party.

3 10.8 The Parties, including their counsel, have participated in the preparation of
4 this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.
5 This Consent Judgment was subject to revision and modification by the Parties and has been
6 accepted and approved as to its final form by all Parties and their counsel. Accordingly, any
7 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
8 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
9 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
10 be resolved against the drafting Party should not be employed in the interpretation of this Consent
11 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

12
13 **IT IS SO STIPULATED:**
14 **CENTER FOR ENVIRONMENTAL HEALTH**

15
16 
17 _____
18 Charlie Pizarro
Associate Director

19 **PLASTEX INTERNATIONAL, LTD.**
20
21 _____
22 Signature
23
24 _____
25 Printed Name
26
27 _____
28 Title

1 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
2 Party.

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4 this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.
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13 **IT IS SO STIPULATED:**

14 **CENTER FOR ENVIRONMENTAL HEALTH**

15
16
17 _____
18 Charlie Pizarro
19 Associate Director

20 **PLASTEX INTERNATIONAL, LTD.**

21 _____
22 
23 Signature

24 _____
25 JACK MALKA
26 Printed Name

27 _____
28 PRESIDENT
Title

ES/PLASTEX/0001/EXR/000964354/EXR/1

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IT IS SO ORDERED:

Dated: 9/17, 2014

ROY CHERNUS

Judge of the Superior Court