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10 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

MAR - 8 2016

CLERK OF THE SUPERIOR COURT
By YOLANDA ESTRADA Deputy

9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ALAMEDA

11
12 CENTER FOR ENVIRONMENTAL
13 HEALTH, a non-profit corporation,

14 Plaintiff,

15 v.

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

17 Defendants.

Case No. RG-13707315

~~PROPOSED~~ CONSENT
JUDGMENT RE: WARD
PROCESS, INC.

18
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 Ward Process, Inc. (“Defendant”) to
22 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 May 8, 2015, CEH served a “Notice of Violation” (the “Notice”) relating to the
27 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
4 tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”) in acoustic and soundproofing foam
5 manufactured, 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. Defendant alleges that it is a business-to-business entity, that it does not sell directly
9 to consumers, and that it has no transactional website on which consumers may purchase Covered
10 Products. Defendant alleges that it has no control or knowledge as to where its customers sell,
11 offer for sale, or distribute Defendant’s Covered Products, nor does Defendant have any control
12 as to how its customers package Defendant’s Covered Products.

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

20 1.5. The Parties enter into this Consent Judgment as a full and final settlement of all
21 claims which were or could have been raised in the Complaint arising out of the facts or conduct
22 related to Defendant and/or its Direct Customers for Covered Products purchased from Defendant
23 alleged therein. By execution of this Consent Judgment and agreeing to comply with its terms,
24 the Parties do not admit any fact, conclusion of law, or violation of law, nor shall compliance
25 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
26 conclusion of law, or violation of law. Defendant denies the material, factual, and legal
27 allegations in the Notice and Complaint and expressly denies any wrongdoing whatsoever.
28 Except as specifically provided herein, nothing in this Consent Judgment shall prejudice, waive,

1 or impair any right, remedy, argument, or defense either Party may have in this or any other
2 pending or future legal proceedings. This Consent Judgment is the product of negotiation and
3 compromise and is accepted by the Parties solely for purposes of settling, compromising, and
4 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 (a) any chemical that has been rated as a Benchmark 4
9 chemical pursuant to Clean Production Action's GreenScreen for Safer Chemicals
10 (<http://www.greenscreenchemicals.org/>); or (b) ammonium polyphosphate.

11 2.2. "Covered Products" means acoustic and/or soundproofing foam manufactured,
12 distributed, and/or sold by Defendant to its Direct Customers that are located in California or that
13 Defendant can reasonably assume may sell to California, or drop shipped to an address in
14 California at the request of a Direct Customer.

15 2.3. "Effective Date" means the date on which the Court enters this Consent Judgment.

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

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

21 2.6. "Treated" means the addition or application of any Chemical Flame Retardant to
22 any polyurethane foam used in any Covered Product.

23 2.7. "Untreated Foam" means polyurethane foam that has not been Treated with any
24 Chemical Flame Retardant.

25 2.8. "Direct Customer" means a customer from whom Defendant receives an order
26 against which Defendant ships, invoices, or receives payment.

1 **3. INJUNCTIVE RELIEF**

2 **3.1. Reformulation of Covered Products.** Defendant shall comply with the following
3 requirements to reformulate the Covered Products to eliminate exposures to TDCPP arising from
4 the use of the Covered Products:

5 **3.1.1. Listed Chemical Flame Retardants – All Covered Products.** As of the
6 Effective Date, Defendant shall not distribute, sell, or offer for sale in California any Covered
7 Product that has been Treated with any Listed Chemical Flame Retardant and which has a
8 Manufacture Date that is on or later than the Effective Date.

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

23 **3.1.2. Interim Compliance – All Covered Products.** Any Covered Products in
24 which the polyurethane foam has been Treated with any Listed Chemical Flame Retardant and
25 which is distributed, sold, or offered for sale by Defendant in California after the Effective Date
26 shall be accompanied by a Clear and Reasonable Warning that complies with Section 3.1.4.

27 **3.1.3. Warnings for Products in the Stream of Commerce.** In an effort to
28 ensure that consumers receive clear and reasonable warnings in compliance with Proposition 65

1 for Covered Products that have not been reformulated pursuant to Section 3.1.1 or labeled in
2 accordance with Section 3.1.2, within 30 days following the Effective Date, Defendant shall
3 provide warning materials by certified mail to each of its Direct Customers located in California
4 or that Defendant reasonably believes may sell to California to whom Defendant reasonably
5 believes it sold or shipped Covered Products that contained or may have contained TDCPP on or
6 after October 31, 2011. Such warning materials shall include a reasonably sufficient number of
7 stickers and/or labels in order to permit the retailer or distributor to place a warning sticker or
8 label on each Covered Product such customer has purchased from Defendant. The stickers and/or
9 labels shall contain the warning language set forth in Section 3.1.4. The warning materials shall
10 also include a letter of instruction for the placement of the stickers and/or labels, and a Notice and
11 Acknowledgment postcard.

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

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

17 A Clear and Reasonable Warning shall not be preceded by, surrounded by, or include any
18 additional words or phrases that contradict, obfuscate, or otherwise undermine the warning. The
19 warning statement shall be prominently displayed on the Covered Product or the packaging of the
20 Covered Product with such conspicuousness, as compared with other words, statements, or
21 designs as to render it likely to be read and understood by an ordinary individual prior to sale.
22 Defendant shall advise in writing each of its Direct Customers who Defendant reasonably
23 believes has a transactional website for internet sales and who Defendant reasonably believes may
24 offer Covered Products for sale to California consumers to provide a warning statement on its
25 transactional website in such a manner that it is likely to be read and understood by a Direct
26 Customer or consumer prior to purchase.

27 3.2. **Optional Additional Reformulation – Use of Untreated Foam.** In order for
28 Defendant to be eligible for a waiver of the additional penalty/payment in lieu of penalty

1 payments set forth in Section 4.1.5 below, Defendant shall undertake the additional actions to
2 reduce or eliminate the use of Chemical Flame Retardants set forth herein. As of 90 days
3 following the Effective Date, Defendant shall not manufacture or distribute, sell, or offer for sale
4 in California any Covered Product that has been Treated with any Chemical Flame Retardant. In
5 order to avoid the additional payments, Defendant must provide written certification to CEH of its
6 use of only Untreated Foam within 120 days following the Effective Date.

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

19 **4. PENALTIES AND PAYMENT**

20 4.1. Defendant shall initially pay to CEH the total sum of thirty-two thousand dollars
21 (\$32,000), which shall be allocated as follows:

22 4.1.1. \$3,520 shall constitute a penalty pursuant to Cal. Health & Safety Code §
23 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health & Safety Code
24 § 25249.12.

25 4.1.2. \$4,800 shall constitute a payment in lieu of civil penalty pursuant to Cal.
26 Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such funds to
27 continue its work of educating and protecting the public from exposures to toxic chemicals,
28 including chemical flame retardants. CEH may also use a portion of such funds to monitor

1 compliance with this Consent Judgment and to purchase and test Defendant's products to confirm
2 compliance. In addition, as part of its Community Environmental Action and Justice Fund, CEH
3 will use four percent (4%) of such funds to award grants to grassroots environmental justice
4 groups working to educate and protect the public from exposures to toxic chemicals. The method
5 of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

6 4.1.3. \$23,680 shall constitute reimbursement of CEH's reasonable attorneys'
7 fees and costs.

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

13 4.1.5. In the event that Defendant elects not to certify its compliance with Section
14 3.2 in accordance with that Section, within 120 days following the Effective Date, Defendant
15 must make an additional payment of \$10,000, which shall be paid in two separate checks, each
16 payable to CEH, to be allocated as follows:

17 4.1.5.1. \$4,000 shall constitute a penalty pursuant to Cal. Health &
18 Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health
19 & Safety Code § 25249.12.

20 4.1.5.2. \$6,000 shall constitute a payment in lieu of civil penalty
21 pursuant to Cal. Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such
22 funds to continue its work of educating and protecting the public from exposures to toxic
23 chemicals, including chemical flame retardants. CEH may also use a portion of such funds to
24 monitor compliance with this Consent Judgment and to purchase and test Defendant's products to
25 confirm compliance. In addition, as part of its Community Environmental Action and Justice
26 Fund, CEH will use four percent (4%) of such funds to award grants to grassroots environmental
27 justice groups working to educate and protect the public from exposures to toxic chemicals. The
28 method of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

1 **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

13 **6. MODIFICATION OF CONSENT JUDGMENT**

14 6.1. This Consent Judgment may only be modified by written agreement of CEH and
15 Defendant, or upon motion of CEH or Defendant as provided by law.

16 **7. CLAIMS COVERED AND RELEASE**

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

1 violation of Proposition 65 that have been or could have been asserted regarding the failure to
2 warn about exposure to TDCPP in connection with Covered Products manufactured, distributed,
3 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 Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Defendant
6 and Downstream Defendant Releasees with respect to any alleged failure to warn about any
7 Listed Chemical Flame Retardants in Covered Products manufactured, distributed, or sold by
8 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 Ken Owens
15 C.O.O.
16 American Acoustical Products
17 311 Hopping Brook Road
18 Holliston, MA 01746

19 And

20 Robert D. Cox, Jr., Esquire
21 Bowditch & Dewey, LLP
22 311 Main Street
23 Post Office Box 15156
24 Worcester, MA 01615-0156

25 8.1.2. **Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
26 this Consent Judgment shall be:

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

1 8.2. Any Party may modify the person and address to whom the notice is to be sent by
2 sending the other Parties notice by first class and electronic mail.

3 **9. COURT APPROVAL**

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

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

10 **10. GOVERNING LAW AND CONSTRUCTION**

11 10.1. The terms and obligations arising from this Consent Judgment shall be construed
12 and enforced in accordance with the laws of the State of California.

13 **11. ENTIRE AGREEMENT**

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

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

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

26 11.4. No supplementation, modification, waiver, or termination of this Consent
27 Judgment shall be binding unless executed in writing by the Party to be bound thereby.
28

1 11.5. No waiver of any of the provisions of this Consent Judgment shall be deemed or
2 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
3 such waiver constitute a continuing waiver.

4 **12. RETENTION OF JURISDICTION**

5 12.1. This Court shall retain jurisdiction of this matter to implement or modify the
6 Consent Judgment.

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

8 13.1. Each signatory to this Consent Judgment certifies that he or she is fully authorized
9 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
10 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

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

12 14.1. Nothing in this Consent Judgment shall preclude CEH from resolving any claim
13 against another entity on terms that are different from those contained in this Consent Judgment.

14 **15. EXECUTION IN COUNTERPARTS**

15 15.1. The stipulations to this Consent Judgment may be executed in counterparts and by
16 means of facsimile, which taken together shall be deemed to constitute one document.

17
18 **IT IS SO STIPULATED:**

19 Dated: 22 Jan, 2016 **CENTER FOR ENVIRONMENTAL HEALTH**

20
21 

22 Carmelita Pizzano

23 Printed Name

24 Associate Director

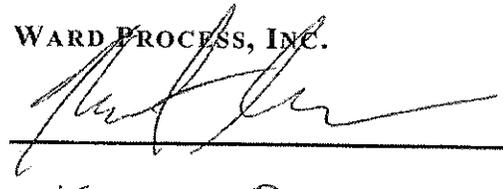
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Dated: JANUARY 13, 2016

WARD PROCESS, INC.



KENNETH OWENS

Printed Name

C.O.O.

Title

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

MAR - 8

GEORGE C. HERNANDEZ, JR.

Dated: _____, 2016

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