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

Case No. RG-13707315

**[PROPOSED] CONSENT
JUDGMENT RE: ACOUSTICAL
SOLUTIONS, INC.**

1. INTRODUCTION

1.1. This Consent Judgment is entered into by Plaintiff Center for Environmental Health, a non-profit corporation (“CEH”), and Defendant Acoustical Solutions, 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. Acoustical Solutions, Inc., et al.*,

1 Alameda County Superior Court Case No. RG-13707315 (the “Action”). CEH and Defendant are
2 referred to collectively as the “Parties.”

3 1.2. On September 27, 2013, CEH served a “Notice of Violation” (the “Notice”)
4 relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition
5 65”) on Defendant, the California Attorney General, the District Attorneys of every County in the
6 State of California, and the City Attorneys for every City in State of California with a population
7 greater than 750,000. The Notice alleges violations of Proposition 65 with respect to the presence
8 of tris (1,3-dichloro-2-propyl) phosphate (“TDCPP”) in acoustic and soundproofing foam
9 manufactured, distributed, and/or sold by Defendant.

10 1.3. Defendant is a corporation that employs ten (10) or more persons and that
11 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
12 California. Defendant asserts that it no longer plans to distribute, sell, or offer for sale such
13 Covered Products in California.

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

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

6 **2. DEFINITIONS**

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

12 2.2. “Covered Products” means acoustic and/or soundproofing foam composed of or
13 containing polyurethane that is manufactured, distributed, and/or sold by Defendant in California.

14 2.3. “Effective Date” means the date on which the Court enters this Consent Judgment.

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

22 2.7. “Untreated Foam” means polyurethane foam that has not been Treated with any
23 Chemical Flame Retardant.

24 **3. INJUNCTIVE RELIEF**

25 3.1. Defendant shall comply with the following requirements to eliminate or minimize
26 exposures to TDCPP and other Chemical Flame Retardants arising from the use of Covered
27 Products in California:

1 3.1.1. **Reformulation of Covered Products.** As of the Effective Date,
2 Defendant shall not distribute, sell, or offer for sale in California any Covered Product that has
3 been Treated with any Chemical Flame Retardant and which has a Manufacture Date that is on or
4 later than the Effective Date. The Parties agree that Defendant may satisfy this Section 3.1.1 by
5 not distributing, selling, or offering for sale in California any Covered Products after the Effective
6 Date.

7 3.1.1.1. To ensure compliance with the reformulation provisions of
8 Section 3.1.1 should Defendant seek to distribute, sell, or offer for sale in California any Covered
9 Product after the Effective Date, Defendant shall directly or through its supply chain issue
10 specifications to its suppliers of Covered Products and/or polyurethane foam used in any Covered
11 Product requiring that such products and/or foam has not been Treated with any Chemical Flame
12 Retardant in accordance with the requirements of Section 3.1.1. Defendant shall obtain and
13 maintain written certification(s) from its suppliers of Covered Products and/or polyurethane foam
14 used in any Covered Product confirming that all such Covered Products and/or foam received by
15 Defendant for distribution in California after the Effective Date have not been Treated with any
16 Chemical Flame Retardant. Defendant shall not be deemed in violation of the requirements of
17 Section 3.1.1 for any Covered Product to the extent: (a) it has relied on a written certification
18 from its vendor that supplied a Covered Product and/or the polyurethane foam used in a Covered
19 Product that such product is made with only Untreated Foam, and/or, if such certification is not
20 relied on or has previously been demonstrated to be invalid, (b) it has obtained a test result from
21 an independent third party certified laboratory reporting that the Covered Product's polyurethane
22 foam is Untreated Foam.

23 3.1.2. **Interim Compliance.** Any Covered Product with a Manufacture Date that
24 is earlier than the Effective Date, that contains polyurethane foam which has been Treated with
25 any Listed Chemical Flame Retardant, and that is distributed, sold, or offered for sale by
26 Defendant in California after the Effective Date shall be accompanied by a Clear and Reasonable
27 Warning that complies with Section 3.1.4. The Parties agree that Defendant may satisfy this
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1 Section 3.1.2 by not distributing, selling, or offering for sale in California any Covered Products
2 after the Effective Date.

3 **3.1.3. Warnings for Products in the Stream of Commerce.** In an effort to
4 ensure that consumers receive clear and reasonable warnings in compliance with Proposition 65
5 for Covered Products that have not been reformulated pursuant to Section 3.1.1 or labeled in
6 accordance with Section 3.1.2, within 30 days following the Effective Date, Defendant shall
7 provide warning materials by certified mail to each of its California retailers or distributors to
8 whom Defendant reasonably believes it sold Covered Products that contained or may have
9 contained any Listed Chemical Flame Retardant on or after October 31, 2011. Such warning
10 materials shall include a reasonably sufficient number of stickers and/or labels in order to permit
11 the retailer or distributor to place a warning sticker or label on each Covered Product such
12 customer has purchased from Defendant, and is still in the retailer's or distributor's possession
13 and has not yet been installed or sold to the ultimate consumer. The stickers and/or labels shall
14 contain the warning language set forth in Section 3.1.4. The warning materials shall also include
15 a letter of instruction for the placement of the stickers and/or labels, and a Notice and
16 Acknowledgment postcard.

17 **3.1.4. Proposition 65 Warnings.** A Clear and Reasonable Warning under this
18 Consent Judgment shall state:

19 WARNING: This product contains a chemical known to the State of California to
20 cause cancer.

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

4 **4. PENALTIES AND PAYMENT**

5 4.1. Defendant shall pay to CEH the total sum of twenty two thousand and five
6 hundred dollars (\$22,500), which shall be allocated as follows:

7 4.1.1. \$2,475 shall constitute a penalty pursuant to Cal. Health & Safety Code §
8 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health & Safety Code
9 § 25249.12.

10 4.1.2. \$3,375 shall constitute a payment in lieu of civil penalty pursuant to Cal.
11 Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such funds to
12 continue its work of educating and protecting the public from exposures to toxic chemicals,
13 including chemical flame retardants. CEH may also use a portion of such funds to monitor
14 compliance with this Consent Judgment and to purchase and test Defendant's products to confirm
15 compliance. In addition, as part of its Community Environmental Action and Justice Fund, CEH
16 will use four percent (4%) of such funds to award grants to grassroots environmental justice
17 groups working to educate and protect the public from exposures to toxic chemicals. The method
18 of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

19 4.1.3. \$16,650 shall constitute reimbursement of CEH's reasonable attorneys'
20 fees and costs.

21 4.1.4. The payments required under Sections 4.1.1-4.1.3 shall be made in three
22 separate checks, all to be delivered within 10 days following the Effective Date. The payments
23 required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable CEH. The payment
24 required pursuant to Section 4.1.3 shall be made payable to Lexington Law Group. All checks
25 shall be delivered to Mark Todzo at Lexington Law Group at the address set forth in Section 8.
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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 in
8 good faith, including providing Defendant a reasonable opportunity of at least thirty (30) days to
9 cure any alleged violation. Should such attempts at informal resolution fail, CEH may file its
10 enforcement motion or application. The prevailing party on any motion to enforce this Consent
11 Judgment shall be entitled to recover its reasonable attorney’s fees and costs incurred as a result
12 of such motion or 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 Listed Chemical Flame Retardants in
26 the Covered Products manufactured, distributed, or sold by Defendant prior to the Effective Date.

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1 7.2. CEH, for itself, waives and forever discharges and provides a release herein which
2 shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of
3 action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities, and
4 demands of Plaintiff of any nature, character, or kind, whether known or unknown, suspected or
5 unsuspected, against Defendant and Downstream Defendant Releasees arising out of the alleged
6 failure to warn about exposure to Listed Chemical Flame Retardants in the Covered Products,
7 manufactured, imported, distributed, or sold by Defendant prior to the Effective Date. The
8 release provision in this Section 7.2 shall not apply to any motion or application to enforce the
9 terms and conditions contained in this Consent Judgment, as allowed by Section 5 of this Consent
10 Judgment.

11 7.3. Compliance with the terms of this Consent Judgment by Defendant and the
12 Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Defendant
13 and Downstream Defendant Releasees with respect to any alleged failure to warn about any
14 Listed Chemical Flame Retardants in Covered Products manufactured, distributed, or sold by
15 Defendant after the Effective Date.

16 **8. PROVISION OF NOTICE**

17 8.1. When any Party is entitled to receive any notice under this Consent Judgment, the
18 notice shall be sent by first class and electronic mail as follows:

19 8.1.1. **Notices to Defendant.** The persons for Defendant to receive notices
20 pursuant to this Consent Judgment shall be:

21 Michael Binns
22 Acoustical Solutions, Inc.
23 2420 Grenoble Road
24 Richmond, Virginia 23294
25 mb@acousticalsolutions.com

26 David Ingersoll
27 Acoustical Solutions, Inc.
28 2420 Grenoble Road
 Richmond, Virginia 23294
 di@acousticalsolutions.com

1 Zachary Cohen
2 Thompson McMullan PC
3 100 Shockoe Slip, Third Floor
4 Richmond, Virginia 23219
5 zcohen@t-mlaw.com

6 8.1.2. **Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
7 this Consent Judgment shall be:

8 Rick Franco
9 Center for Environmental Health
10 2201 Broadway, Suite 302
11 Oakland, California 94612
12 rick@ceh.org

13 Mark Todzo
14 Lexington Law Group
15 503 Divisadero Street
16 San Francisco, California 94117
17 mtodzo@lexlawgroup.com

18 8.2. Any Party may modify the person and address to whom the notice is to be sent by
19 sending the other Parties notice by first class and electronic mail.

20 **9. COURT APPROVAL**

21 9.1. This Consent Judgment shall become effective on the Effective Date, provided
22 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
23 Defendant shall support approval of such Motion.

24 9.2. If this Consent Judgment is not entered by the Court, it shall be of no force or
25 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
26 purpose.

27 **10. GOVERNING LAW AND CONSTRUCTION**

28 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.

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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.

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

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

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

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

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.

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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: 4/9, 2014

CENTER FOR ENVIRONMENTAL HEALTH

C. Pizano

Charles Pizano

Printed Name

Associate Director

Title

Dated: 3/21, 2014

ACOUSTICAL SOLUTIONS, INC.

Michael Binns

Michael Binns

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

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IT IS SO STIPULATED:

Dated: _____, 2014 **CENTER FOR ENVIRONMENTAL HEALTH**

Printed Name

Title

Dated: 3/21, 2014 **ACOUSTICAL SOLUTIONS, INC.**

Michael Binns

Michael Binns

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