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10 CENTER FOR ENVIRONMENTAL HEALTH

11 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF ALAMEDA

13
14 CENTER FOR ENVIRONMENTAL
15 HEALTH, a non-profit corporation,

16 Plaintiff,

17 v.

18 A BABY, INC., *et al.*,

19 Defendants.

Case No. RG-13667688

**[PROPOSED] CONSENT
JUDGMENT RE: CARPENTER
CO.**

20
21 **1. INTRODUCTION**

22 1.1. This Consent Judgment is entered into by Plaintiff Center for Environmental
23 Health, a non-profit corporation (“CEH”), and Defendant Carpenter Co. (“Defendant”) to settle
24 claims asserted by CEH against Defendant as set forth in the operative Complaint, as may be
25 amended, in the matter *Center for Environmental Health v. A Baby, Inc., et al.*, Alameda County
26 Superior Court Case No. RG-13667688 (the “Action”). CEH and Defendant are referred to
27 collectively as the “Parties”.
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1 1.2. On November 20, 2012, CEH served a “Notice of Violation” (the “Notice”)
2 relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition
3 65”) on Defendant, the California Attorney General, the District Attorneys of every County in the
4 State of California, and the City Attorneys for every City in State of California with a population
5 greater than 750,000. The Notice alleges violations of Proposition 65 with respect to the presence
6 of tris (1,3-dichloro-2-propyl) phosphate (“TDCPP”) in foam-cushioned mattress toppers
7 manufactured, distributed, and/or sold by Defendant.

8 1.3. On May 31, 2013, CEH served a Second Notice on Defendant, the California
9 Attorney General, the District Attorneys of every County in the State of California, and the City
10 Attorneys for every City in State of California with a population greater than 750,000 (the
11 “Second Notice”). The Second Notice alleges violations of Proposition 65 with respect to the
12 presence of TDCPP in foam for use in consumer products. The Notice and the Second Notice are
13 collectively referred to herein as the “Notices”.

14 1.4. Defendant is a corporation that employs ten (10) or more persons and that
15 manufactures, distributes, and/or sells Covered Products (as defined in Section 2.2 herein) and
16 FOAM (as defined in Section 2.4 herein) in the State of California.

17 1.5. For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
18 Court has jurisdiction over the allegations of violations contained in the Notices and Complaint
19 and personal jurisdiction over Defendant as to the acts alleged in the Complaint; (ii) venue is
20 proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this Consent
21 Judgment as a full and final resolution of all claims which were or could have been raised in the
22 Complaint based on the facts alleged in the Notices and Complaint with respect to Covered
23 Products and FOAM manufactured, distributed, and/or sold by Defendant.

24 1.6. The Parties enter into this Consent Judgment as a full and final settlement of all
25 claims which were or could have been raised in the Complaint or Notices arising out of the facts
26 or conduct related to Defendant alleged therein. By execution of this Consent Judgment and
27 agreeing to comply with its terms, the Parties do not admit any fact, conclusion of law, or
28 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an

1 admission by the Parties of any fact, conclusion of law, or violation of law. Defendant denies the
2 material, factual, and legal allegations in the Notices and Complaint and expressly denies any
3 wrongdoing whatsoever. Except as specifically and expressly provided herein, nothing in this
4 Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense
5 either Party may have in this or any other pending or future legal proceedings. This Consent
6 Judgment is the product of negotiation and compromise and is accepted by the Parties solely for
7 purposes of settling, compromising, and resolving issues disputed in this Action.

8 1.7. Defendant asserts that prior to October 28, 2012 and prior to CEH's serving either
9 Notice, Defendant had terminated the use of Listed Chemical Flame Retardants (as defined in
10 Section 2.5 herein) in the Covered Products. Further, Carpenter has historically and continues to
11 offer Untreated Foam (as defined in Section 2.10 herein) for use in Covered Products and other
12 products.

13 1.8. On or about October 23, 2012, Defendant provided letters to its current customers
14 informing them that: (a) the listing of TDCPP under Proposition 65 was becoming effective on
15 October 28, 2012; (b) FOAM that Defendant previously sold to such customers contained TDCPP
16 and, if used in products after October 28, 2012 may require warnings; and (c) they should reach
17 out to their customers to advise them of the potential exposure to TDCPP and Proposition 65's
18 requirements. After October 28, 2012, no foam with TDCPP was sold by Defendant unless it had
19 a compliant Proposition 65 warning.

20 2. DEFINITIONS

21 2.1. "Chemical Flame Retardant" means any halogenated or phosphorous-based
22 chemical compound used for the purpose of resisting or retarding the spread of fire. "Chemical
23 Flame Retardant" does not include any chemical that has been rated as a Benchmark 4 chemical
24 pursuant to Clean Production Action's GreenScreen (<http://www.greenscreenchemicals.org/>).

25 2.2. "Covered Products" means foam-cushioned mattress toppers manufactured,
26 distributed, and/or sold by Defendant in California.

27 2.3. "Effective Date" means the date on which the Court enters this Consent Judgment.
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1 2.4. “FOAM” means polyurethane foam manufactured, distributed and/or sold by
2 Defendant for use as a raw material in the manufacture or fabrication of various consumer
3 products sold in California, including, but not limited to (1) foam-cushioned upholstered
4 furniture, such as, by way of example only, foam-cushioned chairs, ottomans, sofas, futons, and
5 back cushions; (2) foam-cushioned pads for infants and children to lie on, such as foam-
6 cushioned pads and mats used for sleeping or resting, diaper changing pads, infant walkers,
7 and/or car safety seats; and (3) foam-cushioned mattress toppers.

8 2.5. “Listed Chemical Flame Retardants” means Tris(1,3-dichloro-2-propyl) phosphate
9 (“TDCPP”), Tris(2-chloroethyl) phosphate (“TCEP”), and Tris(2,3-dibromopropyl)phosphate
10 (“TDBPP”).

11 2.6. “TB 117” means Technical Bulletin No. 117, entitled “Requirements, Test
12 Procedures and Apparatus for Testing the Flame Retardance of Filling Materials Used in
13 Upholstered Furniture,” dated March 2000.

14 2.7. “TB 117-2013” means Technical Bulletin 117-2013, entitled “Requirements, Test
15 Procedures and Apparatus for Testing the Smolder Resistance of Materials Used in Upholstered
16 Furniture,” approved by the State of California on November 21, 2013.

17 2.8. “TB 117-2013 Effective Date” means January 1, 2015.

18 2.9. “Treated” means the intentional addition or application of any Chemical Flame
19 Retardant to any polyurethane foam used as filling material in any Covered Product.

20 2.10. “Untreated Foam” means polyurethane foam that has not been Treated.

21 **3. INJUNCTIVE RELIEF**

22 3.1. **Reformulation of FOAM and Covered Products.** Defendant shall comply with
23 the following requirements to reformulate the FOAM and Covered Products:

24 3.1.1. **Listed Chemical Flame Retardants – Covered Products.** As of the
25 Effective Date, Defendant shall not distribute, sell, or offer for sale in California any Covered
26 Product that has been treated with any Listed Chemical Flame Retardants and which has a
27 manufacture date that is on or later than the Effective Date.

1 3.1.2. **Listed Chemical Flame Retardants – FOAM.** As of the Effective Date,
2 Defendant shall not distribute, sell, or offer for sale in California FOAM for use in consumer
3 products that, to Defendants knowledge will be or are reasonably likely to be sold in California
4 that has been treated with any Listed Chemical Flame Retardants and which has a manufacture
5 date that is on or later than the Effective Date.

6 3.1.3. **Interim Compliance – TDCPP.** Any Covered Products in which the
7 polyurethane foam has intentionally added TDCPP and which is distributed, sold, or offered for
8 sale by Defendant in California after the Effective Date shall be accompanied by a Clear and
9 Reasonable Warning that complies with Section 3.1.5.

10 3.1.4. **Warnings for Covered Products in the Stream of Commerce.** Within
11 30 days following the Effective Date, Defendant shall provide clear and reasonable Proposition
12 65 warning materials to each of its California retailers or distributors to whom Defendant
13 reasonably believes it sold Covered Products that contained or may have contained intentionally
14 added TDCPP within the twelve (12) months prior to the Effective Date. Such warning materials
15 shall include a reasonably sufficient number of warning labels in order to permit the retailer or
16 distributor to place a warning label on each Covered Product such customer has purchased from
17 Defendant. The warning label shall contain the warning language set forth in Section 3.1.5. The
18 warning materials shall also include a letter of instruction for the placement of the warning label,
19 and a Notice and Acknowledgment postcard.

20 3.1.5. **Proposition 65 Warnings.** A clear and reasonable warning under this
21 Consent Judgment shall state:

22 WARNING: This product contains tris(1,3-dichloro-2-propyl) phosphate
23 (“TDCPP”), a chemical known to the State of California to cause cancer.

24 A clear and reasonable warning shall not be preceded by, surrounded by, or include any
25 additional words or phrases that contradict, obfuscate, or otherwise undermine the warning. The
26 warning statement shall be prominently displayed on the Covered Product or the packaging of the
27 Covered Product with such conspicuousness, as compared with other words, statements, or
28 designs as to render it likely to be read and understood by an ordinary individual prior to sale.

1 For internet, catalog, or any other sale where the consumer is not physically present and cannot
2 see a warning displayed on the Covered Product or the packaging of the Covered Product prior to
3 purchase or payment, the warning statement shall be displayed in such a manner that it is likely to
4 be read and understood prior to the authorization of or actual payment.¹ Should new warning
5 regulations be adopted after the Effective Date, Defendant shall be deemed to be in compliance
6 with the new requirements by either: adhering to the requirements in this Consent Judgment or
7 by complying with the newly adopted requirements.

8 **3.2 Making Untreated Foam Available to Customers.** After the Effective Date,
9 Defendant will continue to offer and make available for sale Untreated Foam to all of its
10 customers located in California as well as those customers located outside California as it
11 currently offers customers.

12 **3.3 Optional Additional Reformulation For Covered Products – Use of Untreated**
13 **Foam.** In order for Defendant to be eligible for a waiver of the additional penalty/payment in lieu
14 of penalty payments set forth in Section 4.1.5 below, Defendant shall undertake the additional
15 actions to reduce or eliminate the use of Chemical Flame Retardants set forth in this paragraph
16 3.3. As of the TB117-2013 Effective Date (January 15, 2015), Defendant shall not manufacture
17 for sale in California any Covered Product that has been Treated. In order to avoid the additional
18 payments, within 30 days following the TB117-2013 Effective Date or the Effective Date of this
19 Agreement, whichever is later, Defendant must provide written certification to CEH of its use of
20 only Untreated Foam in Covered Products manufactured for sale in California.

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22 _____
23 ¹ The regulatory safe harbor warning language specified in 27 CCR § 25603.2 may also be used if
24 the Defendant began to use it, prior to the Effective Date. Should Defendant seek to use
25 alternative warning language, other than the language specified above or the safe harbor warning
26 specified in 27 CCR § 25603.2 as is in effect as of the Effective Date, or seek to use an alternate
27 method of transmission of the warning, then Defendant must obtain the Court’s approval of its
28 proposed alternative. Defendant shall 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 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 **4. PENALTIES AND PAYMENT**

2 4.1. Defendant shall pay to CEH the total sum of eighty-seven thousand five hundred
3 dollars (\$87,500), which shall be allocated as follows:

4 4.1.1. \$11,600 shall constitute a penalty pursuant to Cal. Health & Safety Code §
5 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health & Safety Code
6 § 25249.12.

7 4.1.2. \$17,400 shall constitute a payment in lieu of civil penalty pursuant to Cal.
8 Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such funds to
9 continue its work of educating and protecting the public from exposures to toxic chemicals,
10 including chemical flame retardants. CEH may also use a portion of such funds to monitor
11 compliance with this Consent Judgment and to purchase and test Defendant’s products to confirm
12 compliance. In addition, as part of its Community Environmental Action and Justice Fund, CEH
13 will use four percent (4%) of such funds to award grants to grassroots environmental justice
14 groups working to educate and protect the public from exposures to toxic chemicals. The method
15 of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

16 4.1.3. \$58,500 shall constitute reimbursement of CEH’s reasonable attorneys’
17 fees and costs.

18 4.1.4. The payments required under Sections 4.1.1-4.1.3 shall be made in three
19 separate checks, all to be delivered within 10 days following the Effective Date. The payments
20 required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable CEH. The payment
21 required pursuant to Section 4.1.3 shall be made payable to Lexington Law Group. All checks
22 shall be delivered to Mark Todzo at Lexington Law Group at the address set forth in Section 8.

23 4.1.5. Additionally, in the event that Defendant elects not to certify its
24 compliance with Section 3.3 in accordance with that Section, within 150 days following the
25 Effective Date, Defendant must make an additional payment of \$15,000 which shall be paid in
26 two separate checks, each payable to CEH, to be allocated as follows:

1 4.1.5.1. \$6,000 shall constitute a penalty pursuant to Cal. Health &
2 Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health
3 & Safety Code § 25249.12.

4 4.1.5.2. \$9,000 shall constitute a payment in lieu of civil penalty
5 pursuant to Cal. Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such
6 funds to continue its work of educating and protecting the public from exposures to toxic
7 chemicals, including chemical flame retardants. CEH may also use a portion of such funds to
8 monitor compliance with this Consent Judgment and to purchase and test Defendant's products to
9 confirm compliance. In addition, as part of its Community Environmental Action and Justice
10 Fund, CEH will use four percent (4%) of such funds to award grants to grassroots environmental
11 justice groups working to educate and protect the public from exposures to toxic chemicals. The
12 method of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

13 **5. ENFORCEMENT OF CONSENT JUDGMENT**

14 5.1. CEH may, by motion or application for an order to show cause before the Superior
15 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.
16 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH
17 shall provide Defendant with a Notice of Violation and a copy of any test results which
18 purportedly support CEH's Notice of Violation. The Parties shall then meet and confer regarding
19 the basis for CEH's anticipated motion or application in an attempt to resolve it informally,
20 including providing Defendant a reasonable opportunity of at least thirty (30) days to cure any
21 alleged violation. Should such attempts at informal resolution fail, CEH may file its enforcement
22 motion or application. The prevailing party on any motion to enforce this Consent Judgment
23 shall be entitled to its reasonable attorney's fees and costs incurred as a result of such motion or
24 application. This Consent Judgment may only be enforced by the Parties.

25 **6. MODIFICATION OF CONSENT JUDGMENT**

26 6.1. This Consent Judgment may only be modified by written agreement of CEH and
27 Defendant, or upon motion of CEH or Defendant as provided by law.

1 **7. CLAIMS COVERED AND RELEASE**

2 7.1. This Consent Judgment is a full, final, and binding resolution and release between
3 CEH acting in the public interest and Defendant and Defendant’s parents, officers, directors,
4 shareholders, divisions, subdivisions, subsidiaries, partners, affiliated and their respective
5 successors and assigns (inclusively and collectively, the “Defendant Releasees”) and all entities to
6 whom they directly or indirectly distribute or sell or have distributed or sold Covered Products
7 including, but not limited to, distributors, wholesalers, customers, retailers (including, but not
8 limited to, Bed, Bath & Beyond Inc. and J.C. Penney Corporation, Inc. and their affiliated
9 companies), franchisees, cooperative members, and licensees (“Downstream Releasees”), of all
10 claims alleged in the Notices or Complaint in this Action arising from any violation of
11 Proposition 65 that have been or could have been asserted in the public interest against
12 Defendant, Defendant Releasees and Downstream Releasees, regarding the failure to warn about
13 exposure to TDCPP in the Covered Products manufactured, distributed, or sold by Defendant
14 prior to the Effective Date.

15 7.2. This Consent Judgment is also a full, final, and binding resolution and release
16 between CEH acting in the public interest and Defendant with regard to Defendant’s
17 manufacture, distribution and sale of FOAM of all claims alleged in the Notices or Complaint
18 arising from any violation or alleged violation of Proposition 65 that have been or could have
19 been asserted in the public interest against Defendant, Defendant Releasees and Downstream
20 Foam Releasees regarding the failure to warn about exposure to TDCPP in FOAM manufactured,
21 distributed, or sold by Defendant prior to the Effective Date. This release expressly includes a
22 release of all claims against Defendant, Defendant Releasees and Downstream Releasees arising
23 from products manufactured, distributed and sold using Defendant’s FOAM, except as set forth
24 below. This Section 7.2 release does not extend to the products manufactured, distributed, or sold
25 by BabyAge.com, Inc. and the Primary Defendant or Associated Parties set forth on Exhibit A
26 (hereinafter BabyAge.com, Inc. and the entities referenced on Exhibit A are individually and/or
27 collectively referred to as “Exhibit A Entity” or “Exhibit A Entities”) to the extent that such
28 Exhibit A Entity used treated FOAM supplied by Defendant. In addition, this Section 7.2 release

1 does not extend to the products manufactured, distributed, or sold by the Primary Defendant or
2 Associated Parties set forth on Exhibit B (hereinafter referred to as “Exhibit B Entity” or “Exhibit
3 B Entities”) to the extent such entities purchased FOAM directly from Defendant. However,
4 once any Exhibit A or B Entity has a judgment entered, or fully executes a settlement out of
5 court, resolving a claim or notice concerning an alleged failure to warn about TDCPP, then such
6 entity is covered by the releases herein.

7 7.3. Nothing in Section 7.2 acts to diminish or reduce the breadth and scope of the
8 release provided in Section 7.1 for the Covered Products. Compliance with the terms of this
9 Consent Judgment by Defendant shall constitute compliance with Proposition 65 by Defendant
10 with respect to any alleged failure to warn about TDCPP in Covered Products and FOAM
11 manufactured, distributed, or sold by Defendant after the Effective Date. This Consent Judgment
12 is intended to act as a bar to claims against Defendant and Defendant Releasees for FOAM sales
13 it made prior to the Effective Date.

14 7.4. This is a full and final release applying to all unknown and unanticipated injuries
15 or damages relating to or arising out of the claims alleged in the Notices and Complaint, as well
16 as those now known, whether or not disclosed, and CEH, on its own behalf only, hereby
17 relinquishes and waives all rights or benefits conferred upon them by the provisions of Section
18 1542 of the California Civil Code, which reads as follows:

19
20 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
21 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
22 EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE
23 RELEASE, WHICH IF KNOWN BY HIM, MUST HAVE
24 MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
25 DEBTOR.

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:

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

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Malcolm Weiss
Hunton & Williams LLP
550 South Hope Street, Ste. 2000
Los Angeles, CA 90071-2627
mweiss@hunton.com

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

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

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

9. COURT APPROVAL

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

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

10. GOVERNING LAW AND CONSTRUCTION

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

11. ENTIRE AGREEMENT

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

1 11.2. There are no warranties, representations, or other agreements between CEH and
2 Defendant except as expressly set forth herein. No representations, oral or otherwise, express or
3 implied, other than those specifically referred to in this Consent Judgment have been made by any
4 Party hereto.

5 11.3. No other agreements not specifically contained or referenced herein, oral or
6 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
7 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
8 any of the Parties hereto only to the extent that they are expressly incorporated herein.

9 11.4. No supplementation, modification, waiver, or termination of this Consent
10 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

11 11.5. No waiver of any of the provisions of this Consent Judgment shall be deemed or
12 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
13 such waiver constitute a continuing waiver.

14 **12. RETENTION OF JURISDICTION**

15 12.1. This Court shall retain jurisdiction of this matter to implement or modify the
16 Consent Judgment.

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

18 13.1. Each signatory to this Consent Judgment certifies that he or she is fully authorized
19 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
20 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

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

22 14.1. Nothing in this Consent Judgment shall preclude CEH from resolving any claim
23 against another entity on terms that are different from those contained in this Consent Judgment.

24 **15. EXECUTION IN COUNTERPARTS**

25 15.1. The stipulations to this Consent Judgment may be executed in counterparts and by
26 means of facsimile, which taken together shall be deemed to constitute one document.

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28 **IT IS SO STIPULATED:**

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Dated: Feb 4, 2015

CENTER FOR ENVIRONMENTAL HEALTH



Charlie Pizarro
Associate Director

Dated: _____, 2015

CARPENTER CO.

Printed Name

Title

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

Dated: _____, 2015

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

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Dated: _____, 2015

CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

Dated: 1/28/15, 2015

CARPENTER CO.



H.A. CLAIBORNE III

Printed Name

SECRETARY

Title

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

Dated: _____, 2015

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