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10 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

AUG 15 2014

CLERK OF THE SUPERIOR COURT
By YOLANDA 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: TECNIFOAM,
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 Tecnifoam, Inc. (“Defendant”) to settle
22 claims asserted by CEH against Defendant as set forth in the operative Complaint in the matter
23 *Center for Environmental Health v. Acoustical Solutions, Inc., et al.*, Alameda County Superior
24 Court Case No. RG-13707315 (the “Action”). CEH and Defendant are referred to collectively as
25 the “Parties.”

26 1.2. On September 27, 2013, CEH served a “Notice of Violation” (the “Notice”)
27 relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition
28 65”) on Defendant, the California Attorney General, the District Attorneys of every County in the

1 State of California, and the City Attorneys for every City in State of California with a population
2 greater than 750,000. The Notice alleges violations of Proposition 65 with respect to the presence
3 of tris (1,3-dichloro-2-propyl) phosphate (“TDCPP”) in acoustic and soundproofing foam
4 manufactured, distributed, and/or sold by Defendant.

5 1.3. Defendant is a corporation that employs ten (10) or more persons and that
6 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
7 California. Defendant asserts that it no longer plans to sell or distribute such Covered Products in
8 California.

9 1.4. For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
10 Court has jurisdiction over the allegations of violations contained in the Notice and Complaint
11 and personal jurisdiction over Defendant as to the acts alleged in the Complaint; (ii) venue is
12 proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this Consent
13 Judgment as a full and final resolution of all claims which were or could have been raised in the
14 Complaint based on the facts alleged in the Notice and Complaint with respect to Covered
15 Products (as defined herein) manufactured, distributed, and/or sold by Defendant.

16 1.5. The Parties enter into this Consent Judgment as a full and final settlement of all
17 claims which were or could have been raised in the Complaint arising out of the facts or conduct
18 related to Defendant alleged therein. By execution of this Consent Judgment and agreeing to
19 comply with its terms, the Parties do not admit any fact, conclusion of law, or violation of law,
20 nor shall compliance with the Consent Judgment constitute or be construed as an admission by
21 the Parties of any fact, conclusion of law, or violation of law. Defendant denies the material,
22 factual, and legal allegations in the Notice and Complaint and expressly denies any wrongdoing
23 whatsoever. Except as specifically provided herein, nothing in this Consent Judgment shall
24 prejudice, waive, or impair any right, remedy, argument, or defense either Party may have in this
25 or any other pending or future legal proceedings. This Consent Judgment is the product of
26 negotiation and compromise and is accepted by the Parties solely for purposes of settling,
27 compromising, and resolving this Action.

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1 **2. DEFINITIONS**

2 2.1. “Chemical Flame Retardant” means any halogenated or phosphorous-based
3 chemical compound used for the purpose of resisting or retarding the spread of fire. “Chemical
4 Flame Retardant” does not include (a) any chemical that has been rated as a Benchmark 4
5 chemical pursuant to Clean Production Action’s GreenScreen ([http://www.cleanproduction.org/
6 Green.Greenscreen.php](http://www.cleanproduction.org/Green.Greenscreen.php)); or (b) ammonium polyphosphate.

7 2.2. “Covered Products” means acoustic and/or soundproofing foam manufactured,
8 distributed, and/or sold by Defendant in California.

9 2.3. “Effective Date” means the date on which the Court enters this Consent Judgment.

10 2.4. “Listed Chemical Flame Retardants” means Tris(1,3-dichloro-2-propyl) phosphate
11 (“TDCPP”), Tris(2-chloroethyl) phosphate (“TCEP”), and Tris(2,3-dibromopropyl)phosphate
12 (“TDBPP”).

13 2.5. “Manufacture Date” means the date the Covered Product was manufactured and
14 as may be indicated on a tag attached to the Covered Product.

15 2.6. “Treated” means the addition or application of any Chemical Flame Retardant to
16 any polyurethane foam used in any Covered Product.

17 2.7. “Untreated Foam” means polyurethane foam that has not been Treated with any
18 Chemical Flame Retardant.

19 **3. INJUNCTIVE RELIEF**

20 3.1. **Reformulation of Covered Products.** Defendant shall comply with the following
21 requirements to reformulate the Covered Products to eliminate exposures to Listed Chemical
22 Flame Retardants arising from the use of the Covered Products:

23 3.1.1. **Listed Chemical Flame Retardants – All Covered Products.** As of the
24 Effective Date, Defendant shall not distribute, sell, or offer for sale in California any Covered
25 Product that has been Treated with any Listed Chemical Flame Retardant and which has a
26 Manufacture Date that is on or later than the Effective Date. The Parties agree that Defendant
27 may satisfy this Section 3.1.1 by not distributing, selling, or offering for sale in California any
28 Covered Products after the Effective Date.

1 3.1.1.1. To ensure compliance with the reformulation provisions of this
2 Section 3.1.1, should Defendant seek to distribute, sell or offer for sale in California any
3 reformulated Covered Product after the Effective Date, Defendant shall directly or through its
4 supply chain issue specifications to its suppliers of Covered Products and/or polyurethane foam
5 used in any Covered Product requiring that such products and/or foam has not been Treated with
6 any Listed Chemical Flame Retardant in accordance with the requirements of Section 3.1.1.
7 Defendant shall obtain and maintain written certification(s) from its suppliers of Covered Product
8 and/or polyurethane foam used in any Covered Product confirming that all such Covered Products
9 and/or foam received by Defendant for distribution in California after the Effective Date have not
10 been Treated with any Listed Chemical Flame Retardant. Defendant shall not be deemed in
11 violation of the requirements of Section 3.1.1 for any Covered Product to the extent: (a) it has
12 relied on a written certification from its vendor that supplied a Covered Product and/or the
13 polyurethane foam used in a Covered Product that such Covered Product is made without any
14 Listed Chemical Flame Retardants, unless such certification has previously been demonstrated to
15 be invalid, (b) it has obtained a test result from an independent third party certified laboratory
16 reporting that the Covered Product polyurethane foam has been made with no Listed Chemical
17 Flame Retardants.

18 3.1.2. **Interim Compliance.** Any Covered Products with a Manufacture Date
19 that is earlier than the Effective Date, which contains polyurethane foam which has been Treated
20 with any Listed Chemical Flame Retardant and which is distributed, sold, or offered for sale by
21 Defendant in California after the Effective Date shall be accompanied by a Clear and Reasonable
22 Warning that complies with Section 3.1.4.

23 3.1.3. **Warnings for Products in the Stream of Commerce.** In an effort to
24 ensure that consumers receive clear and reasonable warnings in compliance with Proposition 65
25 for Covered Products that have not been reformulated pursuant to Section 3.1.1 or labeled in
26 accordance with Section 3.1.2, within 30 days following the Effective Date, Defendant shall
27 provide warning materials by certified mail to each of its California retailers or distributors to
28 whom Defendant reasonably believes it sold Covered Products that contained or may have

1 contained any Listed Chemical Flame Retardant on or after October 31, 2011. Such warning
2 materials shall include a reasonably sufficient number of stickers and/or labels in order to permit
3 the retailer or distributor to place a warning sticker or label on each Covered Product such
4 customer has purchased from Defendant, and is still in the retailer's or distributor's possession
5 and has not yet been installed or sold to the ultimate consumer. The stickers and/or labels shall
6 contain the warning language set forth in Section 3.1.4. The warning materials shall also include
7 a letter of instruction for the placement of the stickers and/or labels, and a Notice and
8 Acknowledgment postcard.

9 3.1.4. **Proposition 65 Warnings.** A Clear and Reasonable Warning under this
10 Consent Judgment shall state:

11 WARNING: This product contains a chemical known to the State of California to
12 cause cancer.

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

23 **4. PENALTIES AND PAYMENT**

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

26 4.1.1. \$2,750 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. \$3,750 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. \$18,500 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 to be delivered within 15 days following the Effective Date, or August 30,
14 2014, whichever date is later. The payments required pursuant to Sections 4.1.1 and 4.1.2 shall
15 each be made payable CEH. The payment required pursuant to Section 4.1.3 shall be made
16 payable to Lexington Law Group. All checks shall be delivered to Mark Todzo at Lexington Law
17 Group at the address set forth in Section 8.

18 **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

3 **6. MODIFICATION OF CONSENT JUDGMENT**

4 6.1. This Consent Judgment may only be modified by written agreement of CEH and
5 Defendant, or upon motion of CEH or Defendant as provided by law.

6 **7. CLAIMS COVERED AND RELEASE**

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

17 7.2. CEH, for itself, waives and forever discharges and provides a release herein which
18 shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of
19 action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities, penalties,
20 and demands of Plaintiff of any nature, character, or kind, whether known or unknown, suspected
21 or unsuspected, against Defendant and Downstream Defendant Releasees arising out of the
22 alleged failure to warn about exposure to Listed Chemical Flame Retardants in the Covered
23 Products, manufactured, distributed, or sold by Defendant prior to the Effective Date. The release
24 provision in this Section 7.2 shall not apply to any motion or application to enforce the terms and
25 conditions contained in this Consent Judgment, as allowed by Section 5 of this Consent
26 Judgment.

27 7.3. Compliance with the terms of this Consent Judgment by Defendant and the
28 Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Defendant

1 and Downstream Defendant Releasees with respect to any alleged failure to warn about any
2 Listed Chemical Flame Retardants in Covered Products manufactured, distributed, or sold by
3 Defendant after the Effective Date.

4 **8. PROVISION OF NOTICE**

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

7 8.1.1. **Notices to Defendant.** The persons for Defendant to receive notices
8 pursuant to this Consent Judgment shall be:

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10 Robert Funk
11 Tecnifoam, Inc.
12 440 Ball Road
13 Circle Pines, Minnesota 55014
14 Rfunk1@tecnifoam.com

15 Paul R. Smith
16 Larkin Hoffinan Daly & Lindgren, Ltd.
17 1500 Wells Fargo Plaza
18 7900 Xerxes Avenue South
19 Minneapolis, Minnesota 55431
20 psmith@larkinhoffinan.com

21 8.1.2. **Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
22 this Consent Judgment shall be:

23 Rick Franco
24 Center for Environmental Health
25 2201 Broadway, Suite 302
26 Oakland, CA 94612
27 rick@ceh.org

28 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.

1 **9. COURT APPROVAL**

2 9.1. This Consent Judgment shall become effective on the Effective Date, provided
3 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
4 Defendant shall support approval of such Motion.

5 9.2. If this Consent Judgment is not entered by the Court, it shall be of no force or
6 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
7 purpose.

8 **10. GOVERNING LAW AND CONSTRUCTION**

9 10.1. The terms and obligations arising from this Consent Judgment shall be construed
10 and enforced in accordance with the laws of the State of California.

11 **11. ENTIRE AGREEMENT**

12 11.1. This Consent Judgment contains the sole and entire agreement and understanding
13 of CEH and Defendant with respect to the entire subject matter hereof, and any and all prior
14 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
15 merged herein and therein.

16 11.2. There are no warranties, representations, or other agreements between CEH and
17 Defendant except as expressly set forth herein. No representations, oral or otherwise, express or
18 implied, other than those specifically referred to in this Consent Judgment have been made by any
19 Party hereto.

20 11.3. No other agreements not specifically contained or referenced herein, oral or
21 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
22 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
23 any of the Parties hereto only to the extent that they are expressly incorporated herein.

24 11.4. No supplementation, modification, waiver, or termination of this Consent
25 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

26 11.5. No waiver of any of the provisions of this Consent Judgment shall be deemed or
27 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
28 such waiver constitute a continuing waiver.

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12. RETENTION OF JURISDICTION

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

13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT

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

14. NO EFFECT ON OTHER SETTLEMENTS

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

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:

Dated: 15 July, 2014

CENTER FOR ENVIRONMENTAL HEALTH



CHARLIE PICCOLLO

Printed Name


ASSOCIATE DIRECTOR

Title

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Dated: July 11th, 2014

TECNIFOAM, INC.



Robert A. Funk

Printed Name

Owner

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