

1 Mark N. Todzo, State Bar No. 168389
2 Joseph Mann, State Bar No. 207968
3 503 Divisadero Street
4 San Francisco, CA 94117
5 Telephone: (415) 913-7800
6 Facsimile: (415) 759-4112
7 mtodzo@lexlawgroup.com
8 jmann@lexlawgroup.com

9 Rick Franco, State Bar No. 170970
10 Center for Environmental Health
11 2201 Broadway, Suite 302
12 Oakland, California 94612
13 Telephone: (510) 655-3900
14 Facsimile: (510) 655-9100
15 rick@ceh.org

16 Attorneys for Plaintiff
17 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

AUG 15 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 AMERIWOOD INDUSTRIES, INC., *et al.*,

25 Defendants.

Case No. RG-13673582

**[PROPOSED] CONSENT
JUDGMENT RE:
LUMISOURCE, LLC**

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 LumiSource, LLC ("Defendant") to
settle claims asserted by CEH against Defendant as set forth in the operative Complaint in the
matter *Center for Ameriwood Industries, Inc., et al.*, Alameda County Superior Court Case No.
RG-13673582 (the "Action"). CEH and Defendant are referred to collectively as the "Parties".

1 1.2. On November 1, 2013, CEH served a “Notice of Violation” (the “Notice”) relating
2 to the California Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition 65”) on
3 Defendant, the California Attorney General, the District Attorneys of every County in the State of
4 California, and the City Attorneys for every City in State of California with a population greater
5 than 750,000. The Notice alleges violations of Proposition 65 with respect to the presence of tris
6 (1,3-dichloro-2-propyl) phosphate (“TDCPP”) in foam-cushioned upholstered furniture
7 manufactured¹, distributed, and/or sold by Defendant.

8 1.3. Defendant is a corporation that employs ten (10) or more persons and that
9 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
10 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 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 that were or which could have been raised in the Complaint arising out of the facts or
20 conduct related to Defendant alleged therein. By execution of this Consent Judgment and
21 agreeing to comply with its terms, the Parties do not admit any fact, conclusion of law, or
22 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an
23 admission by the Parties of any fact, conclusion of law, or violation of law. Defendant denies the
24 material, factual, and legal allegations in the Notice and Complaint and expressly denies any
25 wrongdoing whatsoever. Except as specifically provided herein, nothing in this Consent

26 _____
27 ¹ As used herein, the term manufacture[d] shall have the meaning defined in Section 3(a)(10) of
28 the Consumer Product Safety Act, 15 U.S.C. § 2052(a)(10) (manufacture, produce, or assemble).

1 Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense either Party
2 may have in this or any other pending or future legal proceedings. This Consent Judgment is the
3 product of negotiation and compromise and is accepted by the Parties solely for purposes of
4 settling, compromising, and resolving issues disputed in this Action.

5 **2. DEFINITIONS**

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

11 2.2. "Covered Products" means foam-cushioned upholstered furniture manufactured,
12 distributed, and/or sold by Defendant in California.

13 2.3. "Effective Date" means the date on which the Court enters this Consent Judgment
14 or July 31, 2014, whichever is later.

15 2.4. "Listed Chemical Flame Retardants" means Tris(1,3-dichloro-2-propyl) phosphate
16 ("TDCPP"), Tris(2-chloroethyl) phosphate ("TCEP"), and Tris(2,3-dibromopropyl)phosphate
17 ("TDBPP").

18 2.5. "Manufacture Date" means the date the Covered Product was manufactured and
19 as may be indicated on a tag attached to the Covered Product.

20 2.6. "TB 117" means Technical Bulletin No. 117, entitled "Requirements, Test
21 Procedures and Apparatus for Testing the Flame Retardance of Filling Materials Used in
22 Upholstered Furniture," dated March 2000.

23 2.7. "TB 117-2013" means Technical Bulletin 117-2013, entitled "Requirements, Test
24 Procedures and Apparatus for Testing the Smolder Resistance of Materials Used in Upholstered
25 Furniture," approved on November 21, 2013 by the California Bureau of Electronic and
26 Appliance Repair, Home Furnishings and Thermal Insulation.

27 2.8. "TB 117-2013 Effective Date" means the date on which filling materials and cover
28 fabrics in upholstered furniture are required to meet the fire retardant requirements in TB 117-

1 2013 pursuant to the amendments to Section 1374 of Article 2 of Title 4 of the California Code of
2 Regulations.

3 2.9. "Treated" means the intentional addition or application of any Chemical Flame
4 Retardant to any polyurethane foam, cushioning, or padding used as filling material in any
5 Covered Product.

6 2.10. "Untreated Foam" means polyurethane foam that has not been Treated with any
7 Chemical Flame Retardant.

8 3. INJUNCTIVE RELIEF

9 3.1. **Reformulation of Covered Products.** Defendant shall comply with the following
10 requirements to reformulate the Covered Products to eliminate exposures to TDCPP arising from
11 the use of the Covered Products:

12 3.1.1. **Listed Chemical Flame Retardants – All Covered Products.** As of the
13 Effective Date, Defendant shall not distribute, sell, or offer for sale in California any Covered
14 Product that has been Treated with any Listed Chemical Flame Retardant and which has a
15 Manufacture Date that is on or later than the Effective Date.

16 3.1.1.1. To ensure compliance with the reformulation provisions of this
17 Section, following the Effective Date, Defendant shall directly or through its supply chain issue
18 specifications to its suppliers of polyurethane foam, cushioning, or padding used as filling
19 material in any Covered Product requiring that such components have not been Treated with
20 Listed Chemical Flame Retardants in accordance with the requirements of this Section 3.1.1.
21 Defendant shall obtain and maintain written certification(s) from its suppliers of polyurethane
22 foam, cushioning, or padding confirming that all such foam received by Defendant for
23 distribution in California has not been Treated with Listed Chemical Flame Retardants.
24 Defendant shall not be deemed in violation of the requirements of this Section 3.1.1 for any
25 Covered Product to the extent: (a) it has relied on a written certification from its vendor that
26 supplied a Covered Product or the polyurethane foam, cushioning, or padding used as filling
27 material in the Covered Product that such Covered Product, foam, cushioning or padding is made
28 with only Untreated Foam, and/or, if such certification is not relied on or has previously been

1 demonstrated to be invalid, (b) it has obtained a test result from an independent third party
2 certified laboratory reporting that the Covered Product's polyurethane foam, cushioning, or
3 padding used as filling material has been made with no Listed Chemical Flame Retardants.

4 **3.1.2. Interim Compliance – Listed Chemical Flame Retardants.** Any
5 Covered Products in which the polyurethane foam has been Treated with any Listed Chemical
6 Flame Retardant and which is distributed, sold, or offered for sale by Defendant in California
7 after the Effective Date shall be accompanied by a Clear and Reasonable Warning that complies
8 with Section 3.1.4.

9 **3.1.3. Warnings for Products in the Stream of Commerce.** In an effort to
10 ensure that consumers receive clear and reasonable warnings in compliance with Proposition 65
11 for Covered Products that have not been reformulated pursuant to Section 3.1.1 or labeled in
12 accordance with Section 3.1.2, within 30 days following the Effective Date, Defendant shall
13 either instruct its California retailers or distributors to discontinue the sale of the Covered
14 Products in California or provide warning materials by certified mail that comply with Section
15 3.1.4 to each of its California retailers or distributors to whom Defendant reasonably believes it
16 sold Covered Products that contained or may have contained TDCPP on or after October 31,
17 2011, if Defendant does not have actual knowledge that (i) the retailer or distributor is no longer
18 holding such Covered Products in inventory for sale in California or (ii) a Proposition 65 warning
19 is already provided for such Covered Products.

20 **3.1.4. Proposition 65 Warnings.** A Clear and Reasonable Warning under this
21 Consent Judgment shall state:

22 WARNING: This product contains "TDCPP" [and/or TCEP and/or TDBPP], a
23 chemical[s] known to the State of California to cause cancer.²

24 _____
25 ² The regulatory safe harbor warning language specified in 27 CCR § 25603.2 may also be used if
26 Defendant had begun to use it, prior to the Effective Date. Should Defendant seek to use
27 alternative warning language, other than the language specified above or the safe harbor warning
28 specified in 27 CCR § 25603.2, or seek to use an alternate method of transmission of the warning,
it must obtain the Court's approval of its proposed alternative and provide all Parties and the
Office of the Attorney General with timely notice and the opportunity to comment or object
before the Court acts on the request. In the event that Defendant's application for Court approval

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

10 **3.2. Optional Additional Reformulation – Use of Untreated Foam.** In order for
11 Defendant to be eligible for a waiver of the additional penalty/payment in lieu of penalty
12 payments set forth in Section 4.1.5 below, Defendant shall undertake the additional actions to
13 reduce or eliminate the use of Chemical Flame Retardants set forth herein. As of the TB117-2013
14 Effective Date, Defendant shall not manufacture for sale in California any Covered Product that
15 has been Treated with any Chemical Flame Retardant. In order to avoid the additional payments,
16 Defendant must provide written certification to CEH of its use of only Untreated Foam within 30
17 days following the TB 117-2013 Effective Date.

18 **3.2.1. Specification To and Certification From Suppliers.** To ensure
19 compliance with the provisions of this Section 3.2, to the extent that Defendant opts for additional
20 reformulation, it shall directly or through its supply chain issue specifications to its suppliers of
21 polyurethane foam, cushioning, or padding used as filling material in any Covered Product
22 requiring that such components shall use only Untreated Foam. Defendant shall not be deemed in
23 violation of the requirements of this Section 3.2 for any Covered Product to the extent: (a) it has
24 relied on a written certification from its vendor that supplied a Covered Product or the

25
26 of an alternative warning is contested by CEH, the prevailing party shall be entitled to its
27 reasonable attorneys' fees associated with opposing or responding to the opposition to the
28 application. No fees shall be recoverable for the initial application seeking an alternative
warning.

1 polyurethane foam, cushioning, or padding used as filling material in the Covered Product is
2 made with only Untreated Foam, and/or (b) it has obtained a test result from a certified laboratory
3 reporting that the Covered Product's polyurethane foam, cushioning, or padding used as filling
4 material has been made with Untreated Foam. Defendant shall obtain and maintain written
5 certification(s) from its suppliers of polyurethane foam, cushioning, or padding confirming that
6 all such foam 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 thirty thousand dollars
9 (\$30,000), which shall be allocated as follows:

10 4.1.1. \$3,300 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. \$4,500 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. \$22,200 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 court entry of this Consent
26 Judgment. The payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made
27 payable CEH. The payment required pursuant to Section 4.1.3 shall be made payable to
28

1 Lexington Law Group. All checks shall be delivered to Mark Todzo at Lexington Law Group at
2 the address set forth in Section 8.

3 4.1.5. In the event that Defendant elects not to certify its compliance with Section
4 3.2 in accordance with that Section, within 30 days following the TB 117-2013 Effective Date,
5 Defendant must make an additional payment of \$10,000, which shall be paid in two separate
6 checks, each payable to CEH, to be allocated as follows:

7 4.1.5.1. \$4,000 shall constitute a penalty pursuant to Cal. Health &
8 Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health
9 & Safety Code § 25249.12.

10 4.1.5.2. \$6,000 shall constitute a payment in lieu of civil penalty
11 pursuant to Cal. Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such
12 funds to continue its work of educating and protecting the public from exposures to toxic
13 chemicals, including chemical flame retardants. CEH may also use a portion of such funds to
14 monitor compliance with this Consent Judgment and to purchase and test Defendant's products to
15 confirm compliance. In addition, as part of its Community Environmental Action and Justice
16 Fund, CEH will use four percent (4%) of such funds to award grants to grassroots environmental
17 justice groups working to educate and protect the public from exposures to toxic chemicals. The
18 method of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

19 5. ENFORCEMENT OF CONSENT JUDGMENT

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

1 shall be entitled to its reasonable attorney's fees and costs incurred as a result of such motion or
2 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, related companies under common ownership, and their
10 successors and assigns ("Defendant Releasees") and all entities to whom they distribute or sell
11 Covered Products including, but not limited to, distributors, wholesalers, customers, retailers,
12 franchisees, cooperative members, and licensees ("Downstream Defendant Releasees"), of all
13 claims alleged in the Complaint in this Action arising from any violation of Proposition 65 that
14 have been or could have been asserted in the public interest against Defendant and Downstream
15 Defendant Releasees, regarding the failure to warn about exposure to TDCPP in the Covered
16 Products manufactured, distributed, or sold by Defendant prior to the Effective Date.

17 7.2. CEH, for itself releases, waives, and forever discharges any and all claims alleged
18 in the Complaint against Defendant and Downstream Defendant Releasees arising from any
19 violation of Proposition 65 that have been or could have been asserted regarding the failure to
20 warn about exposure to Listed Chemical Flame Retardants in connection with Covered Products
21 manufactured, distributed, or sold by Defendant prior to the Effective Date.

22 7.3. Compliance with the terms of this Consent Judgment by Defendant and Defendant
23 Releasees shall constitute compliance with Proposition 65 with respect to any alleged failure to
24 warn about Listed Chemical Flame Retardants in Covered Products manufactured, distributed, or
25 sold on and after the Effective Date.

26 **8. PROVISION OF NOTICE**

27 8.1. When any Party is entitled to receive any notice under this Consent Judgment, the
28 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 Steve Lee
4 LumiSource, LLC
5 2950 Old Higgins Rd.
6 Elk Grove Village, IL 60007
7 stevelee@lumisource.com

8 With a copy to:

9 Jeffrey S. Wilson
10 Wilson & Associates
11 2300 N. Barrington Rd., Suite 400
12 Hoffman Estates, IL 60169-2036
13 INTPROPLAW@aol.com

14 and

15 Sarah Esmaili
16 Arnold & Porter LLP
17 3 Embarcadero Center, 10th Floor
18 San Francisco, CA 94111-4024
19 Sarah.Esmaili@aporter.com

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

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

27 Mark Todzo
28 Lexington Law Group
29 503 Divisadero Street
30 San Francisco, CA 94117
31 mtodzo@lexlawgroup.com

32 8.2. Any Party may modify the person and address to whom the notice is to be sent by
33 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 date the Court enters this
3 Consent Judgment, provided however, that CEH shall prepare and file a Motion for Approval of
4 this Consent Judgment and 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.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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**



Cataliz Pizarro
Printed Name

ASSOCIATE DIRECTOR
Title

Dated: July 10, 2014 **LUMISOURCE, LLC**



Steve Lee
Printed Name

President
Title

RG13673582

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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