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6 CENTER FOR ENVIRONMENTAL HEALTH

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

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

13 Plaintiff,)

14 v.)

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16 EBERHARD FABER GMBH, *et al*; and)
DEFENDANT DOES 1 through 200, inclusive,)

17 Defendants.)
18

Case No. CGC 07-466897

**[PROPOSED] CONSENT JUDGMENT
RE: EBERHARD FABER GMBH**

1 **1. INTRODUCTION**

2 **1.1** On September 5, 2007, plaintiff the Center for Environmental Health
3 (“CEH”), a non-profit corporation acting in the public interest, filed a complaint titled *Center for*
4 *Environmental Health v. Eberhard Faber GmbH, et al.*, San Francisco County Superior Court
5 Case Number CGC 07-466897 (the “CEH Action”), for civil penalties and injunctive relief
6 pursuant to the provisions of Cal. Health & Safety Code §25249.5 *et seq.* (“Proposition 65”)
7 naming Eberhard Faber GmbH (“Defendant”) as a defendant, among others.

8 **1.2** Defendant is a corporation that employs 10 or more persons and
9 manufactured, distributed and/or sold modeling clay previously containing di-n-hexyl phthalate
10 (“DnHP”) (herinafter the “Products”) in the State of California.

11 **1.3** Beginning on or about March 2, 2007, CEH served Defendant and the
12 appropriate public enforcement agencies with the requisite 60-day notice alleging that Defendant
13 was in violation of Proposition 65. CEH’s notice and the Complaint in this Action allege that
14 Defendant exposes people who use or otherwise handle the Products to DnHP, a chemical known
15 to the State of California to cause birth defects and other reproductive harm, without first
16 providing clear and reasonable warning to such persons regarding the reproductive toxicity of
17 DnHP. The notice and Complaint allege that Defendant’s conduct violates Health & Safety
18 Code §25249.6, the warning provision of Proposition 65. Defendant disputes such allegations
19 and asserts that all of its products are safe and comply with all applicable laws.

20 **1.4** Defendant asserts it recently stopped manufacturing and selling Products
21 with DnHP or any other Phthalate. For purposes of this Consent Judgment, “Phthalate” means
22 “any dialkyl or alkyl aryl esters of 1,2-benzenedicarboxylic acid.” Defendant further asserts that
23 the levels of DnHP previously contained in the Products did not cause exposures requiring
24 Proposition 65 warnings, and that no user of the Products was exposed to unsafe levels of DnHP.

25 **1.5** For purposes of this Consent Judgment only, the parties stipulate that this
26 Court has jurisdiction over the subject matter of the violations alleged in CEH’s Complaint and
27 personal jurisdiction over Defendant as to the acts alleged in CEH’s Complaint, that venue is
28 proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent

1 Judgment as a full and final resolution of all claims which were or could have been raised in the
2 Complaint based on the facts alleged therein.

3 **1.6** The Parties enter into this Consent Judgment pursuant to a settlement of
4 certain disputed claims between the Parties as alleged in the Complaint. By executing this
5 Consent Judgment, the Parties do not admit any facts or conclusions of law. It is the parties'
6 intent that nothing in this Consent Judgment shall be construed as an admission by the Parties of
7 any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
8 Consent Judgment constitute or be construed as an admission by the Parties of any fact,
9 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
10 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or
11 any other or future legal proceedings.

12 **2. COMPLIANCE - REFORMULATION**

13 **2.1 Removal of DnHP.** As of the date of entry of this Consent Judgment (the
14 "Compliance Date"), Defendant shall not manufacture, distribute, ship, or sell or authorize to be
15 manufactured, distributed or sold, any Product that is comprised of DnHP. This obligation is
16 limited to manufacture, distribution, shipping and sales of Products in California.

17 **2.2 Proof of reformulation.** Within 30 days after entry of this Consent
18 Judgment, Defendant shall provide test results of two colors (one to be chosen by each of the
19 Parties) of the Products from an independent laboratory to CEH demonstrating that the Products
20 no longer contain DnHP. All testing shall be performed in accordance with both of the following
21 test protocols: (1) EPA SW8270C; and (2) EPA SW3580A (together referred to as the "Test
22 Protocols").

23 **2.3 Confirmatory Testing by CEH.** CEH intends to conduct confirmatory
24 testing of the Products. Any such testing shall be conducted by CEH at an independent
25 laboratory, in accordance with both of the Test Protocols. Acknowledging that Defendant has
26 reformulated the Products, CEH agrees to undertake this confirmatory testing only on those
27 Products that are reformulated, which can be identified by the letters "PF" as part of their
28 product code. In the event that CEH's testing demonstrates that the Products contain DnHP

1 subsequent to the Compliance Date, CEH shall inform Defendant of the test results, including
2 information sufficient to permit Defendant to identify the Product(s). Defendant shall, within 30
3 days following such notice, provide CEH, at the address listed in Section 12, with an explanation
4 regarding the presence of DnHP in the Products. Unless Defendant provides CEH with
5 information sufficient to demonstrate that CEH's test result was incorrect, Defendant shall be
6 liable for stipulated payments in lieu of penalties for Products for which CEH produces tests
7 demonstrating the presence of DnHP in the Products. The payments shall be made to CEH and
8 used for the purposes described in Section 3.1.

9 **2.3.1 Stipulated Payments In Lieu of Penalties.** If stipulated
10 payments in lieu of penalties are warranted under section 2.4, the stipulated payment amount
11 shall be as follows for each unit of Product for which CEH produces a test result showing that
12 Defendant sold a Product containing DnHP after the Compliance Date:

13	First Occurrence:	\$500
14	Second Occurrence:	\$750
15	Third Occurrence:	\$1,000
16	Thereafter:	\$2,500

17 **2.3.2 Products in the stream of commerce.** Defendant's
18 Products that have been manufactured, shipped, sold, or that otherwise are in the stream of
19 commerce prior to the Compliance Date shall be released from any claims that were brought or
20 that could have been brought by CEH in its Complaint, as though they were Covered Claims
21 within the meaning of Section 7.1, below. As a result, the stipulated payments in section 2.4.1
22 above do not apply to these Products.

23 **3. SETTLEMENT PAYMENTS**

24 **3.1 Monetary Payment in Lieu of Penalty.** Defendant shall pay to CEH
25 \$5,000 in lieu of any penalty pursuant to Health and Safety Code §25249.7(b). CEH shall use
26 such funds to continue its work protecting people from exposures to toxic chemicals. As part of
27 this work, CEH intends to conduct periodic testing of the Products as set forth in section 2.4.
28 The parties acknowledge that the payment in lieu of penalty provided for in this section has been

1 greatly reduced due to Defendant's efforts to eliminate DnHP and other Phthalates from the
2 Products prior to the date the warning requirement for DnHP became effective. The payment
3 required under this section shall be made payable to CEH.

4 **3.2 Attorneys' Fees and Costs.** Defendant shall pay \$10,000 to reimburse
5 CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any
6 other costs incurred as a result of investigating, bringing this matter to Defendant' attention,
7 litigating and negotiating a settlement in the public interest. The payment required under this
8 section shall be made payable to Lexington Law Group, LLP.

9 **3.3 Timing of payments.** The payments required under Sections 3.1 and 3.2
10 shall be made payable within 10 days of entry of judgment. All of the payments made pursuant
11 to this Section 3 shall be delivered to the Lexington Law Group, LLP at the address set forth in
12 section 11.1.

13 **4. MODIFICATION OF CONSENT JUDGMENT**

14 **4.1** This Consent Judgment may be modified by written agreement of
15 CEH and Defendant, or upon motion of CEH or Defendant as provided by law.

16 **5. ENFORCEMENT OF CONSENT JUDGMENT**

17 **5.1** CEH may, by motion or application for an order to show cause, enforce
18 the terms and conditions contained in this Consent Judgment. Should CEH prevail on any such
19 motion, it shall be entitled to recover its reasonable attorneys' fees and costs associated with
20 enforcing the Consent Judgment.

21 **6. APPLICATION OF CONSENT JUDGMENT**

22 **6.1** This Consent Judgment shall apply to and be binding upon the
23 parties hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any
24 of them.

25 **7. CLAIMS COVERED AND RELEASE OF CLAIMS**

26 **7.1** This Consent Judgment is a full, final and binding resolution between
27 CEH and Defendant of any violation of Proposition 65 that was or could have been asserted in
28 the Complaint against Defendant (including any claims that could be asserted in connection with

1 any of the Products covered by this Consent Judgment) or its parents, subsidiaries, directors,
2 officers, employees, or attorneys (collectively, "Defendant Releasees") based on failure to warn
3 about alleged exposures to DnHP resulting from any Products manufactured, distributed or sold
4 by Defendant ("Covered Claims") on or prior to the date of entry of this Consent Judgment.
5 CEH, its directors, officers, employees and attorneys hereby release all Covered Claims against
6 Defendant Releasees. Compliance with the terms of this Consent Judgment constitutes
7 compliance with Proposition 65 for purposes of DnHP exposures from the Products. This
8 paragraph is not intended to release and does not constitute a release from liability of
9 Defendant's United States distributor for the Products, American Art Clay Company, Inc.
10 ("Amaco") for claims against Amaco arising out of CEH's Proposition 65 60-day notice served
11 on that entity.

12 **8. SEVERABILITY**

13 **8.1** In the event that any of the provisions of this Consent Judgment are
14 held by a court to be unenforceable, the validity of the enforceable provisions shall not be
15 adversely affected.

16 **9. GOVERNING LAW**

17 **9.1** The terms of this Consent Judgment shall be governed by the laws of
18 the State of California.

19 **10. RETENTION OF JURISDICTION**

20 **10.1** This Court shall retain jurisdiction of this matter to implement and
21 enforce the terms this Consent Judgment.

22 **11. PROVISION OF NOTICE**

23 **11.1** All notices required pursuant to this Consent Judgment and
24 correspondence shall be sent to the following:
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1 For CEH:

2 Mark N. Todzo
3 Lexington Law Group, LLP
4 1627 Irving Street
5 San Francisco, CA 94122

6 For Defendant:

7 Ann G. Grimaldi
8 McKenna Long & Aldridge LLP
9 101 California Street, Floor 41
10 San Francisco, CA 94111

11 **12. COURT APPROVAL**

12 **12.1** CEH will comply with the settlement notice provisions of Health and
13 Safety Code § 25249.7(f) and Title 11 of the California Code of Regulations § 3003.

14 **13. EXECUTION AND COUNTERPARTS**

15 **13.1** The stipulations to this Consent Judgment may be executed in
16 counterparts and by means of facsimile, which taken together shall be deemed to constitute one
17 document.

18 **14. AUTHORIZATION**

19 **14.1** Each signatory to this Consent Judgment certifies that he or she is
20 fully authorized by the party he or she represents to stipulate to this Consent Judgment and to
21 enter into and execute the Consent Judgment on behalf of the party represented and legally bind
22 that party. The undersigned have read, understand and agree to all of the terms and conditions of
23 this Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees
24 and costs.
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AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH



Dated: 9/13/07

Charlie Pizzaro, Associate Director
Center for Environmental Health

Pizzaro

EBERHARD FABER GMBH

Dated: _____

[Name]

[Title]

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AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH

Dated: _____

Charlie Pizzaro, Associate Director
Center for Environmental Health

EBERHARD FABER GMBH

Dated: 17.09.2007

Stijn van der Pijl
[Name]

Managing Directors
[Title]

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ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between CEH and Eberhard Faber GmbH the settlement is approved and judgment is hereby entered according to the terms herein.

Dated: _____

Judge, Superior Court of the State of California