

1 Mark N. Todzo, State Bar No. 168389
Joseph Mann, State Bar No. 207968
2 503 Divisadero Street
San Francisco, CA 94117
3 Telephone: (415) 913-7800
Facsimile: (415) 759-4112
4 mtodzo@lexlawgroup.com
jmann@lexlawgroup.com

5 Rick Franco, State Bar No. 170970
6 Center for Environmental Health
2201 Broadway, Suite 302
7 Oakland, California 94612
Telephone: (510) 655-3900
8 Facsimile: (510) 655-9100
rick@ceh.org

9 Attorneys for Plaintiff
10 CENTER FOR ENVIRONMENTAL HEALTH

11
12 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF ALAMEDA
14

15
16 CENTER FOR ENVIRONMENTAL
HEALTH, a non-profit corporation,

17 Plaintiff,

18 v.

19
20 AMERIWOOD INDUSTRIES, INC., *et al.*,

21 Defendants.
22

Case No. RG-13673582

**[PROPOSED] CONSENT
JUDGMENT RE: COMFORT
RESEARCH, LLC**

23 **1. INTRODUCTION**

24 1.1. This Consent Judgment is entered into by Plaintiff Center for Environmental
25 Health, a non-profit corporation (“CEH”), and Defendant Comfort Research, LLC (“Defendant”)
26 to settle claims asserted by CEH against Defendant as set forth in the operative Complaint in the
27 matter *Center for Environmental Health v. Ameriwood Industries, Inc., et al.*, Alameda County
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1 Superior Court Case No. RG-13673582 (the “Action”). CEH and Defendant are referred to
2 collectively as the “Parties.”

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

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.

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 alleged therein. By execution of this Consent Judgment and agreeing to
23 comply with its terms, the Parties do not admit any fact, conclusion of law, or violation of law,
24 nor shall compliance with the Consent Judgment constitute or be construed as an admission by
25 the Parties of any fact, conclusion of law, or violation of law. Defendant denies the material,
26 factual, and legal allegations in the Notice and Complaint and expressly denies any wrongdoing
27 whatsoever. Except as specifically provided herein, nothing in this Consent Judgment shall
28 prejudice, waive, or impair any right, remedy, argument, or defense either Party may have in this

1 or any other pending or future legal proceedings. This Consent Judgment is the product of
2 negotiation and compromise and is accepted by the Parties solely for purposes of settling,
3 compromising, and resolving issues disputed in this Action.

4 **2. DEFINITIONS**

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

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

12 2.3. "Effective Date" means the date on which the Court enters this Consent Judgment.

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

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

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

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

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

1 2.9. “Treated” means the addition or application of any Chemical Flame Retardant to
2 any polyurethane foam, cushioning, or padding used as filling material in any 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 and other
8 Listed Chemical Flame Retardants arising from the use of the Covered Products:

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

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

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

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

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

21 WARNING: This product contains tris(1,3-dichloro-2-propyl) phosphate
22 (“TDCPP”) [and/or tris(2-chloroethyl) phosphate (“TCEP”) and/or tris(2,3-
23 dibromopropyl) phosphate (“TDBPP”)], a chemical[s] known to the State of
24 California to cause cancer.

25 A Clear and Reasonable Warning shall not be preceded by, surrounded by, or include any
26 additional words or phrases that contradict, obfuscate, or otherwise undermine the warning. The
27 warning statement shall be prominently displayed on the Covered Product or the packaging of the
28 Covered Product with such conspicuousness, as compared with other words, statements, or
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.

5 3.1.5 Nothing in this Section 3.1 shall limit Defendant's ability to amend the language
6 of the Clear and Reasonable Warning to include other chemicals and/or to warn of potential
7 reproductive harm, as may become required by Proposition 65.

8 3.1.6 Defendant is under no obligation to continue providing a warning under this
9 Section 3.1 for a Listed Chemical Flame Retardant if at any time that Listed Chemical Flame
10 Retardant is removed from the list of chemicals published pursuant to Health & Safety Code
11 Section 25249.8.

12 3.2. **Optional Additional Reformulation – Use of Untreated Foam.** In order for
13 Defendant to be eligible for a waiver of the additional penalty/payment in lieu of penalty
14 payments set forth in Section 4.1.5 below, Defendant shall undertake the additional actions to
15 reduce or eliminate the use of Chemical Flame Retardants set forth herein. As of the TB117-2013
16 Effective Date, Defendant shall not manufacture, or distribute, sell, or offer for sale in California
17 any Covered Product that has been Treated with any Chemical Flame Retardant. In order to
18 avoid the additional payments, Defendant must provide written certification to CEH of its use of
19 only Untreated Foam within 30 days following the TB 117-2013 Effective Date.

20 3.2.1. **Specification To and Certification From Suppliers.** To ensure
21 compliance with the reformulation provisions of Section 3.2, to the extent that Defendant opts for
22 additional reformulation, it shall directly or through its supply chain issue specifications to its
23 suppliers of polyurethane foam, cushioning, or padding used as filling material in any Covered
24 Product requiring that such components shall use only Untreated Foam. Defendant shall not be
25 deemed in violation of the requirements of Section 3.2 for any Covered Product to the extent: (a)
26 it has relied on a written certification from its vendor that supplied a Covered Product or the
27 polyurethane foam, cushioning, or padding used as filling material in the Covered Product is
28 made with only Untreated Foam, and/or (b) has obtained a test result from a certified laboratory

1 reporting that the Covered Product's polyurethane foam, cushioning, or padding used as filling
2 material has been made with Untreated Foam. Defendant shall obtain and maintain written
3 certification(s) from its suppliers of polyurethane foam, cushioning, or padding confirming that
4 all such foam received by Defendant for distribution in California is Untreated Foam.

5 **4. PENALTIES AND PAYMENT**

6 4.1. Defendant shall initially pay to CEH the total sum of thirty thousand dollars
7 (\$30,000), which shall be allocated as follows:

8 4.1.1. \$3,300 shall constitute a penalty pursuant to Cal. Health & Safety Code §
9 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health & Safety Code
10 § 25249.12.

11 4.1.2. \$4,500 shall constitute a payment in lieu of civil penalty pursuant to Cal.
12 Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such funds to
13 continue its work of educating and protecting the public from exposures to toxic chemicals,
14 including chemical flame retardants. CEH may also use a portion of such funds to monitor
15 compliance with this Consent Judgment and to purchase and test Defendant's products to confirm
16 compliance. In addition, as part of its Community Environmental Action and Justice Fund, CEH
17 will use four percent (4%) of such funds to award grants to grassroots environmental justice
18 groups working to educate and protect the public from exposures to toxic chemicals. The method
19 of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

20 4.1.3. \$22,200 shall constitute reimbursement of CEH's reasonable attorneys'
21 fees and costs.

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

27 4.1.5. In the event that Defendant elects not to certify its compliance with Section
28 3.2 in accordance with that Section, within 30 days following the TB 117-2013 Effective Date,

1 Defendant must make an additional payment of \$12,000, which shall be paid in two separate
2 checks, each payable to CEH, to be allocated as follows:

3 4.1.5.1. \$4,800 shall constitute a penalty pursuant to Cal. Health &
4 Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health
5 & Safety Code § 25249.12.

6 4.1.5.2. \$7,200 shall constitute a payment in lieu of civil penalty
7 pursuant to Cal. Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such
8 funds to continue its work of educating and protecting the public from exposures to toxic
9 chemicals, including chemical flame retardants. CEH may also use a portion of such funds to
10 monitor compliance with this Consent Judgment and to purchase and test Defendant's products to
11 confirm compliance. In addition, as part of its Community Environmental Action and Justice
12 Fund, CEH will use four percent (4%) of such funds to award grants to grassroots environmental
13 justice groups working to educate and protect the public from exposures to toxic chemicals. The
14 method of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

15 **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

1 **6. MODIFICATION OF CONSENT JUDGMENT**

2 6.1. This Consent Judgment may only be modified by written agreement of CEH and
3 Defendant, or upon motion of CEH or Defendant as provided by law.

4 **7. CLAIMS COVERED AND RELEASE**

5 7.1. This Consent Judgment is a full, final, and binding resolution between CEH acting
6 in the public interest and Defendant and Defendant’s parents, officers, directors, shareholders,
7 divisions, subdivisions, subsidiaries, and their respective successors and assigns (“Defendant
8 Releasees”) and all entities to whom they distribute or sell or have distributed or sold Covered
9 Products including, but not limited to, distributors, wholesalers, customers, retailers, franchisees,
10 cooperative members, and licensees, including but not limited to Wal-Mart Stores, Inc. and its
11 affiliates and subsidiaries (“Downstream Defendant Releasees”), of all claims alleged in the
12 Complaint in this Action arising from any violation of Proposition 65 that have been or could
13 have been asserted in the public interest against Defendant and Downstream Defendant
14 Releasees, regarding the failure to warn about exposure to TDCPP in the Covered Products
15 manufactured, distributed, or sold by Defendant prior to the Effective Date.

16 7.2. CEH, for itself releases, waives, and forever discharges any and all claims which
17 were or could have been raised in the Complaint based on the facts alleged in the Notice and/or
18 Complaint with respect to Covered Products manufactured, distributed, and/or sold by Defendant
19 against Defendant and Downstream Defendant Releasees arising from any violation of
20 Proposition 65 that have been or could have been asserted regarding the failure to warn about
21 exposure to TDCPP in connection with Covered Products manufactured, distributed, or sold by
22 Defendant prior to the Effective Date.

23 7.3. Compliance with the terms of this Consent Judgment by Defendant and the
24 Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Defendant
25 and Downstream Defendant Releasees with respect to any alleged failure to warn about any
26 Listed Chemical Flame Retardants in Covered Products manufactured, distributed, or sold by
27 Defendant after the Effective Date.

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1 **8. PROVISION OF NOTICE**

2 8.1. When any Party is entitled to receive any notice under this Consent Judgment, the
3 notice shall be sent by first class and electronic mail as follows:

4 8.1.1. **Notices to Defendant.** The persons for Defendant to receive notices
5 pursuant to this Consent Judgment shall be:

6 Chip George
7 Comfort Research LLC
8 1719 Elizabeth Avenue NW
9 Grand Rapids, Michigan 49504
10 chip@comfortresearch.com

11 S. Lee Johnson, Esq.
12 Honigman Miller Schwartz and Cohn LLP
13 2290 First National Building
14 Detroit, Michigan 48226
15 SLJohnson@honigman.com

16 8.1.2. **Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
17 this Consent Judgment shall be:

18 Rick Franco
19 Center for Environmental Health
20 2201 Broadway, Suite 302
21 Oakland, California 94612
22 rick@ceh.org

23 Mark Todzo
24 Lexington Law Group
25 503 Divisadero Street
26 San Francisco, California 94117
27 mtodzo@lexlawgroup.com

28 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.

1 9.2. If this Consent Judgment is not entered by the Court, it shall be of no force or
2 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
3 purpose.

4 **10. GOVERNING LAW AND CONSTRUCTION**

5 10.1. The terms and obligations arising from this Consent Judgment shall be construed
6 and enforced in accordance with the laws of the State of California.

7 **11. ENTIRE AGREEMENT**

8 11.1. This Consent Judgment contains the sole and entire agreement and understanding
9 of CEH and Defendant with respect to the entire subject matter hereof, and any and all prior
10 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
11 merged herein and therein.

12 11.2. There are no warranties, representations, or other agreements between CEH and
13 Defendant except as expressly set forth herein. No representations, oral or otherwise, express or
14 implied, other than those specifically referred to in this Consent Judgment have been made by any
15 Party hereto.

16 11.3. No other agreements not specifically contained or referenced herein, oral or
17 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
18 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
19 any of the Parties hereto only to the extent that they are expressly incorporated herein.

20 11.4. No supplementation, modification, waiver, or termination of this Consent
21 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

22 11.5. No waiver of any of the provisions of this Consent Judgment shall be deemed or
23 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
24 such waiver constitute a continuing waiver.

25 **12. RETENTION OF JURISDICTION**

26 12.1. This Court shall retain jurisdiction of this matter to implement or modify the
27 Consent Judgment.

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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.

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: April 9, 2014 **CENTER FOR ENVIRONMENTAL HEALTH**



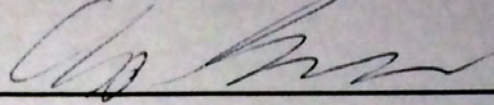
Corinne Pizzano
Printed Name

Associate Director
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Dated: March 21, 2014

COMFORT RESEARCH, LLC



Chip George
Printed Name

CEO
Title

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

Dated: _____, 2014

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