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10 CENTER FOR ENVIRONMENTAL HEALTH

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

CENTER FOR ENVIRONMENTAL
HEALTH, a non-profit corporation,

Plaintiff,

v.

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

Defendants.

Case No. RG-13707315

**[PROPOSED] CONSENT
JUDGMENT RE: INDUSTRIAL
NOISE CONTROL, INC.**

1. INTRODUCTION

1.1. This Consent Judgment is entered into by Plaintiff Center for Environmental Health, a non-profit corporation (“CEH”), and Defendant Industrial Noise Control, 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.*, Alameda County Superior Court Case No. RG-13707315 (the “Action”). CEH and Defendant are referred to collectively as the “Parties.”

1.2. On June 26, 2014, CEH served a “Notice of Violation” (the “Notice”) relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition 65”) on

1 Defendant, the California Attorney General, the District Attorneys of every County in the State of
2 California, and the City Attorneys for every City in State of California with a population greater
3 than 750,000. The Notice alleges violations of Proposition 65 with respect to the presence of tris
4 (1,3-dichloro-2-propyl) phosphate (“TDCPP”) in acoustic and soundproofing foam manufactured,
5 distributed, and/or sold by Defendant.

6 1.3. Defendant is a corporation that employs ten (10) or more persons and that
7 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
8 California.

9 1.4. For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
10 Court has jurisdiction over the allegations of violations contained in the Notice and Complaint
11 and personal jurisdiction over Defendant as to the acts alleged in the Complaint; (ii) venue is
12 proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this Consent
13 Judgment as a full and final resolution of all claims which were or could have been raised in the
14 Complaint based on the facts alleged in the Notice and Complaint with respect to Covered
15 Products manufactured, distributed, and/or sold by Defendant.

16 1.5. The Parties enter into this Consent Judgment as a full and final settlement of all
17 claims which were or could have been raised in the Complaint arising out of the facts or conduct
18 related to Defendant alleged therein. By execution of this Consent Judgment and agreeing to
19 comply with its terms, the Parties do not admit any fact, conclusion of law, or violation of law,
20 nor shall compliance with the Consent Judgment constitute or be construed as an admission by
21 the Parties of any fact, conclusion of law, or violation of law. Defendant denies the material,
22 factual, and legal allegations in the Notice and Complaint and expressly denies any wrongdoing
23 whatsoever. Except as specifically provided herein, nothing in this Consent Judgment shall
24 prejudice, waive, or impair any right, remedy, argument, or defense either Party may have in this
25 or any other pending or future legal proceedings. This Consent Judgment is the product of
26 negotiation and compromise and is accepted by the Parties solely for purposes of settling,
27 compromising, and resolving issues disputed in this Action.

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1 **2. DEFINITIONS**

2 2.1. “Chemical Flame Retardant” means any halogenated or phosphorous-based
3 chemical compound used for the purpose of resisting or retarding the spread of fire. “Chemical
4 Flame Retardant” does not include (a) any chemical that has been rated as a Benchmark 4
5 chemical pursuant to Clean Production Action’s GreenScreen ([http://www.cleanproduction.org/
6 Green.Greenscreen.php](http://www.cleanproduction.org/Green.Greenscreen.php)); or (b) ammonium polyphosphate.

7 2.2. “Covered Products” means acoustic and/or soundproofing foam manufactured,
8 distributed, and/or sold by Defendant in California.

9 2.3. “Effective Date” means the date on which the Court enters this Consent Judgment
10 or January 1, 2015, whichever is later.

11 2.4. “Listed Chemical Flame Retardants” means Tris(1,3-dichloro-2-propyl) phosphate
12 (“TDCPP”), Tris(2-chloroethyl) phosphate (“TCEP”), and Tris(2,3-dibromopropyl)phosphate
13 (“TDBPP”).

14 2.5. “Manufacture Date” means the date the Covered Product was manufactured and
15 as may be indicated on a tag attached to the Covered Product.

16 2.6. “Treated” means the addition or application of any Chemical Flame Retardant to
17 any polyurethane foam used in any Covered Product.

18 2.7. “Untreated Foam” means polyurethane foam that has not been Treated with any
19 Chemical Flame Retardant.

20 **3. INJUNCTIVE RELIEF**

21 3.1. **Reformulation of Covered Products.** Defendant shall comply with the following
22 requirements to reformulate the Covered Products to eliminate exposures to TDCPP arising from
23 the use of the Covered Products:

24 3.1.1. **Listed Chemical Flame Retardants – All 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 Retardant and which has a
27 Manufacture Date that is on or later than the Effective Date.

1 3.1.1.1. To ensure compliance with the reformulation provisions of this
2 Section, following the Effective Date, Defendant shall directly or through its supply chain issue
3 specifications to its suppliers of Covered Products and/or polyurethane foam used in any Covered
4 Product requiring that such products and/or foam has not been any Treated with Listed Chemical
5 Flame Retardant in accordance with the requirements of Section 3.1.1. Defendant shall obtain
6 and maintain written certification(s) from its suppliers confirming that all such Covered Products
7 and/or foam received by Defendant for distribution in California have not been Treated with any
8 Listed Chemical Flame Retardant. Defendant shall not be deemed in violation of the
9 requirements of Section 3.1.1 for any Covered Product to the extent: (a) it has relied on a written
10 certification from its vendor that supplied a Covered Product that such Covered Product is made
11 with only Untreated Foam, and/or, if such certification is not relied on or has previously been
12 demonstrated to be invalid, (b) it has obtained a test result from an independent third party
13 certified laboratory reporting that the Covered Product has been made with no Listed Chemical
14 Flame Retardants.

15 3.1.2. **Interim Compliance – All Covered Products.** Any Covered Products in
16 which the polyurethane foam has been Treated with any Listed Chemical Flame Retardant and
17 which is distributed, sold, or offered for sale by Defendant in California after the Effective Date
18 shall be accompanied by a Clear and Reasonable Warning that complies with Section 3.1.4.

19 3.1.3. **Warnings for Products in the Stream of Commerce.** In an effort to
20 ensure that consumers receive clear and reasonable warnings in compliance with Proposition 65
21 for Covered Products that have not been reformulated pursuant to Section 3.1.1 or labeled in
22 accordance with Section 3.1.2, within 30 days following the Effective Date, Defendant shall
23 provide warning materials by certified mail to each of its California retailers or distributors to
24 whom Defendant reasonably believes it sold Covered Products that contained or may have
25 contained TDCPP on or after October 31, 2011. Such warning materials shall include a
26 reasonably sufficient number of stickers and/or labels in order to permit the retailer or distributor
27 to place a warning sticker or label on each Covered Product such customer has purchased from
28 Defendant. The stickers and/or labels shall contain the warning language set forth in Section

1 3.1.4. The warning materials shall also include a letter of instruction for the placement of the
2 stickers and/or labels, and a Notice and Acknowledgment postcard.

3 3.1.4. **Proposition 65 Warnings.** A Clear and Reasonable Warning under this
4 Consent Judgment shall state:

5 WARNING: This product contains chemicals, including tris(1,3-dichloro-2-
6 propyl) phosphate (“TDCPP”) and/or TCEP and/or TDBPP, known to the State of
7 California to cause cancer.

8 A Clear and Reasonable Warning shall not be preceded by, surrounded by, or include any
9 additional words or phrases that contradict, obfuscate, or otherwise undermine the warning. The
10 warning statement shall be prominently displayed on the Covered Product or the packaging of the
11 Covered Product with such conspicuousness, as compared with other words, statements, or
12 designs as to render it likely to be read and understood by an ordinary individual prior to sale.
13 For internet, catalog, or any other sale where the consumer is not physically present and cannot
14 see a warning displayed on the Covered Product or the packaging of the Covered Product prior to
15 purchase or payment, the warning statement shall be displayed in such a manner that it is likely to
16 be read and understood prior to the authorization of or actual payment.

17 3.2. **Optional Additional Reformulation – Use of Untreated Foam.** In order for
18 Defendant to be eligible for a waiver of the additional penalty/payment in lieu of penalty
19 payments set forth in Section 4.1.5 below, Defendant shall undertake the additional actions to
20 reduce or eliminate the use of Chemical Flame Retardants set forth herein. As of 120 days
21 following the Effective Date, Defendant shall not manufacture or distribute, sell, or offer for sale
22 in California any Covered Product that has been Treated with any Chemical Flame Retardant. In
23 order to avoid the additional payments, Defendant must provide written certification to CEH of its
24 use of only Untreated Foam within 125 days following the Effective Date.

25 3.2.1. **Specification To and Certification From Suppliers.** To ensure
26 compliance with the provisions of this Section 3.2, to the extent that Defendant opts for additional
27 reformulation, it shall directly or through its supply chain issue specifications to its suppliers of
28 Covered Products and/or polyurethane foam used in any Covered Product requiring that such

1 products and/or foam shall use only Untreated Foam. Defendant shall not be deemed in violation
2 of the requirements of this Section 3.2 for any Covered Product to the extent: (a) it has relied on
3 a written certification from its vendor that supplied a Covered Product and/or the polyurethane
4 foam used in a Covered Product that such product is made with only Untreated Foam, and/or (b)
5 has obtained a test result from a certified laboratory reporting that the Covered Product's
6 polyurethane foam has been made with Untreated Foam. Defendant shall obtain and maintain
7 written certification(s) from its suppliers confirming that all such Covered Products and/or foam
8 received by Defendant for distribution in California is Untreated Foam.

9 **4. PENALTIES AND PAYMENT**

10 4.1. Defendant shall initially pay to CEH the total sum of \$25,000, which shall be
11 allocated as follows:

12 4.1.1. \$2,750 shall constitute a penalty pursuant to Cal. Health & Safety Code §
13 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health & Safety Code
14 § 25249.12.

15 4.1.2. \$3,750 shall constitute a payment in lieu of civil penalty pursuant to Cal.
16 Health & Safety Code § 25249.7(b) and 11 C.C.R. § 3202(b). CEH will use such funds to
17 continue its work of educating and protecting the public from exposures to toxic chemicals,
18 including chemical flame retardants. CEH may also use a portion of such funds to monitor
19 compliance with this Consent Judgment and to purchase and test Defendant's products to confirm
20 compliance. In addition, as part of its Community Environmental Action and Justice Fund, CEH
21 will use four percent (4%) of such funds to award grants to grassroots environmental justice
22 groups working to educate and protect the public from exposures to toxic chemicals. The method
23 of selection of such groups can be found at the CEH website at www.ceh.org/justicefund.

24 4.1.3. \$18,500 shall constitute reimbursement of CEH's reasonable attorneys'
25 fees and costs.

26 4.1.4. The payments required under Sections 4.1.1-4.1.3 shall be made in three
27 separate checks, all to be delivered within 10 days following the Effective Date. The payments
28 required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable CEH. The payment

1 required pursuant to Section 4.1.3 shall be made payable to Lexington Law Group. All checks
2 shall be delivered to Mark Todzo at Lexington Law Group at the address set forth in Section 8.

3 4.1.5. In the event that Defendant elects not to certify its compliance with Section
4 3.2 in accordance with that Section, within 150 days following the Effective Date, Defendant
5 must make an additional payment of \$10,000, which shall be paid in two separate checks, each
6 payable to CEH, to be allocated as follows:

7 4.1.5.1. \$4,000 shall constitute a penalty pursuant to Cal. Health &
8 Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with Cal. Health
9 & Safety Code § 25249.12.

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

19 **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

1 shall be entitled to its reasonable attorney's fees and costs incurred as a result of such motion or
2 application. This Consent Judgment may only be enforced by the Parties.

3 **6. MODIFICATION OF CONSENT JUDGMENT**

4 6.1. This Consent Judgment may only be modified by written agreement of CEH and
5 Defendant, or upon motion of CEH or Defendant as provided by law.

6 **7. CLAIMS COVERED AND RELEASE**

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

18 7.2. CEH, for itself releases, waives, and forever discharges any and all claims alleged
19 in the Complaint against Defendant and Downstream Defendant Releasees arising from any
20 violation of Proposition 65 that have been or could have been asserted regarding the failure to
21 warn about exposure to TDCPP in connection with Covered Products manufactured, distributed,
22 or sold by 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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8. PROVISION OF NOTICE

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

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

President
Industrial Noise Control, Inc.
401 Airport Road
North Aurora, IL 60542
www.inc-noise.com

with a copy to:

David R. Gabor
Weintraub Tobin Chediak Coleman Grodin Law Corporation
9665 Wilshire Blvd, Suite 900
Beverly Hills, CA 90212
DGabor@weintraub.com

8.1.2. **Notices to Plaintiff.** The person 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.

1 **10. GOVERNING LAW AND CONSTRUCTION**

2 10.1. The terms and obligations arising from this Consent Judgment shall be construed
3 and enforced in accordance with the laws of the State of California.

4 **11. ENTIRE AGREEMENT**

5 11.1. This Consent Judgment contains the sole and entire agreement and understanding
6 of CEH and Defendant with respect to the entire subject matter hereof, and any and all prior
7 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
8 merged herein.

9 11.2. There are no warranties, representations, or other agreements between CEH and
10 Defendant except as expressly set forth herein. No representations, oral or otherwise, express or
11 implied, other than those specifically referred to in this Consent Judgment have been made by any
12 Party hereto.

13 11.3. No other agreements not specifically contained or referenced herein, oral or
14 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
15 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
16 any of the Parties hereto only to the extent that they are expressly incorporated herein.

17 11.4. No supplementation, modification, waiver, or termination of this Consent
18 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

19 11.5. No waiver of any of the provisions of this Consent Judgment shall be deemed or
20 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
21 such waiver constitute a continuing waiver.

22 **12. RETENTION OF JURISDICTION**

23 12.1. This Court shall retain jurisdiction of this matter to implement or modify the
24 Consent Judgment.

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

26 13.1. Each signatory to this Consent Judgment certifies that he or she is fully authorized
27 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
28 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: 10/31, 2014

CENTER FOR ENVIRONMENTAL HEALTH



CARMELO PIZANO


Printed Name

ASSOCIATE DIRECTOR

Title

Dated: OCTOBER 29, 2014

INDUSTRIAL NOISE CONTROL, INC.



MARK RUBINO

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