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CENTER FOR ENVIRONMENTAL HEALTH

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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA

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14 CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 15-753967
a non-profit corporation,)
15) **[PROPOSED] CONSENT**
Plaintiff,) **JUDGMENT AS TO UNITED**
16) **MEDICAL DEVICES, LLC**
vs.)
17)
18 UNITED MEDICAL DEVICES, LLC; and)
DOES 1 through 200, inclusive,)
19)
Defendants.)
20)

21
22 **1. INTRODUCTION**

23 **1.1** The parties to this Consent Judgment (“Parties”) are the Center for
24 Environmental Health (“CEH”) and defendant United Medical Devices, LLC (“Settling
25 Defendant”). CEH and Settling Defendant are referred to collectively as the “Parties.”
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1 **1.2** Settling Defendant is a corporation that employs ten (10) or more persons and
2 that manufactures, distributes, and/or sells condoms that contain n-nitrosodiethylamine
3 (“NDEA”) in the State of California or has done so in the past.

4 **1.3** On October 6, 2014, CEH served a 60-Day Notice of Violation under
5 Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
6 & Safety Code § 25249.5, *et seq.*) (“Notice”) on Settling Defendant, the California Attorney
7 General, the District Attorneys of every County in the State of California, and the City Attorneys
8 for every City in the State of California with a population greater than 750,000. The Notice
9 alleges violations of Proposition 65 with respect to the presence of NDEA in condoms that are
10 manufactured, distributed, and/or sold by Settling Defendant.

11 **1.4** On January 8, 2015, CEH filed the above-captioned action in the Superior
12 Court of California for Alameda County, naming Settling Defendant as a defendant in this action.
13 On April 20, 2015, Settling Defendant filed its Answer denying the allegation in the Complaint
14 and it asserted numerous affirmative defenses.

15 **1.5** For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
16 Court has jurisdiction over the allegations of violations contained in the operative Complaint in
17 the above-captioned action (“Complaint”) and personal jurisdiction over Settling Defendant as to
18 the acts alleged in the Complaint; (ii) venue is proper in the County of Alameda; and (iii) this
19 Court has jurisdiction to enter this Consent Judgment.

20 **1.6** Nothing in this Consent Judgment is or shall be construed as an admission by
21 the Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall compliance
22 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
23 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
24 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
25 other legal proceeding. This Consent Judgment is the product of negotiation and compromise and
26 is accepted by the Parties for purposes of settling, compromising, and resolving issues disputed in
27 this action.
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1 **2. DEFINITIONS**

2 **2.1** “Covered Products” means condoms.

3 **2.2** “Effective Date” means the date on which this Consent Judgment is entered by
4 the Court.

5 **3. INJUNCTIVE RELIEF**

6 **3.1 Reformulation of Covered Products.** As of the Effective Date, Settling
7 Defendant shall not manufacture, distribute, sell, or offer for sale any Covered Product that
8 contains NDEA in excess of 10 parts per billion (“ppb”) and that will be sold or offered for sale to
9 California consumers.

10 **3.2 Specification to and Certification from Suppliers.** No more than thirty (30)
11 days after the Effective Date, Settling Defendant shall issue specifications to its suppliers of
12 Covered Products requiring that Covered Products not contain NDEA in excess of 10 ppb, and
13 shall instruct each supplier to use reasonable efforts to eliminate Covered Products containing
14 NDEA on a nationwide basis. Settling Defendant shall obtain and maintain written certification(s)
15 from its suppliers of Covered Products confirming that all such Covered Products received by
16 Settling Defendant for distribution in California do not contain NDEA in excess of 10 ppb.
17 Settling Defendant shall not be deemed in violation of the requirements of Section 3.1 for any
18 Covered Product to the extent: (a) it has relied on a written certification from its vendor that
19 supplied a Covered Product that such Covered Product does not contain NDEA in excess of 10
20 ppb and such certification has not previously been demonstrated to be invalid, or (b) it has
21 obtained a test result from an independent third party certified laboratory reporting that the
22 Covered Product does not contain NDEA in excess of 10 ppb.

23 **3.3 Action Regarding Specific Products.**

24 **3.3.1** On or before the Effective Date, Settling Defendant shall cease selling the
25 Playboy Premium Latex Condom, Lubricated, SKU No. 8-57784-00205-4 (the “Section 3.3
26 Product”). On or before the Effective Date, Settling Defendant shall also: (i) cease shipping the
27 Section 3.3 Product to any of its stores and/or customers that resell the Section 3.3 Product in
28 California; and (ii) send instructions to its stores and/or customers that resell the Section 3.3

1 Product in California instructing them either to: (a) return all the Section 3.3 Product to Settling
2 Defendant for destruction, or (b) directly destroy the Section 3.3 Product.

3 **3.3.2** Any destruction of the Section 3.3 Product shall be in compliance with all
4 applicable laws.

5 **3.3.3** Within sixty (60) days of the Effective Date, Settling Defendant shall
6 provide CEH with written certification from Settling Defendant confirming compliance with the
7 requirements of this Section 3.3.

8 **4. ENFORCEMENT**

9 **4.1** CEH may, by motion or application for an order to show cause before the
10 Superior Court of Alameda County, enforce the terms and conditions contained in this Consent
11 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3
12 above, CEH shall provide Settling Defendant with a Notice of Violation and a copy of any test
13 results which purportedly support CEH's Notice of Violation. The Parties shall then meet and
14 confer regarding the basis for CEH's anticipated motion or application in an attempt to resolve it
15 informally, including providing Settling Defendant a reasonable opportunity of at least thirty (30)
16 days to cure any alleged violation. Should such attempts at informal resolution fail, CEH may
17 file its enforcement motion or application. This Consent Judgment may only be enforced by the
18 Parties.

19 **5. PAYMENTS**

20 **5.1 Payments by Settling Defendant.** Within seven (7) business days of the
21 Effective Date, Settling Defendant shall pay the total sum of \$34,000 as a settlement payment.
22 With the exception of the payment to the Office of Environmental Health Hazard Assessment set
23 forth in Section 5.1.1 below, the settlement payment from Settling Defendant shall be paid in four
24 separate checks delivered to counsel for CEH at the address set forth in Section 8.1 below. The
25 funds paid by Settling Defendant shall be allocated between the following categories:

26 **5.1.1** \$3,468 as a civil penalty pursuant to Health & Safety Code § 25249.7(b).
27 Of this amount, \$2,601 (75%) shall be made payable to the Office of Environmental Health
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1 Hazard Assessment and associated with taxpayer identification number 68-0284486. This
2 payment shall be delivered as follows:

3 For United States Postal Service Delivery:

4 Attn: Mike Gyurics
5 Fiscal Operations Branch Chief
6 Office of Environmental Health Hazard Assessment
7 P.O. Box 4010, MS #19B
8 Sacramento, CA 95812-4010

9 The remaining \$867 (25%) of this civil penalty shall be made payable to the Center for
10 Environmental Health and delivered to counsel for CEH as set forth above.

11 **5.1.2** \$5,202 as payment in lieu of civil penalty to CEH pursuant to Health &
12 Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH will use
13 such funds to continue its work educating and protecting people from exposures to toxic
14 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
15 Judgment and to purchase and test Settling Defendant's Covered Products to confirm compliance.
16 In addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
17 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
18 educate and protect people from exposures to toxic chemicals. The method of selection of such
19 groups can be found at the CEH web site at www.ceh.org/justicefund. The check for this
20 payment in lieu of civil penalty shall be made payable to the Center for Environmental Health.

21 **5.1.3** \$25,330 as reimbursement of a portion of CEH's reasonable attorneys'
22 fees and costs. Of this, \$3,230 shall be made payable to CEH and \$22,100 shall be made payable
23 to Lexington Law Group.

24 **6. MODIFICATION**

25 **6.1 Written Consent.** This Consent Judgment may be modified from time to
26 time by express written agreement of the Parties with the approval of the Court, or by an order of
27 this Court upon motion and in accordance with law.

28 **6.2 Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
attempt in good faith to meet and confer with all affected Parties prior to filing a motion to

1 modify the Consent Judgment. The Parties acknowledge and agree that a change in the no
2 significant risk level for NDEA may provide a reason for modification of Sections 3.1 and 3.2 of
3 this Consent Judgment.

4 **7. CLAIMS COVERED AND RELEASED**

5 **7.1** This Consent Judgment is a full, final, and binding resolution between CEH on
6 behalf of itself and the public interest and Settling Defendant, and its parents, subsidiaries,
7 affiliated entities that are under common ownership, directors, Managers, members, officers,
8 employees, and attorneys (“Defendant Releasees”), and each entity to whom they directly or
9 indirectly distribute or sell Covered Products, including but not limited to distributors,
10 wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees
11 (“Downstream Defendant Releasees”) and Thai Nippon Rubber Industry Co., Ltd. of any
12 violation of Proposition 65 that was or could have been asserted in the Complaint against Settling
13 Defendant, Defendant Releasees, Thai Nippon Rubber Industry Co., Ltd., and Downstream
14 Defendant Releasees, based on failure to warn about alleged exposure to NDEA contained in
15 Covered Products that were sold by Settling Defendant prior to the Effective Date.

16 **7.2** Compliance with the terms of this Consent Judgment by Settling Defendant
17 and Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant,
18 Defendant Releasees, Thai Nippon Rubber Industry Co., Ltd., and Downstream Defendant
19 Releasees with respect to any alleged failure to warn about NDEA in Covered Products
20 manufactured, distributed, or sold by Settling Defendant after the Effective Date.

21 **7.3** Nothing in this Section 7 affects CEH’s right to commence or prosecute an
22 action under Proposition 65 against any person other than Settling Defendant, Defendant
23 Releasees, Thai Nippon Rubber Industry Co., Ltd. or Downstream Defendant Releasees.

24 **8. NOTICE**

25 **8.1** When CEH is entitled to receive any notice under this Consent Judgment, the
26 notice shall be sent by first class and electronic mail to:
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Mark Todzo
Lexington Law Group
503 Divisadero Street
San Francisco, CA 94117
mtodzo@lexlawgroup.com

8.2 When Settling Defendant is entitled to receive any notice under this Consent Judgment, the notice shall be sent by first class and electronic mail to:

Michael J. Perry
A Professional Law Corporation
4640 Admiralty Way, Suite 500
Marina Del Rey, California 90292
mjp@michaelperrylaw.com

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

9. COURT APPROVAL

9.1 This Consent Judgment shall become effective upon entry by the Court. CEH shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant shall support entry of this Consent Judgment.

9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or effect and shall never be introduced into evidence or otherwise used in any proceeding for any purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

10. ATTORNEYS' FEES

10.1 Should CEH prevail on any motion, application for an order to show cause, or other proceeding to enforce a violation of this Consent Judgment, CEH shall be entitled to its reasonable attorneys' fees and costs incurred as a result of such motion or application. Should Settling Defendant prevail on any motion application for an order to show cause or other proceeding, Settling Defendant may be awarded its reasonable attorneys' fees and costs as a result of such motion or application upon a finding by the Court that CEH's prosecution of the motion or application lacked substantial justification. For purposes of this Consent Judgment, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016, *et seq.*

1 **10.2** Except as otherwise provided in this Consent Judgment, each Party shall bear
2 its own attorneys' fees and costs.

3 **10.3** Nothing in this Section 10 shall preclude a Party from seeking an award of
4 sanctions pursuant to law.

5 **11. OTHER TERMS**

6 **11.1** The terms of this Consent Judgment shall be governed by the laws of the State
7 of California.

8 **11.2** This Consent Judgment shall apply to and be binding upon CEH and Settling
9 Defendant, and its respective divisions, subdivisions, and subsidiaries, and the successors or
10 assigns of any of them.

11 **11.3** This Consent Judgment contains the sole and entire agreement and
12 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
13 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
14 merged herein and therein. There are no warranties, representations, or other agreements between
15 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
16 implied, other than those specifically referred to in this Consent Judgment have been made by any
17 Party hereto. No other agreements not specifically contained or referenced herein, oral or
18 otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation,
19 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
20 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
21 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
22 whether or not similar, nor shall such waiver constitute a continuing waiver.

23 **11.4** Nothing in this Consent Judgment shall release, or in any way affect any rights
24 that Settling Defendant might have against any other party, whether or not that party is a settling
25 defendant.

26 **11.5** This Court shall retain jurisdiction of this matter to implement or modify the
27 Consent Judgment.

28 **11.6** The stipulations to this Consent Judgment may be executed in counterparts

1 and by means of facsimile or portable document format (pdf), which taken together shall be
2 deemed to constitute one document.

3 **11.7** Each signatory to this Consent Judgment certifies that he or she is fully
4 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into
5 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
6 Party.

7 **11.8** The Parties, including their counsel, have participated in the preparation of
8 this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.
9 This Consent Judgment was subject to revision and modification by the Parties and has been
10 accepted and approved as to its final form by all Parties and their counsel. Accordingly, any
11 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
12 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
13 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
14 be resolved against the drafting Party should not be employed in the interpretation of this Consent
15 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

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17 **IT IS SO STIPULATED:**

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19 Dated: July 31, 2015 **CENTER FOR ENVIRONMENTAL HEALTH**

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Charlie Pizarro
Assistant Director

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Dated: July 27, 2015 **UNITED MEDICAL DEVICES, LLC**



Jimmy Esebag
Printed Name

CEO
Title

IT IS SO ORDERED:

Dated: _____, 2015 _____
Judge of the Superior Court