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ENDORSED
FILED
ALAMEDA COUNTY

DEC 12 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: AURALEX
ACOUSTICS, 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 Auralex Acoustics, Inc. (“Defendant”)
22 to settle claims asserted by CEH against Defendant as set forth in the operative Complaint in the
23 matter *Center for Environmental Health v. Acoustical Solutions, Inc., et al.*, Alameda County
24 Superior Court Case No. RG-13707315 (the “Action”). CEH and Defendant are referred to
25 collectively as the “Parties.”

26 1.2. On November 1, 2013, CEH served a “Notice of Violation” (the “Notice”) relating
27 to the California Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition 65”) on
28

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

6 1.3. Defendant is a corporation that employs ten (10) or more persons and that
7 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
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 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 issues disputed in 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 TDCPP arising from
22 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.

27 3.1.1.1. To ensure compliance with the reformulation provisions of this
28 Section, following the Effective Date, Defendant shall directly or through its supply chain issue

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

13 **3.1.2. Interim Compliance – All Covered Products.** Any Covered Products in
14 which the polyurethane foam has been Treated with any Listed Chemical Flame Retardant and
15 which is distributed, sold, or offered for sale by Defendant in California after the Effective Date
16 shall be accompanied by a Clear and Reasonable Warning that complies with Section 3.1.4.

17 **3.1.3. Warnings for Products in the Stream of Commerce.** In an effort to
18 ensure that consumers receive clear and reasonable warnings in compliance with Proposition 65
19 for Covered Products that have not been reformulated pursuant to Section 3.1.1 or labeled in
20 accordance with Section 3.1.2, within 30 days following the Effective Date, Defendant shall
21 provide warning materials by certified mail to each of its California retailers or distributors to
22 whom Defendant reasonably believes it sold Covered Products that contained or may have
23 contained TDCPP on or after October 31, 2011. Such warning materials shall include a
24 reasonably sufficient number of stickers and/or labels in order to permit the retailer or distributor
25 to place a warning sticker or label on each Covered Product such customer has purchased from
26 Defendant. The stickers and/or labels shall contain the warning language set forth in Section
27 3.1.4. The warning materials shall also include a letter of instruction for the placement of the
28 stickers and/or labels, and a Notice and Acknowledgment postcard.

1 3.1.4. **Proposition 65 Warnings.** A Clear and Reasonable Warning under this
2 Consent Judgment shall state:

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

6 A Clear and Reasonable Warning shall not be preceded by, surrounded by, or include any
7 additional words or phrases that contradict, obfuscate, or otherwise undermine the warning. The
8 warning statement shall be prominently displayed on the Covered Product or the packaging of the
9 Covered Product with such conspicuousness, as compared with other words, statements, or
10 designs as to render it likely to be read and understood by an ordinary individual prior to sale.

11 For internet, catalog, or any other sale where the consumer is not physically present and cannot
12 see a warning displayed on the Covered Product or the packaging of the Covered Product prior to
13 purchase or payment, the warning statement shall be displayed in such a manner that it is likely to
14 be read and understood prior to the authorization of or actual payment.

15 3.2. **Optional Additional Reformulation – Use of Untreated Foam.** In order for
16 Defendant to be eligible for a waiver of the additional penalty/payment in lieu of penalty
17 payments set forth in Section 4.1.5 below, Defendant shall undertake the additional actions to
18 reduce or eliminate the use of Chemical Flame Retardants set forth herein. As of 90 days
19 following the Effective Date, Defendant shall not manufacture or distribute, sell, or offer for sale
20 in California any Covered Product that has been Treated with any Chemical Flame Retardant. In
21 order to avoid the additional payments, Defendant must provide written certification to CEH of its
22 use of only Untreated Foam within 120 days following the Effective Date.

23 3.2.1. **Specification To and Certification From Suppliers.** To ensure
24 compliance with the provisions of this Section 3.2, to the extent that Defendant opts for additional
25 reformulation, it shall directly or through its supply chain issue specifications to its suppliers of
26 Covered Products and/or polyurethane foam used in any Covered Product requiring that such
27 products and/or foam shall use only Untreated Foam. Defendant shall not be deemed in violation
28 of the requirements of this Section 3.2 for any Covered Product to the extent: (a) it has relied on

1 a written certification from its vendor that supplied a Covered Product and/or the polyurethane
2 foam used in a Covered Product that such product is made with only Untreated Foam, and/or (b)
3 has obtained a test result from a certified laboratory reporting that the Covered Product's
4 polyurethane foam has been made with Untreated Foam. Defendant shall obtain and maintain
5 written certification(s) from its suppliers confirming that all such Covered Products and/or foam
6 received by Defendant for distribution in California is Untreated Foam.

7 **4. PENALTIES AND PAYMENT**

8 4.1. Defendant shall initially pay to CEH the total sum of twenty seven thousand and
9 five hundred dollars (\$27,500), which shall be allocated as follows:

10 4.1.1. \$3,025 shall constitute a penalty pursuant to Cal. Health & Safety Code §
11 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health & Safety Code
12 § 25249.12.

13 4.1.2. \$4,125 shall constitute a payment in lieu of civil penalty pursuant to Cal.
14 Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such funds to
15 continue its work of educating and protecting the public from exposures to toxic chemicals,
16 including chemical flame retardants. CEH may also use a portion of such funds to monitor
17 compliance with this Consent Judgment and to purchase and test Defendant's products to confirm
18 compliance. In addition, as part of its Community Environmental Action and Justice Fund, CEH
19 will use four percent (4%) of such funds to award grants to grassroots environmental justice
20 groups working to educate and protect the public from exposures to toxic chemicals. The method
21 of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

22 4.1.3. \$20,350 shall constitute reimbursement of CEH's reasonable attorneys'
23 fees and costs.

24 4.1.4. The payments required under Sections 4.1.1-4.1.3 shall be made in three
25 separate checks, all to be delivered within 10 days following the Effective Date. The payments
26 required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable CEH. The payment
27 required pursuant to Section 4.1.3 shall be made payable to Lexington Law Group. All checks
28 shall be delivered to Mark Todzo at Lexington Law Group at the address set forth in Section 8.

1 4.1.5. In the event that Defendant elects not to certify its compliance with Section
2 3.2 in accordance with that Section, within 120 days following the Effective Date, Defendant
3 must make an additional payment of \$11,000, which shall be paid in two separate checks, each
4 payable to CEH, to be allocated as follows:

5 4.1.5.1. \$4,400 shall constitute a penalty pursuant to Cal. Health &
6 Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health
7 & Safety Code § 25249.12.

8 4.1.5.2. \$6,600 shall constitute a payment in lieu of civil penalty
9 pursuant to Cal. Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such
10 funds to continue its work of educating and protecting the public from exposures to toxic
11 chemicals, including chemical flame retardants. CEH may also use a portion of such funds to
12 monitor compliance with this Consent Judgment and to purchase and test Defendant's products to
13 confirm compliance. In addition, as part of its Community Environmental Action and Justice
14 Fund, CEH will use four percent (4%) of such funds to award grants to grassroots environmental
15 justice groups working to educate and protect the public from exposures to toxic chemicals. The
16 method of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

17 **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

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6. MODIFICATION OF CONSENT JUDGMENT

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

7. CLAIMS COVERED AND RELEASE

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

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

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

8. PROVISION OF NOTICE

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

1 **8.1.1. Notices to Defendant.** The persons for Defendant to receive notices
2 pursuant to this Consent Judgment shall be:

3 Andy Symons (or acting Director of Operations)
4 9955 Westpoint Drive, Suite 101
5 Indianapolis, IN 46256
6 asymons@auralex.com

7 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
8 this Consent Judgment shall be:

9 Rick Franco
10 Center for Environmental Health
11 2201 Broadway, Suite 302
12 Oakland, CA 94612
 rick@ceh.org

13 Mark Todzo
14 Lexington Law Group
15 503 Divisadero Street
 San Francisco, CA 94117
 mtodzo@lexlawgroup.com

16 8.2. Any Party may modify the person and address to whom the notice is to be sent by
17 sending the other Parties notice by first class and electronic mail.

18 **9. COURT APPROVAL**

19 9.1. This Consent Judgment shall become effective on the Effective Date, provided
20 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
21 Defendant shall support approval of such Motion.

22 9.2. If this Consent Judgment is not entered by the Court, it shall be of no force or
23 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
24 purpose.

25 **10. GOVERNING LAW AND CONSTRUCTION**

26 10.1. The terms and obligations arising from this Consent Judgment shall be construed
27 and enforced in accordance with the laws of the State of California.

28

1 **11. ENTIRE AGREEMENT**

2 11.1. This Consent Judgment contains the sole and entire agreement and understanding
3 of CEH and Defendant with respect to the entire subject matter hereof, and any and all prior
4 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
5 merged herein and therein.

6 11.2. There are no warranties, representations, or other agreements between CEH and
7 Defendant except as expressly set forth herein. No representations, oral or otherwise, express or
8 implied, other than those specifically referred to in this Consent Judgment have been made by any
9 Party hereto.

10 11.3. No other agreements not specifically contained or referenced herein, oral or
11 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
12 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
13 any of the Parties hereto only to the extent that they are expressly incorporated herein.

14 11.4. No supplementation, modification, waiver, or termination of this Consent
15 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

16 11.5. No waiver of any of the provisions of this Consent Judgment shall be deemed or
17 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
18 such waiver constitute a continuing waiver.

19 **12. RETENTION OF JURISDICTION**

20 12.1. This Court shall retain jurisdiction of this matter to implement or modify the
21 Consent Judgment.

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

23 13.1. Each signatory to this Consent Judgment certifies that he or she is fully authorized
24 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
25 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

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

27 14.1. Nothing in this Consent Judgment shall preclude CEH from resolving any claim
28 against another entity 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:

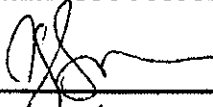
Dated: Oct 31, 2014 **CENTER FOR ENVIRONMENTAL HEALTH**



CATALINA PIZARRO
Printed Name

ASSOCIATE DIRECTOR
Title

Dated: Sept 2nd, 2014 **AURALEX ACOUSTICS, INC.**



Andrew J. Symons
Printed Name

Director of Operations
Title

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

Dated: DEC 12, 2014 **GEORGE C. HERNANDEZ, JR.**

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