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16 Attorneys for Plaintiff
17 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

MAY - 9 2014

CLERK OF THE SUPERIOR COURT
By YOLANDA ESTRADA Deputy

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

20 CENTER FOR ENVIRONMENTAL
21 HEALTH, a non-profit corporation,

22 Plaintiff,

23 v.

24 ACOUSTICAL SOLUTIONS, INC., *et al.*,

25 Defendants.

Case No. RG-13707315

**[PROPOSED] CONSENT
JUDGMENT RE: TOWER
PRODUCTS INC.**

26 **1. INTRODUCTION**

27 1.1. This Consent Judgment is entered into by Plaintiff Center for Environmental
28 Health, a non-profit corporation ("CEH"), and Defendant Tower Products 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. Acoustical Solutions, Inc., et al.*, Alameda County

1 Superior Court Case No. RG-13707315 (the "Action"). CEH and Defendant are referred to
2 collectively as the "Parties."

3 1.2. On November 1, 2013, CEH served a "Notice of Violation" (the "Notice") relating
4 to the California Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65") on
5 Defendant, the California Attorney General, the District Attorneys of every County in the State of
6 California, and the City Attorneys for every City in State of California with a population greater
7 than 750,000. The Notice alleges violations of Proposition 65 with respect to the presence of tris
8 (1,3-dichloro-2-propyl) phosphate ("TDCPP") in acoustic and soundproofing foam manufactured,
9 distributed, and/or sold by Defendant.

10 1.3. Defendant is a corporation that employs ten (10) or more persons and that sells
11 Covered Products (as defined herein) in the State of California. For purposes of this Consent
12 Judgment only, the Parties stipulate that: (i) this Court has jurisdiction over the allegations of
13 violations contained in the Notice and Complaint and personal jurisdiction over Defendant as to
14 the acts alleged in the Complaint; (ii) venue is proper in the County of Alameda; and (iii) this
15 Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all claims
16 which were or could have been raised in the Complaint based on the facts alleged in the Notice
17 and Complaint with respect to Covered Products manufactured, distributed, and/or sold by
18 Defendant.

19 1.4. The Parties enter into this Consent Judgment as a full and final settlement of all
20 claims which were or could have been raised in the Complaint arising out of the facts or conduct
21 related to Defendant alleged therein. By execution of this Consent Judgment and agreeing to
22 comply with its terms, the Parties do not admit any fact, conclusion of law, or violation of law,
23 nor shall compliance with the Consent Judgment constitute or be construed as an admission by
24 the Parties of any fact, conclusion of law, or violation of law. Defendant denies the material,
25 factual, and legal allegations in the Notice and Complaint and expressly denies any wrongdoing
26 whatsoever. Except as specifically provided herein, nothing in this Consent Judgment shall
27 prejudice, waive, or impair any right, remedy, argument, or defense either Party may have in this
28 or any other pending or future legal proceedings. This Consent Judgment is the product of

1 negotiation and compromise and is accepted by the Parties solely for purposes of settling,
2 compromising, and resolving issues disputed in 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 Products" means acoustic and/or soundproofing foam sold, distributed,
10 and/or manufactured by Defendant in California.

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

12 2.4. "Listed Chemical Flame Retardants" means Tris(1,3-dichloro-2-propyl) phosphate
13 ("TDCPP"), Tris(2-chloroethyl) phosphate ("TCEP"), and 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 intentional addition or application of any Chemical Flame
18 Retardant to 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. **Reformulation of Covered Products.** Defendant shall comply with the following
23 requirements so as to reduce or eliminate exposures to TDCPP arising from the use of the
24 Covered Products:

25 3.1.1. **Listed Chemical Flame Retardants – All Covered Products.** As of the
26 Effective Date, Defendant shall not distribute, sell, or offer for sale in California any Covered
27 Product that has been Treated with any Listed Chemical Flame Retardant and which has a
28 Manufacture Date that is on or later than the Effective Date.

1 3.1.1.1. To ensure compliance with the reformulation provisions of
2 this Section 3.1.1, following the Effective Date, Defendant shall directly or through its supply
3 chain issue specifications to its suppliers of Covered Products and/or polyurethane foam used in
4 any Covered Product requiring that such products and/or foam has not been any Treated with
5 Listed Chemical Flame Retardant in accordance with the requirements of this Section 3.1.1.
6 Defendant shall obtain and maintain written certification(s) from its suppliers confirming that all
7 such Covered Products and/or foam received by Defendant for distribution in California have not
8 been Treated with any Listed Chemical Flame Retardant. Defendant shall not be deemed in
9 violation of the requirements of Section 3.1.1 for any Covered Product to the extent: (a) it has
10 relied on a written certification from its vendor that supplied a Covered Product and/or the
11 polyurethane foam used in a Covered Product that such product is made with only Untreated
12 Foam, and/or, if such certification is not relied on or has previously been demonstrated to be
13 invalid, (b) Defendant has obtained a test result from an independent third party certified
14 laboratory reporting that the Covered Product's polyurethane foam has been made with no Listed
15 Chemical Flame Retardants.

16 3.1.2. **Interim Compliance – All Covered Products.** Any Covered Products in
17 which the polyurethane foam has been Treated with any Listed Chemical Flame Retardant and
18 which is distributed, sold, or offered for sale by Defendant in California after the Effective Date
19 shall be accompanied by a Clear and Reasonable Warning that complies with Section 3.1.4.

20 3.1.3. **Warnings for Products in the Stream of Commerce.** In an effort to
21 ensure that consumers receive clear and reasonable warnings in compliance with Proposition 65
22 for Covered Products that have not been reformulated pursuant to Section 3.1.1 or labeled in
23 accordance with Section 3.1.2, Defendant shall take the following action within 30 days
24 following the Effective Date. For any Covered Product that Defendant sold to a retailer after
25 October 31, 2011 and for which the Defendant does not have actual knowledge that (i) the retailer
26 is no longer holding such Covered Product in inventory for sale in California, or (ii) a Proposition
27 65 warning is already affixed to the Covered Product or is otherwise being provided by the
28 retailer, the Defendant shall either send the retailer warning materials that comply with Section

1 3.1.4 for such Covered Products via certified mail or commercial courier or direct the retailer to
2 discontinue sale of the Covered Product in California.

3 3.1.4. **Proposition 65 Warnings.** A Clear and Reasonable Warning under this
4 Consent Judgment shall state:

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

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

17 3.2. **Optional Additional Reformulation – Use of Untreated Foam.** In order for
18 Defendant to be eligible for a waiver of the additional penalty/payment in lieu of penalty
19 payments set forth in Section 4.1.5 below, Defendant shall undertake the additional actions to
20 reduce or eliminate the use of Chemical Flame Retardants set forth herein. As of 90 days
21 following the Effective Date, Defendant shall not manufacture or distribute, sell, or offer for sale

22 ¹ The regulatory safe harbor warning language specified in 27 C.C.R. § 25603.2 may also be used
23 if Defendant had begun to use it, prior to the Effective Date. Should Defendant seek to use
24 alternative warning language, other than the language specified above or the safe harbor warning
25 specified in 27 C.C.R. § 25603.2, or seek to use an alternate method of transmission of the
26 warning, it must obtain the Court’s approval of its proposed alternative and provide all Parties
27 and the Office of the Attorney General with timely notice and the opportunity to comment or
28 object before the Court acts on the request. In the event that Defendant’s application for Court
approval of an alternative warning is contested by CEH, the prevailing party shall be entitled to
its reasonable attorneys’ fees associated with opposing or responding to the opposition to the
application. No fees shall be recoverable for the initial application seeking an alternative
warning.

1 in California any Covered Product that has been Treated with any Chemical Flame Retardant. In
2 order to avoid the additional payments, Defendant must provide written certification to CEH of its
3 use of only Untreated Foam within 120 days following the Effective Date.

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

16 **4. PENALTIES AND PAYMENT**

17 4.1. Defendant shall initially pay to CEH the total sum of thirty thousand dollars
18 (\$30,000), which shall be allocated as follows:

19 4.1.1. \$3,300 shall constitute a penalty pursuant to Cal. Health & Safety Code §
20 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health & Safety Code
21 § 25249.12.

22 4.1.2. \$4,500 shall constitute a payment in lieu of civil penalty pursuant to Cal.
23 Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such funds to
24 continue its work of educating and protecting the public from exposures to toxic chemicals,
25 including chemical flame retardants. CEH may also use a portion of such funds to monitor
26 compliance with this Consent Judgment and to purchase and test Defendant's products to confirm
27 compliance. In addition, as part of its Community Environmental Action and Justice Fund, CEH
28 will use four percent (4%) of such funds to award grants to grassroots environmental justice

1 groups working to educate and protect the public from exposures to toxic chemicals. The method
2 of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

3 4.1.3. \$22,200 shall constitute reimbursement of CEH's reasonable attorneys'
4 fees and costs.

5 4.1.4. The payments required under Sections 4.1.1-4.1.3 shall be made in three
6 separate checks, all to be delivered within 10 days following the Effective Date. The payments
7 required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable CEH. The payment
8 required pursuant to Section 4.1.3 shall be made payable to Lexington Law Group. All checks
9 shall be delivered to Mark Todzo at Lexington Law Group at the address set forth in Section 8.

10 4.1.5. In the event that Defendant elects not to certify its compliance with Section
11 3.2 in accordance with that Section, within 120 days following the Effective Date, Defendant
12 must make an additional payment of \$12,000, which shall be paid in two separate checks, each
13 payable to CEH, to be allocated as follows:

14 4.1.5.1. \$4,800 shall constitute a penalty pursuant to Cal. Health &
15 Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health
16 & Safety Code § 25249.12.

17 4.1.5.2. \$7,200 shall constitute a payment in lieu of civil penalty
18 pursuant to Cal. Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such
19 funds to continue its work of educating and protecting the public from exposures to toxic
20 chemicals, including chemical flame retardants. CEH may also use a portion of such funds to
21 monitor compliance with this Consent Judgment and to purchase and test Defendant's products to
22 confirm compliance. In addition, as part of its Community Environmental Action and Justice
23 Fund, CEH will use four percent (4%) of such funds to award grants to grassroots environmental
24 justice groups working to educate and protect the public from exposures to toxic chemicals. The
25 method of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

26 **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

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

10 **6. MODIFICATION OF CONSENT JUDGMENT**

11 6.1. This Consent Judgment may only be modified by written agreement of CEH and
12 Defendant, or upon motion of CEH or Defendant as provided by law, provided that either Party
13 seeking to modify this Consent Judgment shall attempt in good faith to meet and confer with the
14 other Party at least 30 days before filing such motion.

15 **7. CLAIMS COVERED AND RELEASE**

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

27 7.2. CEH, for itself releases, waives, and forever discharges any and all claims alleged
28 in the Complaint against Defendant, Defendant Releasees, and Downstream Defendant Releasees

1 arising from any violation of Proposition 65 that have been or could have been asserted regarding
2 the failure to warn about exposure to TDCPP in connection with Covered Products manufactured,
3 distributed, or sold by Defendant prior to the Effective Date.

4 7.3. Compliance with the terms of this Consent Judgment by Defendant and the
5 Defendant Releasees shall constitute compliance with Proposition 65 by Defendant, Defendant
6 Releasees, and Downstream Defendant Releasees with respect to any alleged failure to warn
7 about any Listed Chemical Flame Retardants in Covered Products manufactured, distributed, or
8 sold by Defendant 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 Erick Krein
15 Tower Products, Inc.
16 1 Tower Drive, PO Box 397
17 Saugerties, NY 12477
18 erick@towerpower.com

19 8.1.2. **Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
20 this Consent Judgment shall be:

21 Rick Franco
22 Center for Environmental Health
23 2201 Broadway, Suite 302
24 Oakland, California 94612
25 rick@ceh.org

26 Mark Todzo
27 Lexington Law Group
28 503 Divisadero Street
San Francisco, CA 94117
mtodzo@lexlawgroup.com

29 8.2. Any Party may modify the person and address to whom the notice is to be sent by
30 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

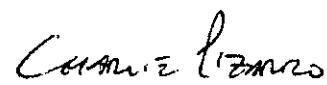
15.1. The stipulations to this Consent Judgment may be executed in counterparts and by means of facsimile, which taken together shall be deemed to constitute one document.

IT IS SO STIPULATED:

Dated: April 9, 2014

CENTER FOR ENVIRONMENTAL HEALTH





Printed Name

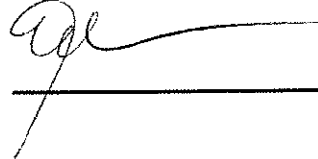


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Dated: February 20_____, 2014

TOWER PRODUCTS INC.



Erick Krein
Printed Name

SVP
Title

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

Dated: **MAY - 9** , 2014

GEORGE C. HERNANDEZ, JR.

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