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16 Attorneys for Plaintiff
17 CENTER FOR ENVIRONMENTAL HEALTH

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20 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
21 FOR THE COUNTY OF ALAMEDA

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CENTER FOR ENVIRONMENTAL
HEALTH, a non-profit corporation,

Plaintiff,

v.

BRITAX CHILD SAFETY, INC., *et al.*,
Defendants.

Case No. RG-13683725

**[PROPOSED] CONSENT
JUDGMENT RE: SHERMAG,
INC.**

1. INTRODUCTION

1.1. This Consent Judgment is entered into by Plaintiff Center for Environmental Health, a non-profit corporation (“CEH”), and Defendant Shermag, Inc. (“Defendant”) to settle claims asserted by CEH against Defendant as set forth in the operative Complaint in the matter *Center for Environmental Health v. Britax Child Safety, Inc., et al.*, Alameda County Superior Court Case No. RG-13683725 (the “Action”). CEH and Defendant are referred to collectively as

1 the “Parties”.

2 1.2. On May 16, 2013, CEH served a “Notice of Violation” (the “Notice”) relating to
3 the California Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition 65”) on
4 Defendant, the California Attorney General, the District Attorneys of every County in the State of
5 California, and the City Attorneys for every City in State of California with a population greater
6 than 750,000. The Notice alleges violations of Proposition 65 with respect to the presence of tris
7 (1,3-dichloro-2-propyl) phosphate (“TDCPP”) in foam-cushioned upholstered furniture
8 manufactured, distributed, and/or sold by Defendant.

9 1.3. Defendant is a corporation that employs ten (10) or more persons and that
10 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
11 California.

12 1.4. For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
13 Court has jurisdiction over the allegations of violations contained in the Notice and Complaint
14 and personal jurisdiction over Defendant as to the acts alleged in the Complaint; (ii) venue is
15 proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this Consent
16 Judgment as a full and final resolution of all claims which were or could have been raised in the
17 Complaint based on the facts alleged in the Notice and Complaint with respect to Covered
18 Products manufactured, distributed, and/or sold by Defendant.

19 1.5. The Parties enter into this Consent Judgment as a full and final settlement of all
20 claims that were or which could have been raised in the Complaint arising out of the facts or
21 conduct related to Defendant alleged therein. By execution of this Consent Judgment and
22 agreeing to comply with its terms, the Parties do not admit any fact, conclusion of law, or
23 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an
24 admission by the Parties of any fact, conclusion of law, or violation of law. Defendant denies the
25 material, factual, and legal allegations in the Notice and Complaint and expressly denies any
26 wrongdoing whatsoever. Except as specifically provided herein, nothing in this Consent
27 Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense either Party
28 may have in this or any other pending or future legal proceedings. This Consent Judgment is the

1 product of negotiation and compromise and is accepted by the Parties solely for purposes of
2 settling, compromising, and resolving issues disputed in this Action.

3 **2. DEFINITIONS**

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

9 2.2. “Covered Products” means foam-cushioned upholstered furniture manufactured,
10 distributed, and/or sold by Defendant in California.

11 2.3. “Effective Date” means the date on which the Court enters this Consent Judgment.

12 2.4. “Listed Chemical Flame Retardants” means Tris(1,3-dichloro-2-propyl) phosphate
13 (“TDCPP”), Tris(2-chloroethyl) phosphate (“TCEP”), and Tris(2,3-dibromopropyl)phosphate
14 (“TDBPP”).

15 2.5. “Manufacture Date” means the date the Covered Product was manufactured and
16 as may be indicated on a tag attached to the Covered Product.

17 2.6. “TB 117” means Technical Bulletin No. 117, entitled “Requirements, Test
18 Procedures and Apparatus for Testing the Flame Retardance of Filling Materials Used in
19 Upholstered Furniture,” dated March 2000.

20 2.7. “TB 117-2013” means Technical Bulletin 117-2013, entitled “Requirements, Test
21 Procedures and Apparatus for Testing the Smolder Resistance of Materials Used in Upholstered
22 Furniture,” approved on November 21, 2013 by the California Bureau of Electronic and
23 Appliance Repair, Home Furnishings and Thermal Insulation.

24 2.8. “TB 117-2013 Effective Date” means the date on which filling materials and cover
25 fabrics in upholstered furniture are required to meet the fire retardant requirements in TB 117-
26 2013 pursuant to the amendments to Section 1374 of Article 2 of Title 4 of the California Code of
27 Regulations.

28 2.9. “Treated” means the intentional addition or application of any Chemical Flame

1 Retardant to any polyurethane foam, cushioning, or padding used as filling material in any
2 Covered Product.

3 2.10. “Untreated Foam” means polyurethane foam that has not been Treated with any
4 Chemical Flame Retardant.

5 **3. INJUNCTIVE RELIEF**

6 3.1. **Reformulation of Covered Products.** Defendant shall comply with the following
7 requirements to reformulate the Covered Products to eliminate exposures to TDCPP arising from
8 the use of the Covered Products:

9 3.1.1. **Listed Chemical Flame Retardants – All Covered Products.** As of the
10 Effective Date, a Settling Defendant shall not distribute, sell, or offer for sale in California any
11 Covered Product that has been Treated with any Listed Chemical Flame Retardant and which has
12 a Manufacture Date that is on or later than the Effective Date.

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

1 **3.1.2. Interim Compliance – Listed Chemical Flame Retardants.** Any
2 Covered Products in which the polyurethane foam has been Treated with any Listed Chemical
3 Flame Retardant and which is distributed, sold, or offered for sale by Defendant in California
4 after the Effective Date shall be accompanied by a Clear and Reasonable Warning that complies
5 with Section 3.1.4.

6 **3.1.3. Warnings for Products in the Stream of Commerce.** In an effort to
7 ensure that consumers receive clear and reasonable warnings in compliance with Proposition 65
8 for Covered Products that have not been reformulated pursuant to Section 3.1.1 or labeled in
9 accordance with Section 3.1.2, within 30 days following the Effective Date, Defendant shall
10 provide warning materials by certified mail to each of its California retailers or distributors to
11 whom Defendant reasonably believes it sold Covered Products that contained or may have
12 contained TDCPP on or after October 31, 2011. Such warning materials shall include a
13 reasonably sufficient number of hang tags in order to permit the retailer or distributor to place a
14 warning tag on each Covered Product such customer has purchased from Defendant. The hang
15 tags shall contain the warning language set forth in Section 3.1.4. The warning materials shall
16 also include a letter of instruction for the placement of the hang tags, and a Notice and
17 Acknowledgment postcard.

18 **3.1.4. Proposition 65 Warnings.** A Clear and Reasonable Warning under this
19 Consent Judgment shall state:

20 WARNING: This product contains “TDCPP” [and/or TCEP and/or TDBPP], a
21 chemical[s] known to the State of California to cause cancer.¹

22
23 ¹ The regulatory safe harbor warning language specified in 27 CCR § 25603.2 may also be used if
24 Defendant had begun 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, or seek to use an alternate method of transmission of the warning,
27 it must obtain the Court’s approval of its proposed alternative and provide all Parties and the
28 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 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
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 polyurethane foam, cushioning, or padding used as filling material in the Covered Product is
26 made with only Untreated Foam, and/or (b) it has obtained a test result from a certified laboratory
27 reporting that the Covered Product’s polyurethane foam, cushioning, or padding used as filling
28 material has been made with Untreated Foam. Defendant shall obtain and maintain written

1 certification(s) from its suppliers of polyurethane foam, cushioning, or padding confirming that
2 all such foam received by Defendant for distribution in California is Untreated Foam.

3 **4. PENALTIES AND PAYMENT**

4 4.1. Defendant shall initially pay to CEH the total sum of fifty-five thousand dollars
5 (\$55,000), which shall be allocated as follows:

6 4.1.1. \$6,050 shall constitute a penalty pursuant to Cal. Health & Safety Code §
7 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health & Safety Code
8 § 25249.12.

9 4.1.2. \$8,250 shall constitute a payment in lieu of civil penalty pursuant to Cal.
10 Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such funds to
11 continue its work of educating and protecting the public from exposures to toxic chemicals,
12 including chemical flame retardants. CEH may also use a portion of such funds to monitor
13 compliance with this Consent Judgment and to purchase and test Defendant's products to confirm
14 compliance. In addition, as part of its Community Environmental Action and Justice Fund, CEH
15 will use four percent (4%) of such funds to award grants to grassroots environmental justice
16 groups working to educate and protect the public from exposures to toxic chemicals. The method
17 of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

18 4.1.3. \$40,700 shall constitute reimbursement of CEH's reasonable attorneys'
19 fees and costs.

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

25 4.1.5. In the event that Defendant elects not to certify its compliance with Section
26 3.2 in accordance with that Section, within 30 days following the TB 117-2013 Effective Date,
27 Defendant must make an additional payment of \$22,000, which shall be paid in two separate
28 checks, each payable to CEH, to be allocated as follows:

1 4.1.5.1. \$8,800 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. \$13,200 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 Sacramento, CA 95814
2 majones@stoel.com

3 8.1.2. **Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
4 this Consent Judgment shall be:

5 Rick Franco
6 Center for Environmental Health
7 2201 Broadway, Suite 302
8 Oakland, California 94612
9 rick@ceh.org

10 Mark Todzo
11 Lexington Law Group
12 503 Divisadero Street
13 San Francisco, CA 94117
14 mtodzo@lexlawgroup.com

15 8.2. Any Party may modify the person and address to whom the notice is to be sent by
16 sending the other Parties notice by first class and electronic mail.

17 **9. COURT APPROVAL**

18 9.1. This Consent Judgment shall become effective on the Effective Date, provided
19 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
20 Defendant shall support approval of such Motion.

21 9.2. If this Consent Judgment is not entered by the Court, it shall be of no force or
22 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
23 purpose.

24 **10. GOVERNING LAW AND CONSTRUCTION**

25 10.1. The terms and obligations arising from this Consent Judgment shall be construed
26 and enforced in accordance with the laws of the State of California.

27 **11. ENTIRE AGREEMENT**

28 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.

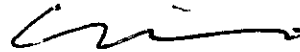
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IT IS SO STIPULATED:

Dated: Feb 20, 2014

CENTER FOR ENVIRONMENTAL HEALTH



CHARLIE PIZARRO

Printed Name

ASSOCIATE DIRECTOR

Title

Dated: _____, 2014

SHERMAG, INC.

Printed Name

Title

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

Dated: _____, 2014

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

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IT IS SO STIPULATED:

Dated: _____, 2014

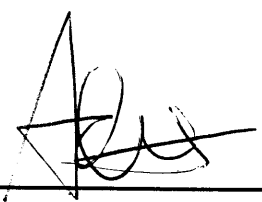
CENTER FOR ENVIRONMENTAL HEALTH

Printed Name

Title

Dated: 17-02, 2014

SHERMAG, INC.



ALEX ADIMANTI
Printed Name

PRESIDENT
Title

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

Dated: _____, 2014

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