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10 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED  
FILED  
ALAMEDA COUNTY

AUG 15 2014

CLERK OF THE SUPERIOR COURT  
VOLANDA ESTRADA Deputy

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

13 CENTER FOR ENVIRONMENTAL  
14 HEALTH, a non-profit corporation,

15 Plaintiff,

16 v.

17 ACOUSTICAL SOLUTIONS, INC., *et al.*,  
18 Defendants.

Case No. RG-13707315

~~PROPOSED~~ CONSENT  
JUDGMENT RE: AMERICAN  
MICRO INDUSTRIES, INC.

19 **1. INTRODUCTION**

20 1.1. This Consent Judgment is entered into by Plaintiff Center for Environmental  
21 Health, a non-profit corporation (“CEH”), and Defendant American Micro Industries, Inc.  
22 (“Defendant”) to settle claims asserted by CEH against Defendant as set forth in the operative  
23 Complaint in the matter *Center for Environmental Health v. Acoustical Solutions, Inc., et al.*,  
24 Alameda County Superior Court Case No. RG-13707315 (the “Action”). CEH and Defendant are  
25 sometimes referred to hereinafter as a “Party” or collectively as the “Parties.”

26 1.2. On July 17, 2013, CEH served a “Notice of Violation” (the “Notice”) relating to  
27 the California Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition 65”) on  
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1 Defendant, the California Attorney General, the District Attorneys of every County in the State of  
2 California, and the City Attorneys for every City in the State of California with a population  
3 greater than 750,000. The Notice alleges violations of Proposition 65 with respect to the presence  
4 of tris (1,3-dichloro-2-propyl) phosphate (“TDCPP”) in acoustic and soundproofing foam  
5 allegedly manufactured, distributed, and/or sold by Defendant.

6 1.3. Defendant is a corporation that employs ten (10) or more persons and is alleged in  
7 the Complaint to have manufactured, distributed, and/or sold Covered Products (as defined  
8 herein) in the State of California. Defendant denies the allegations in the Complaint and asserts  
9 that it never manufactured and does not now, nor in the future does it plan to, distribute, sell, or  
10 offer for sale Covered Products in the State of California.

11 1.4. For purposes of this Consent Judgment only, the Parties stipulate that: (i) this  
12 Court has jurisdiction over the allegations of violations contained in the Notice and Complaint  
13 and personal jurisdiction over Defendant as to the acts alleged in the Complaint; (ii) venue is  
14 proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this Consent  
15 Judgment as a full and final resolution of all claims which were or could have been raised in the  
16 Complaint based on the facts alleged in the Notice and Complaint with respect to Covered  
17 Products allegedly manufactured, distributed, and/or sold by Defendant.

18 1.5. The Parties enter into this Consent Judgment as a full and final settlement of all  
19 claims which were or could have been raised in the Complaint arising out of the facts or conduct  
20 related to Defendant alleged therein. By execution of this Consent Judgment and agreeing to  
21 comply with its terms, the Parties do not admit any fact, conclusion of law, or violation of law,  
22 nor shall compliance with the Consent Judgment constitute or be construed as an admission by  
23 the Parties of any fact, conclusion of law, or violation of law. Defendant denies the material,  
24 factual, and legal allegations in the Notice and Complaint and expressly denies any wrongdoing  
25 whatsoever. Except as specifically provided herein, nothing in this Consent Judgment shall  
26 prejudice, waive, or impair any right, remedy, argument, or defense either Party may have in this  
27 or any other pending or future legal proceedings. This Consent Judgment is the product of  
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1 negotiation and compromise and is accepted by the Parties solely for purposes of settling,  
2 compromising, and resolving issues disputed in the Notice and this Action.

### 3 2. DEFINITIONS

4 2.1. "Chemical Flame Retardant" means any halogenated or phosphorous-based  
5 chemical compound used for the purpose of resisting or retarding the spread of fire. "Chemical  
6 Flame Retardant" does not include (a) any chemical that has been rated as a Benchmark 4  
7 chemical pursuant to Clean Production Action's GreenScreen ([http://www.cleanproduction.org/  
8 Green.Greenscreen.php](http://www.cleanproduction.org/Green.Greenscreen.php)); or (b) ammonium polyphosphate.

9 2.2. "Covered Product" means any acoustic and/or soundproofing foam manufactured,  
10 distributed, and/or sold by Defendant in the State of California.

11 2.3. "Effective Date" means the date on which the Court enters this Consent Judgment.

12 2.4. "Listed Chemical Flame Retardant" means Tris (1,3-dichloro-2-propyl) phosphate  
13 ("TDCPP"), Tris (2-chloroethyl) phosphate ("TCEP"), or Tris (2,3-dibromopropyl) phosphate  
14 ("TDBPP").

15 2.5. "Manufacture Date" means the date the Covered Product was manufactured and  
16 as may be indicated on a tag attached to the Covered Product.

17 2.6. "Treated" means the addition or application of any Chemical Flame Retardant to  
18 any polyurethane foam used in any Covered Product.

19 2.7. "Untreated Foam" means polyurethane foam that has not been Treated with any  
20 Chemical Flame Retardant.

### 21 3. INJUNCTIVE RELIEF

22 3.1. Defendant shall comply with the following requirements to reformulate any  
23 Covered Product to eliminate exposures to TDCPP and any other Chemical Flame Retardant  
24 arising from the use of any Covered Product:

25 3.1.1. **Reformulation of any Covered Product.** As of the Effective Date,  
26 Defendant shall not distribute, sell, or offer for sale in the State of California any Covered  
27 Product that has been Treated with any Chemical Flame Retardant and that has a Manufacture  
28 Date which is on or later than the Effective Date. The Parties agree that Defendant may satisfy

1 this Section 3.1.1 by not distributing, selling, or offering for sale in the State of California any  
2 Covered Product containing any Chemical Flame Retardant after the Effective Date.

3 3.1.1.1. To ensure compliance with the reformulation provisions of  
4 Section 3.1.1, should Defendant seek to distribute, sell, or offer for sale in the State of California  
5 any Covered Product after the Effective Date, Defendant shall directly or through its supply chain  
6 issue specifications to its suppliers of any Covered Product and/or polyurethane foam used in any  
7 Covered Product requiring that such products and/or foam has not been Treated with any  
8 Chemical Flame Retardant in accordance with the requirements of Section 3.1.1. Defendant shall  
9 obtain and maintain written certification(s) from its suppliers confirming that any such Covered  
10 Product and/or foam used in any Covered Product received by Defendant for distribution in the  
11 State of California after the Effective Date have not been Treated with any Chemical Flame  
12 Retardant. Defendant shall not be deemed in violation of the requirements of Section 3.1.1 for  
13 any Covered Product to the extent: (a) it has relied on a written certification from its vendor that  
14 supplied a Covered Product that such Covered Product is made with only Untreated Foam,  
15 and/or, if such certification is not relied on or has previously been demonstrated to be invalid, (b)  
16 it has obtained a test result from an independent third party certified laboratory reporting that the  
17 Covered Product has been made with no Chemical Flame Retardant.

18 3.1.2. **Interim Compliance – Any Covered Product.** Any Covered Product  
19 with a Manufacture Date that is earlier than the Effective Date, that contains polyurethane foam  
20 which has been Treated with any Listed Chemical Flame Retardant, and that is distributed, sold,  
21 or offered for sale by Defendant in the State of California after the Effective Date shall be  
22 accompanied by a Clear and Reasonable Warning that complies with Section 3.1.4. The Parties  
23 agree that Defendant may satisfy this Section 3.1.2 by not distributing, selling, or offering for sale  
24 in California any Covered Product containing any Listed Chemical Flame Retardant after the  
25 Effective Date.

26 3.1.3. **Warnings for Products in the Stream of Commerce.** In an effort to  
27 ensure that consumers receive clear and reasonable warnings in compliance with Proposition 65  
28 for any Covered Product that has not been reformulated pursuant to Section 3.1.1 or labeled in

1 accordance with Section 3.1.2, within 30 days following the Effective Date, Defendant shall  
2 provide warning materials by certified mail to any California retailer or distributor to whom  
3 Defendant reasonably believes it sold any Covered Product that contained or may have contained  
4 any Listed Chemical Flame Retardant on or after October 31, 2011. Such warning materials shall  
5 include a reasonably sufficient number of stickers and/or labels in order to permit the retailer or  
6 distributor to place a warning sticker or label on each such Covered Product such customer of a  
7 retailer or distributor has purchased from Defendant. The stickers and/or labels shall contain the  
8 warning language set forth in Section 3.1.4. The warning materials shall also include a letter of  
9 instruction for the placement of the stickers and/or labels, and a Notice and Acknowledgment  
10 postcard.

11           3.1.4. **Proposition 65 Warnings.** A Clear and Reasonable Warning under this  
12 Consent Judgment shall state:

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

16 A Clear and Reasonable Warning shall not be preceded by, surrounded by, or include any  
17 additional words or phrases that contradict, obfuscate, or otherwise undermine the warning. The  
18 warning statement shall be prominently displayed on the Covered Product containing any Listed  
19 Chemical Flame Retardant or the packaging of such Covered Product with such conspicuousness,  
20 as compared with other words, statements, or designs as to render it likely to be read and  
21 understood by an ordinary individual prior to sale. For internet, catalog, or any other sale where  
22 the consumer is not physically present and cannot see a warning displayed on the Covered  
23 Product containing any Listed Chemical Flame Retardant or the packaging of any such Covered  
24 Product prior to purchase or payment, the warning statement shall be displayed in such a manner  
25 that it is likely to be read and understood prior to the authorization of or actual payment.

26           **4. PENALTIES AND PAYMENT**

27           4.1. Defendant shall pay to CEH the total sum of Twenty-Nine Thousand, Five  
28 Hundred Dollars (\$29,500), which shall be allocated as follows:

1                   4.1.1. Three Thousand Two Hundred, Forty-Five Hundred Dollars (\$3,245) shall  
2 constitute a penalty pursuant to Cal. Health & Safety Code § 25249.7(b), such money to be  
3 apportioned by CEH in accordance with Cal. Health & Safety Code § 25249.12.

4                   4.1.2. Four Thousand Four Hundred Twenty Five Dollars (\$4,425) shall  
5 constitute a payment in lieu of civil penalty pursuant to Cal. Health & Safety Code § 25249.7(b)  
6 and 11 C.C.R. § 3202(b). CEH will use such funds to continue its work of educating and  
7 protecting the public from exposures to toxic chemicals, including chemical flame retardants.  
8 CEH may also use a portion of such funds to monitor compliance with this Consent Judgment and  
9 to purchase and test any of Defendant's products distributed or sold in the State of California after  
10 the Effective Date to confirm compliance. In addition, as part of its Community Environmental  
11 Action and Justice Fund, CEH will use four percent (4%) of such funds to award grants to  
12 grassroots environmental justice groups working to educate and protect the public from exposures  
13 to toxic chemicals. The method of selection of such groups can be found at the CEH website at  
14 [www.ceh.org/justicefund](http://www.ceh.org/justicefund).

15                   4.1.3. Twenty One Thousand, Eight Hundred Thirty Dollars (\$21,830) shall  
16 constitute reimbursement of CEH's reasonable attorneys' fees and costs.

17                   4.1.4. The payments required under Sections 4.1.1 to 4.1.3 shall be made in three  
18 separate checks, all to be delivered to Mark Todzo at Lexington Law Group at the address set  
19 forth in Section 8, within 10 days following the Effective Date. The payments required pursuant  
20 to Sections 4.1.1 and 4.1.2 shall each be made payable CEH. On or before the Effective Date,  
21 CEH shall provide Defendant with CEH's Employer Identification Number. The payment  
22 required pursuant to Section 4.1.3 shall be made payable to Lexington Law Group. On or before  
23 the Effective Date, Lexington Law Group shall provide Defendant with Lexington Law Group's  
24 Employer Identification Number.

## 25                   **5. ENFORCEMENT OF CONSENT JUDGMENT**

26                   5.1. CEH may, by motion or application for an order to show cause before the Superior  
27 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.  
28 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH

1 shall provide Defendant with a Notice of Violation and a copy of any test results which  
2 purportedly support CEH's Notice of Violation. The Parties shall then meet and confer regarding  
3 the basis for CEH's anticipated motion or application in an attempt to resolve it informally,  
4 including providing Defendant a reasonable opportunity of at least thirty (30) days to cure any  
5 alleged violation. Should such attempts at informal resolution fail, CEH may file its enforcement  
6 motion or application. The prevailing party on any motion to enforce this Consent Judgment  
7 shall be entitled to its reasonable attorney's fees and costs incurred as a result of such motion or  
8 application. This Consent Judgment may only be enforced by the Parties.

9 **6. MODIFICATION OF CONSENT JUDGMENT**

10 6.1. This Consent Judgment may only be modified by written agreement of CEH and  
11 Defendant, or upon motion of CEH or Defendant as provided by law.

12 **7. CLAIMS COVERED AND RELEASE**

13 7.1. This Consent Judgment is a full, final, and binding resolution between CEH acting  
14 in the public interest and Defendant and Defendant's officers, directors, shareholders, employees,  
15 agents, attorneys, accountants, affiliates, parents, divisions, subdivisions, subsidiaries, and their  
16 respective predecessors, successors and assigns ("Defendant Releasees"), and all entities to whom  
17 they distribute or sell or have distributed or sold any Covered Product including, but not limited  
18 to, distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees  
19 ("Downstream Defendant Releasees"), of all claims alleged in the Notice and Complaint in this  
20 Action arising from any violation of Proposition 65 that have been or could have been asserted in  
21 the public interest against Defendant, Defendant Releasees, and Downstream Defendant  
22 Releasees, regarding the failure to warn about exposure to any Listed Chemical Flame Retardant  
23 in any Covered Product manufactured, distributed, or sold by Defendant or Defendant Releasees  
24 prior to the Effective Date.

25 7.2. CEH, for itself releases, waives, and forever discharges any and all claims alleged  
26 in the Notice and Complaint against Defendant, Defendant Releasees, and Downstream  
27 Defendant Releasees arising from any violation of Proposition 65 that has been or could have  
28 been asserted regarding the failure to warn about exposure to TDCPP in connection with Covered

1 Products manufactured, distributed, or sold by Defendant or Defendant Releasees prior to the  
2 Effective Date.

3 7.3. Compliance with the terms of this Consent Judgment by Defendant, Defendant  
4 Releasees, and the Downstream Defendant Releasees shall constitute compliance with  
5 Proposition 65, respectively, by Defendant, Defendant Releasees, and Downstream Defendant  
6 Releasees with respect to any alleged failure to warn about any Listed Chemical Flame Retardant  
7 in any Covered Product manufactured, distributed, or sold by Defendant and Defendant Releasees  
8 after the Effective Date.

9 **8. PROVISION OF NOTICE**

10 8.1. When any Party is entitled to receive any notice under this Consent Judgment, the  
11 notice shall be sent by first class and electronic mail as follows:

12 8.1.1. **Notices to Defendant.** The persons for Defendant to receive notices  
13 pursuant to this Consent Judgment shall be:

14 Robert J. Parks  
15 Buchanan Ingersoll & Rooney LLP  
16 600 W. Broadway, Suite 1100  
17 San Diego, CA 92101  
18 Robert.parks@bipc.com

19 Anthony (T.J.) Andrisano  
20 Buchanan Ingersoll & Rooney LLP  
21 409 N. Second Street, Suite 500  
22 Harrisburg, PA 17101  
23 anthony.andrisano@bipc.com

24 Michael P. Lehman  
25 CEO  
26 American Micro Industries, Inc.  
27 440 Ramsey Avenue  
28 Chambersburg, PA 17201  
melehman@americanmicroinc.com

29 8.1.2. **Notices to Plaintiff.** The persons for CEH to receive notices pursuant to  
30 this Consent Judgment shall be:



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Rick Franco  
Center for Environmental Health  
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, rights 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, except Defendant, Defendant Releasees, and Downstream Defendant  
20 Releasees, on terms that are different from those contained in this Consent Judgment.

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**15. EXECUTION IN COUNTERPARTS**

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

**IT IS SO STIPULATED AND AGREED:**

Dated: 15 July, 2014 **CENTER FOR ENVIRONMENTAL HEALTH**

  
\_\_\_\_\_

CHARLIE PIZZANO  
Printed Name

Associate Director  
Title

Dated: \_\_\_\_\_, 2014 **AMERICAN MICRO INDUSTRIES, INC.**

\_\_\_\_\_

Printed Name

Title

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

Dated: \_\_\_\_\_, 2014

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

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**15. EXECUTION IN COUNTERPARTS**

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

**IT IS SO STIPULATED AND AGREED:**

Dated: \_\_\_\_\_, 2014      **CENTER FOR ENVIRONMENTAL HEALTH**

\_\_\_\_\_

Printed Name

Title

Dated: 7/21/2, 2014      **AMERICAN MICRO INDUSTRIES, INC.**

M. E. Lehman

M. E. LEHMAN  
Printed Name

PRESIDENT  
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