

1 Clifford A. Chanler, State Bar No. 135534
2 Laralei S. Paras, State Bar No. 203319
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 LAURENCE VINOCUR

ENDORSED
FILED
ALAMEDA COUNTY

MAR - 7 2014

CLERK OF THE SUPERIOR COURT
By YOLANDA ESTRADA Deputy

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF ALAMEDA

13 UNLIMITED CIVIL JURISDICTION

14 LAURENCE VINOCUR,

15 Plaintiff,

16 v.

17 CHERRY MAN INDUSTRIES, INC.; et al.

18 Defendant.

Case No. RG13675512

**[PROPOSED] JUDGMENT PURSUANT
TO PROPOSITION 65 SETTLEMENT
AND CONSENT JUDGMENT AS TO
DEFENDANT CHERRY MAN
INDUSTRIES, INC.**

Date: March 7, 2014

Time: 9:00 a.m.

Dept.: 17

Judge: Hon. George C. Hernandez, Jr.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to California Health & Safety Code § 25249.7(f)(4) and California Code of Civil Procedure § 664.6, Judgment is entered in accordance with the terms of the Consent Judgment attached hereto as **Exhibit 1**, and as further modified by the Order approving the Proposition 65 settlement and Consent Judgment. By stipulation of the parties, the Court will retain jurisdiction to enforce the settlement under Code of Civil Procedure § 664.6.

IT IS SO ORDERED.

MAR - 7 2014

GEORGE C. HERNANDEZ, JR.

Dated: _____

JUDGE OF THE SUPERIOR COURT

Exhibit 1
(To Judgment)

1 Clifford A. Chanler, State Bar No. 135534
Laralei S. Paras, State Bar No. 203319
2 THE CHANLER GROUP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, CA 94710
4 Telephone: (510) 848-8880
Facsimile: (510) 848-8118

5 Attorneys for Plaintiff
6 LAURENCE VINO CUR

7 Bruce Nye, State Bar No. 77608
8 adams | nye | becht LLP
222 Kearny Street, 7th Floor
9 San Francisco, CA 94108-4521
Telephone: (415) 982-8955
10 Facsimile: (415) 982-2042

11 Attorneys for Defendant
12 CHERRY MAN INDUSTRIES, INC.

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF ALAMEDA - UNLIMITED CIVIL JURISDICTION
15

16 LAURENCE VINO CUR,
17 Plaintiff,
18 v.
19 CHERRY MAN INDUSTRIES, INC.; et al.
20 Defendants.
21
22
23
24

Case No. RG13675512

Assigned for All Purposes to
Judge George C. Hernandez, Jr.,
Department 17

**[PROPOSED] CONSENT JUDGMENT AS
TO CHERRY MAN INDUSTRIES, INC.**

(Health & Safety Code § 25249.6 et seq.)

Complaint Filed: April 15, 2013

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Laurence Vinocur
4 (“Plaintiff”) and Cherry Man Industries, Inc. (“Cherry Man”), with Plaintiff and the Cherry Man
5 collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

7 Plaintiff is an individual residing in the State of California who seeks to promote awareness
8 of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous
9 substances contained in consumer and commercial products.

10 **1.3 Cherry Man**

11 Cherry Man employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &
13 Safety Code § 25249.6, *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 1.4.1 Plaintiff alleges that Cherry Man manufactured, imported, sold and/or
16 distributed for sale in California, products with foam cushioned components containing tris(1,3-
17 dichloro-2-propyl) phosphate (“TDCPP”) without the requisite Proposition 65 health hazard
18 warnings.

19 1.4.3 Pursuant to Proposition 65, on October 28, 2011, California identified and
20 listed TDCPP as a chemical known to cause cancer. TDCPP became subject to the “clear and
21 reasonable warning” requirements of Proposition 65 one year later on October 28, 2012. Cal. Code
22 Regs., tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 and 25249.10(b). TDCPP is hereinafter
23 collectively referred to as the “Listed Chemical.” Plaintiff alleges that the Listed Chemical escapes
24 from foam padding, leading to human exposures.

25 **1.5 Product Description**

26 The categories of products that are covered by this Consent Judgment as to Cherry Man are
27 identified on Exhibit A (hereinafter “Products”). Polyurethane foam that is supplied, shaped or
28 manufactured for use as a component of another product, such as seat cushions, but which is not

1 itself a finished product, is specifically excluded from the definition of Products and shall not be
2 identified by Cherry Man on Exhibit A as a Product.

3 **1.6 Notice of Violation**

4 On February 5, 2013, Plaintiff served Cherry Man and certain requisite public enforcement
5 agencies with a "60-Day Notice of Violation" ("Notice") that provided the recipients with notice of
6 alleged violations of Proposition 65 based on the alleged failure to warn customers, consumers, and
7 workers in California that the Products expose users to one or more Listed Chemicals. To the best of
8 the Parties' knowledge, no public enforcer has commenced or is diligently prosecuting the
9 allegations set forth in the Notice.

10 **1.7 Complaint**

11 On April 15, 2013, Plaintiff filed a Complaint in the Superior Court in and for the County of
12 Alameda against the Cherry Man and Does 1 through 150, *Laurence Vinocur v. Cherry Man*
13 *Industries, Inc., et al.*, Case No. RG 13-675512, alleging violations of Proposition 65, based in part
14 on the alleged unwarned exposures to TDCPP contained in the Products.

15 **1.8 No Admission**

16 Cherry Man denies the material factual and legal allegations contained in Plaintiff's Notice
17 and Complaint and maintain that all products that it has manufactured, imported, distributed, and/or
18 sold in California, including the Products, have been and are in compliance with all laws. Nothing in
19 this Consent Judgment shall be construed as an admission by Cherry Man of any fact, finding,
20 conclusion, issue of law, or violation of law, nor shall compliance with this Consent Judgment
21 constitute or be construed as an admission by Cherry Man of any fact, finding, conclusion, issue of
22 law, or violation of law. However, this Section shall not diminish or otherwise affect Cherry Man's
23 obligations, responsibilities, and duties under this Consent Judgment.

24 **1.9 Consent to Jurisdiction**

25 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
26 jurisdiction over Cherry Man as to the allegations contained in the Complaint, that venue is proper in
27 the County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions of
28 this Consent Judgment pursuant to Proposition 65 and California Code of Civil Procedure § 664.6.

1 **2. DEFINITIONS**

2 **2.1 California Customers**

3 "California Customer" shall mean any customer that Cherry Man reasonably understands is
4 located in California, has a California warehouse or distribution center, maintains a retail outlet in
5 California, or has made internet sales into California on or after January 1, 2011.

6 **2.2 Detectable**

7 "Detectable" shall mean containing more than 25 parts per million ("ppm") (the equivalent of
8 .0025%) of any one chemical in any material, component, or constituent of a subject product, when
9 analyzed by a NVLAP accredited laboratory pursuant to EPA testing methodologies 3545 and
10 8270C, or equivalent methodologies utilized by federal or state agencies to determine the presence,
11 and measure the quantity, of TDCPP and/or tris(2-chloroethyl) phosphate ("TCEP") in a solid
12 substance.

13 **2.3 Effective Date**

14 "Effective Date" shall mean October 15, 2013.

15 **2.4 Private Label Covered Products**

16 "Private Label Covered Products" means Products that bear a brand or trademark owned or
17 licensed by a Retailer or affiliated entity that are sold or offered for sale by a Retailer in the State of
18 California.

19 **2.5 Reformulated Products**

20 "Reformulated Products" shall mean Products that contain no Detectable amount of TDCPP
21 or TCEP.

22 **2.6 Reformulation Standard**

23 The "Reformulation Standard" shall mean containing no more than 25 ppm for each of
24 TDCPP and TCEP.

25 **2.7 Retailer**

26 "Retailer" means an individual or entity that offers a Product for retail sale to consumers in
27 the State of California.

28

1 **3. INJUNCTIVE RELIEF: REFORMULATION**

2 **3.1 Reformulation Commitment**

3 Commencing on March 31, 2014, Cherry Man shall not manufacture or import for
4 distribution or sale to California Customers, or cause to be manufactured or imported for distribution
5 or sale to California Customers, any Products that are not Reformulated Products.

6 **3.2 Vendor Notification/Certification**

7 On or before the Effective Date, Cherry Man shall provide written notice to all of its then-
8 current vendors of the Products that will be sold or offered for sale in California, or to California
9 Customers, instructing each such vendor to use reasonable efforts to provide only Reformulated
10 Products for potential sale in California. In addressing the obligation set forth in the preceding
11 sentence, Cherry Man shall not employ statements that will encourage a vendor to delay compliance
12 with the Reformulation Standard. Cherry Man shall subsequently obtain written certifications, no
13 later than April 1, 2014, from such vendors, and any newly engaged vendors, that the Products
14 manufactured by such vendors are in compliance with the Reformulation Standard. Certifications
15 shall be held by Cherry Man for at least two years after their receipt and shall be made available to
16 Plaintiff upon request.

17 **3.3 Products No Longer in Cherry Man's Control**

18 No later than 45 days after the Effective Date, Cherry Man shall send a letter, electronic or
19 otherwise ("Notification Letter") to: (1) each California Customer and/or Retailer which it, after
20 October 28, 2011, supplied the item for resale in California described as an exemplar in the Notice
21 Cherry Man received from Plaintiff ("Exemplar Product"); and (2) any California Customer and/or
22 Retailer that Cherry Man reasonably understands or believes had any inventory for resale in
23 California of Exemplar Products as of the Notice's date. The Notification Letter shall advise the
24 recipient that the Exemplar Product "contains TDCPP, a chemical known to the State of California
25 to cause cancer," and request that the recipient either: (a) label the Exemplar Products remaining in
26 inventory for sale in California, or to California Customers, pursuant to Section 3.5; or (b) return, at
27 Cherry Man's sole expense, all units of the Exemplar Product held for sale in California, or to
28 California Customers, to Cherry Man or a party Cherry Man has otherwise designated. The

1 Notification Letter shall require a response from the recipient within 15 days confirming whether the
2 Exemplar Product will be labeled or returned. Cherry Man shall maintain records of all
3 correspondence or other communications generated pursuant to this Section for two years after the
4 Effective Date and shall promptly produce copies of such records upon Plaintiff's written request.

5 **3.4 Current Inventory**

6 Any Products in, or manufactured and en route to, Cherry Man's inventory as of or after
7 December 31, 2013, that do not qualify as Reformulated Products and that Cherry Man has reason to
8 believe may be sold or distributed for sale in California, shall contain a clear and reasonable warning
9 as set forth in Section 3.5 below unless Section 3.6 applies.

10 **3.5 Product Warnings**

11 **3.5.1 Product Labeling**

12 Any warning provided under Section 3.3 or 3.4 above shall be affixed to the packaging,
13 labeling, or directly on each Product. Each warning shall be prominently placed with such
14 conspicuousness as compared with other words, statements, designs, or devices as to render it likely
15 to be read and understood by an ordinary individual under customary conditions before purchase.
16 Each warning shall be provided in a manner such that the consumer or user understands to which
17 specific Product the warning applies, so as to minimize the risk of consumer confusion.

18 A warning provided pursuant to this Consent Judgment shall state:

19 **WARNING:** This product contains TDCPP, a
20 flame retardant chemical known
21 to the State of California to cause
22 cancer.¹

23
24 ¹ The regulatory safe harbor warning language specified in 27 CCR 25603.2 may also be
25 used if Cherry Man had begun to use it, prior to the Effective Date. If Cherry Man seeks to use
26 alternative warning language, other than the language specified above or the safe harbor warning
27 specified in 27 CCR § 25603.2, or an alternate method of transmission of the warning, it must
28 obtain the Court's approval of its proposed alternative and provide Plaintiff and the Office of the
California Attorney General with timely notice and the opportunity to comment or object before the
Court acts on the request. The Parties agree that the following warning language shall not be
deemed to meet the requirements of 27 CCR § 25601 and shall not be used pursuant to this Consent
Judgment: (a) "cancer or birth defects or other reproductive harm"; and (b) "cancer, birth defects or
other reproductive harm."

1 Attached as Exhibit B are template warnings developed by Plaintiff that are deemed to be
2 clear and reasonable for purposes of this Consent Judgment.² Provided that the other requirements
3 set forth in this Section are addressed, including as to the required warning statement and method of
4 transmission as set forth above, Cherry Man remains free not to utilize the template warnings.

5 3.5.2 Internet Website Warning

6 A warning shall be given in conjunction with the sale of the Products to California, or
7 California Customers, via the internet, which warning shall appear on one or more web pages
8 displayed to a purchaser during the checkout process. The following warning statement shall be
9 used and shall: (a) appear adjacent to or immediately following the display, description, or price of
10 the Product; (b) appear as a pop-up box; or (c) otherwise appear automatically to the consumer. The
11 warning text shall be the same type size or larger than the Product description text:

12 **WARNING:** This product contains TDCPP, a
13 flame retardant chemical known
14 to the State of California to cause
cancer.³

15 3.6 Alternatives to Interim Warnings

16 The obligations of Cherry Man under Section 3.3 shall be relieved provided Cherry Man
17 certifies on or before December 15, 2013 that only Exemplar Products meeting the Reformulation
18 Standard will be offered for sale in California, or to California Customers, after December 31, 2013.
19 The obligations of Cherry Man under Section 3.4 shall be relieved provided Cherry Man certifies on
20 or before December 15, 2013 that, after June 30, 2014, it will only distribute or cause to be
21 distributed for sale in, or sell in, California, or to California Customers, Products (i.e., Products
22 beyond the Exemplar Product) meeting the Reformulation Standard. The certifications provided by
23 this Section are material terms and time is of the essence.

24 ² The characteristics of the template warnings are as follows: (a) a yellow hang tag
25 measuring 3" x 5", with no less than 12 point font, with the warning language printed on each side
26 of the hang tag, which shall be affixed directly to the Product; (b) a yellow warning sign measuring
27 8.5" x. 11", with no less that 32 point font, with the warning language printed on each side, which
shall be affixed directly to the Product; and (c) for Products sold at retail in a box or packaging, a
yellow warning sticker measuring 3" x 3", with no less than 12 point font, which shall be affixed
directly to the Product packaging.

28 ³ Footnote 1, supra, applies in this context as well.

1 **4. MONETARY PAYMENTS**

2 **4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

3 In settlement of all the claims referred to in this Consent Judgment, Cherry Man shall pay the
4 civil penalties shown for it on Exhibit A in accordance with this Section. Each penalty payment will
5 be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with
6 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment
7 (“OEHHA”), 25% of the penalty remitted to “The Chanler Group in Trust for Laurence Vinocur.”
8 Each penalty payment shall be made within two business days of the date it is due and be delivered
9 to the addresses listed in Section 4.5 below. Cherry Man shall be liable for payment of interest, at a
10 rate of 10% simple interest, for all amounts due and owing under this Section that are not received
11 within two business days of the due date.

12 4.1.1 Initial Civil Penalty. On or before the Effective Date, Cherry Man shall make
13 an initial civil penalty payment in the amount identified on Exhibit A.

14 4.1.2 Second Civil Penalty. On or before January 15, 2014, Cherry Man shall make
15 a second civil penalty payment in the amount identified on Exhibit A. The amount of the second
16 penalty may be reduced according to any penalty waiver for which Cherry Man is eligible under
17 Sections 4.1.4(i) and 4.1.4(iii), below.

18 4.1.3 Third Civil Penalty. On or before November 30, 2014, Cherry Man shall
19 make a third civil penalty payment in the amount identified on Exhibit A. The amount of the third
20 penalty may be reduced according to any penalty waiver for which Cherry Man is eligible under
21 Sections 4.1.4(ii) and 4.1.4(iv), below.

22 4.1.4 Reductions to Civil Penalty Payment Amounts. Cherry Man may reduce the
23 amount of the second and/or third civil penalty payments identified on Exhibit A by providing
24 Plaintiff with certification of certain efforts undertaken to reformulate its Products or limit the
25 ongoing sale of non-reformulated Products in California. The options to provide a written
26 certification in lieu of making a portion of the civil penalty payment constitute material terms of this
27 Consent Judgment, and with regard to such terms, time is of the essence.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

4.1.4(i) Partial Penalty Waiver for Accelerated Reformulation of Products Sold or Offered for Sale in California.

As shown on Exhibit A, a portion of the second civil penalty shall be waived, to the extent that it has agreed that, as of November 1, 2013, and continuing into the future, it shall only manufacture or import for distribution or sale to California Customers or cause to be manufactured or imported for distribution or sale to California Customers, Reformulated Products. An officer or other authorized representative of Cherry Man that has exercised this election shall provide Plaintiff with a written certification confirming compliance with such conditions, which certification must be received by Plaintiff's counsel on or before December 15, 2013.

4.1.4(ii) Partial Penalty Waiver for Extended Reformulation.

As shown on Exhibit A, a portion of the third civil penalty shall be waived, to the extent that Cherry Man has agreed that, as of March 31, 2014, and continuing into the future, it shall only manufacture or import for distribution or sale in California or cause to be manufactured or imported for distribution or sale in California, Reformulated Products which also do not contain tris(2,3-dibromopropyl)phosphate ("TDBPP") in a detectable amount of more than 25 parts per million ("ppm") (the equivalent of .0025%) in any material, component, or constituent of a subject product, when analyzed by a NVLAP accredited laboratory pursuant to EPA testing methodologies 3545 and 8270C, or equivalent methodologies utilized by federal or state agencies to determine the presence, and measure the quantity, of TDBPP in a solid substance. An officer or other authorized representative of Cherry Man that has exercised this election shall provide Plaintiff with a written certification confirming compliance with such conditions, which certification must be received by Plaintiff's counsel on or before November 15, 2014.

4.1.4(iii) Partial Penalty Waiver for Withdrawal of Unreformulated Exemplar Products from the California Market.

As shown on Exhibit A, a portion of the second civil penalty shall be waived, if an officer or other authorized representative of Cherry Man provides Plaintiff with written certification, by December 15, 2013, confirming that each individual or establishment in California to which it

1 supplied the Exemplar Product after October 28, 2011, has elected, pursuant to Section 3.3, to return
2 all Exemplar Products held for sale in California.⁴

3 **4.1.4(iv) Partial Penalty Waiver for Termination of Distribution to**
4 **California of Unreformulated Inventory.**

5 As shown on Exhibit A, a portion of the third civil penalty shall be waived, if an officer or
6 other authorized representative of Cherry Man provides Plaintiff with written certification, on or
7 before November 15, 2014, confirming that, as of July 1, 2014, it has and will continue to distribute,
8 offer for sale, or sell in California, or to California Customers, only Reformulated Products.

9 **4.2 Representations**

10 Cherry Man represents that the sales data and other information concerning its size,
11 knowledge of the Listed Chemical, and prior reformulation and/or warning efforts, it provided to
12 Plaintiff was truthful to its knowledge and a material factor upon which Plaintiff has relied to
13 determine the amount of civil penalties assessed pursuant to Health & Safety Code § 25249.7 in this
14 Consent Judgment. If, within nine months of the Effective Date, Plaintiff discovers and presents to
15 Cherry Man evidence demonstrating that the preceding representation and warranty was materially
16 inaccurate, then Cherry Man shall have 30 days to meet and confer regarding the Plaintiff's
17 contention. Should this 30 day period pass without any such resolution between the Plaintiff and
18 Cherry Man, Plaintiff shall be entitled to file a formal legal claim including, but not limited to, a
19 claim for damages for breach of contract.

20 Cherry Man further represents that in implementing the requirements set forth in Sections 3.1
21 and 3.2 of this Consent Judgment, it will voluntarily employ commercial best efforts to achieve
22 reformulation of its Products and Additional Products on a nationwide basis and not employ
23 statements that will encourage a vendor to limit its compliance with the Reformulation Standard to
24 goods intended for sale to California Consumers.

25
26
27 ⁴ For purposes of this Section, the term Exemplar Products shall further include Products for
28 which Plaintiff has, prior to **October 31, 2013**, provided Cherry Man with test results from a
NVLAP accredited laboratory showing the presence of the Listed Chemical at a level in excess of
250 ppm pursuant to EPA testing methodologies 3545 or 8270C.

1 **4.3 Stipulated Penalties for Certain Violations of the Reformulation Standard.**

2 If Plaintiff provides notice and appropriate supporting information to Cherry Man that levels
3 of a Listed Chemical in excess of the Reformulation Standard have been detected in one or more
4 Products labeled or otherwise marked in an identifiable manner as manufactured or imported after a
5 deadline for meeting the Reformulation Standard has arisen for Cherry Man under Sections 3.1 or
6 3.6 above, Cherry Man may elect to pay a stipulated penalty to relieve any further potential liability
7 under Proposition 65 or sanction under this Consent Judgment as to Products sourced from the
8 vendor in question.⁵ The stipulated penalty shall be \$1,500 if the violation level is below 100 ppm
9 and \$3,000 if the violation level is between 100 ppm and 249 ppm, this being applicable for any
10 amount in excess of the Reformulation Standards but under 250 ppm.⁶ Plaintiff shall further be
11 entitled to reimbursement of their associated expense in an amount not to exceed \$5,000 regardless
12 of the stipulated penalty level. Cherry Man under this Section must provide notice and appropriate
13 supporting information relating to the purchase (e.g. vendor name and contact information including
14 representative, purchase order, certification (if any) received from vendor for the exemplar or
15 subcategory of products), test results, and a letter from a company representative or counsel attesting
16 to the information provided, to Plaintiff within 30 calendar days of receiving test results from
17 Plaintiff's counsel. Any violation levels at or above 250 ppm shall be subject to the full remedies
18 provided pursuant to this Consent Judgment and at law.

19 **4.4 Reimbursement of Fees and Costs**

20 The Parties acknowledge that Plaintiff and his counsel offered to resolve this dispute without
21 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
22 reimbursement issue to be resolved after the material terms of the agreement had been settled.
23 Shortly after the other settlement terms had been finalized, Cherry Man expressed a desire to resolve

24 _____
25 ⁵ This Section shall not be applicable where the vendor in question had previously been
26 found by Cherry Man to have provided unreliable certifications as to meeting the Reformulation
27 Standard in its Products on more than one occasion. Notwithstanding the foregoing, a stipulated
28 penalty for a second exceedance by Cherry Man's vendor at a level between 100 and 249 ppm shall
not be available after July 1, 2015.

⁶ Any stipulated penalty payments made pursuant to this Section should be allocated and
remitted in the same manner as set forth in Sections 4.1 and 4.5, respectively.

1 the fee and cost issue. Cherry Man then agreed to pay Plaintiff and his counsel under general
2 contract principles and the private attorney general doctrine codified at California Code of Civil
3 Procedure § 1021.5 for all work performed through the mutual execution of this agreement,
4 including the fees and costs incurred as a result of investigating, bringing this matter to Cherry
5 Man's attention, negotiating a settlement in the public interest, and seeking court approval of the
6 same. In addition, the negotiated fee and cost figure expressly includes the anticipated significant
7 amount of time plaintiffs' counsel will incur to monitor various provisions in this agreement over the
8 next two years, with the exception of additional fees that may be incurred pursuant to a Settling
9 Defendant's election in Section 11. Cherry Man more specifically agreed, upon the Court's approval
10 and entry of this Consent Judgment, to pay Plaintiff's counsel the amount of fees and costs indicated
11 on Exhibit A. Cherry Man further agreed to tender and shall tender its full required payment under
12 this Section to a trust account at The Chanler Group (made payable "In Trust for The Chanler
13 Group") within two business days of the Effective Date. Such funds shall be released from the trust
14 account upon the Court's approval and entry of this Consent Judgment.

15 **4.5 Payment Procedures**

16 **4.5.1 Issuance of Payments.**

17 (a) All payments owed to Plaintiff and his counsel, pursuant to Sections
18 4.1 and 4.2 shall be delivered to the following payment address:

19 The Chanler Group
20 Attn: Proposition 65 Controller
21 2560 Ninth Street
22 Parker Plaza, Suite 214
23 Berkeley, CA 94710

24 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to
25 Section 4.1, shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at one of the
26 following addresses, as appropriate:

27 For United States Postal Service Delivery:
28 Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

1 For Non-United States Postal Service Delivery:

2 Mike Gyurics
3 Fiscal Operations Branch Chief
4 Office of Environmental Health Hazard Assessment
1001 I Street
5 Sacramento, CA 95814

6 4.5.2 Proof of Payment to OEHHA. A copy of each check payable to OEHHA
7 shall be mailed, simultaneous with payment, to The Chanler Group at the address set forth in Section
8 4.3.1(a) above, as proof of payment to OEHHA.

9 4.5.3 Tax Documentation. Cherry Man shall issue a separate 1099 form for each
10 payment required by this Section to: (a) Laurence Vinocur, whose address and tax identification
11 number shall be furnished upon request after this Consent Judgment has been fully executed by the
12 Parties; (b) OEHHA, who shall be identified as "California Office of Environmental Health Hazard
13 Assessment" (EIN: 68-0284486) in the 1099 form, to be delivered directly to OEHHA, P.O. Box
14 4010, Sacramento, CA 95814, and (c) "The Chanler Group" (EIN: 94-3171522) to the address set
15 forth in Section 4.3.1(a) above.

16 **5. CLAIMS COVERED AND RELEASED**

17 **5.1 Plaintiff's Release of Proposition 65 Claims**

18 Plaintiff, acting on his own behalf and in the public interest, releases Cherry Man, its parents,
19 subsidiaries, affiliated entities under common ownership, directors, officers, agents employees,
20 attorneys, and each entity to whom Cherry Man directly or indirectly distributes or sells Products,
21 including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees,
22 cooperative members, and licensees (collectively, "Releasees"), from all claims for violations of
23 Proposition 65 through the Effective Date based on unwarned exposures to the Listed Chemical in
24 the Products, as set forth in the Notice. Compliance with the terms of this Consent Judgment
25 constitutes compliance with Proposition 65 with respect to exposures to the Listed Chemical from
26 the Products, as set forth in the Notice. The Parties further understand and agree that this Section 5.1
27 release shall not extend upstream to any entities, other than Cherry Man, that manufactured the
28 Products or any component parts thereof, or any distributors or suppliers who sold the Products or
any component parts thereof to Cherry Man, except that any entity upstream of Cherry Man that is a

1 Retailer of a Private Labeled Covered Product shall be released as to the Private Labeled Covered
2 Products offered for sale in California, or to California Customers, by the Retailer in question.

3 **5.2 Plaintiff's Individual Releases of Claims**

4 Plaintiff, in his individual capacity only and *not* in his representative capacity, provides a
5 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
6 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
7 liabilities, and demands of Plaintiff of any nature, character, or kind, whether known or unknown,
8 suspected or unsuspected, limited to and arising out of alleged or actual exposures to TDCPP, TCEP,
9 and/or TDBPP in the Products or Additional Products (as defined in Section 11.1 and delineated on
10 Exhibit A) manufactured, imported, distributed, or sold by Cherry Man prior to the Effective Date.⁷
11 The Parties further understand and agree that this Section 5.2 release shall not extend upstream to
12 any entities that manufactured the Products or Additional Products, or any component parts thereof,
13 or any distributors or suppliers who sold the Products or Additional Products, or any component
14 parts thereof to Cherry Man, except that any entities upstream of Cherry Man that is a Retailer of a
15 Private Labeled Covered (or Additional) Product shall be released as to the Private Labeled Covered
16 (or Additional) Products offered for sale in California by the Retailer in question. Nothing in this
17 Section affects Plaintiff's rights to commence or prosecute an action under Proposition 65 against a
18 Releasee that does not involve Cherry Man's Products or Additional Products.

19 **5.3 Cherry Man's Release of Plaintiff**

20 Cherry Man, on behalf of itself, its past and current agents, representatives, attorneys,
21 successors, and assignees, hereby waives any and all claims against Plaintiff and his attorneys and
22 other representatives, for any and all actions taken or statements made (or those that could have been
23 taken or made) by Plaintiff and his attorneys and other representatives, whether in the course of
24 investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with
25 respect to the Products or Additional Products.

26
27

28 ⁷ The injunctive relief requirements of Section 3 shall apply to Additional Products as otherwise specified.

1 **6. COURT APPROVAL**

2 This Consent Judgment is not effective until it is approved and entered by the Court and shall
3 be null and void if, for any reason, it is not approved in its entirety and entered by the Court within
4 one year after it has been fully executed by all Parties. If the Court does not approve the Consent
5 Judgment, the Parties shall meet and confer as to whether to modify the language or appeal the
6 ruling. If the Parties do not jointly agree on a course of action to take, then the case shall proceed in
7 its normal course on the Court's trial calendar. If the Court's approval is ultimately overturned by an
8 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
9 Judgment. If the Parties do not jointly agree on a course of action to take, then the case shall
10 proceed in its normal course on the Court's trial calendar. In the event that this Consent Judgment is
11 entered by the Court and subsequently overturned by any appellate court, any monies that have been
12 provided to OEHHA, Plaintiff or his counsel pursuant to Section 4, above, shall be refunded within
13 15 days of the appellate decision becoming final. If the Court does not approve and enter the
14 Consent Judgment within one year of the Effective Date, any monies that have been provided to
15 OEHHA or held in trust for Plaintiff or his counsel pursuant to Section 3, above, shall be refunded to
16 Cherry Man within 15 days.

17 **7. GOVERNING LAW**

18 The terms of this Consent Judgment shall be governed by the laws of the State of California.
19 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by
20 reason of law generally, or if any of the provisions of this Consent Judgment are rendered
21 inapplicable or are no longer required as a result of any such repeal or preemption, or rendered
22 inapplicable by reason of law generally as to the Products, then Cherry Man may provide written
23 notice to Plaintiff of any asserted change in the law, and shall have no further obligations pursuant to
24 this Consent Judgment with respect to, and to the extent that, the Products are so affected. Nothing
25 in this Consent Judgment shall be interpreted to relieve Cherry Man from any obligation to comply
26 with any pertinent state or federal law or regulation.

27
28

1 **8. NOTICES**

2 Unless specified herein, all correspondence and notices required to be provided pursuant to
3 this Consent Judgment shall be in writing and sent by: (i) personal delivery, (ii) first-class registered
4 or certified mail, return receipt requested; or (iii) overnight courier to any party by the other party at
5 the following addresses:

6 To Cherry Man:

7 At the address shown on Exhibit A

To Plaintiff:

8 Proposition 65 Coordinator
9 The Chanler Group
10 2560 Ninth Street
11 Parker Plaza, Suite 214
12 Berkeley, CA 94710-2565

11 Any Party, from time to time, may specify in writing to the other Party a change of address to which
12 all notices and other communications shall be sent.

13 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

14 This Consent Judgment may be executed in counterparts and by facsimile or pdf signature,
15 each of which shall be deemed an original, and all of which, when taken together, shall constitute
16 one and the same document. A facsimile or pdf signature shall be as valid as the original.

17 **10. COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(f)**

18 Plaintiff and his attorneys agree to comply with the reporting form requirements referenced
19 in California Health & Safety Code § 25249.7(f).

20 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

21 11.1 In addition to the Products, where Cherry Man has identified on Exhibit A additional
22 products that contain Listed Chemicals and that are sold or offered for sale by it in California, or to
23 California Customers, ("Additional Products"), then by no later than October 31, 2013, Cherry Man
24 may provide Plaintiff with additional information or representations necessary to enable them to
25 issue a 60-Day Notice of Violation and valid Certificate of Merit therefore, pursuant to Health &
26 Safety Code § 25249.7, that includes the Additional Products. Polyurethane foam that is supplied,
27 shaped or manufactured for use as a component of a product, such as seat cushions, is specifically
28 excluded from the definition of Additional Products and shall not be identified by Cherry Man on

1 Exhibit A as an Additional Product. Except as agreed upon by Plaintiff, Cherry Man shall not
2 include a product, as an Additional Product, that is the subject of an existing 60-day notice issued by
3 Plaintiff or any other private enforcer at the time of execution. After receipt of the required
4 information, Plaintiff agrees to issue a supplemental 60-day notice in compliance with all statutory
5 and regulatory requirements for the Additional Products. Plaintiff will, and in no event later than
6 October 15, 2014, prepare and file an amendment to this Consent Judgment to incorporate the
7 Additional Products within the defined term "Products" and, upon the Court's approval thereof, the
8 Additional Products shall become subject to Section 5.1 in addition to Section 5.2. Cherry Man
9 shall, at the time it elects to utilize this Section and tenders the additional information or
10 representations regarding the Additional Products to Plaintiff, tender to The Chanler Group's trust
11 account an amount not to exceed \$8,750 as stipulated penalties and attorneys' fees and costs incurred
12 by Plaintiff in issuing the new notice and engaging in other reasonably related activities, which may
13 be released from the trust as awarded by the Court upon Plaintiff's application. (Any tendered funds
14 remaining in the trust thereafter shall be refunded to Cherry Man within 15 days). Such payment
15 shall be made to "in trust for The Chanler Group" and delivered as per Section 4.5.1(a) above.

16 11.2 Plaintiff and Cherry Man agree to support the entry of this agreement as a Consent
17 Judgment and obtain approval of the Consent Judgment by the Court in a timely manner. The
18 Parties acknowledge that, pursuant to California Health & Safety Code § 25249.7, a noticed motion
19 is required to obtain judicial approval of this Consent Judgment, which Plaintiff shall draft and file.
20 If any third party objection to the noticed motion is filed, Plaintiff and Cherry Man shall work
21 together to file a reply and appear at any hearing before the Court. This provision is a material
22 component of the Consent Judgment and shall be treated as such in the event of a breach.

23 **13. MODIFICATION**

24 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
25 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion of
26 any party and entry of a modified Consent Judgment by the Court.

27
28

1 **14. AUTHORIZATION**

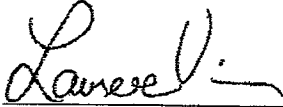
2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective Parties and have read, understood, and agree to all of the terms and conditions of this
4 Consent Judgment.

5

6 AGREED TO:

AGREED TO:

7

8 

9 Plaintiff Laurence Vinocur

Cherry Man Industries, Inc.

10

11 Date: October 3, 2013

Date: October __, 2013

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **14. AUTHORIZATION**

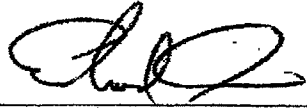
2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective Parties and have read, understood, and agree to all of the terms and conditions of this
4 Consent Judgment.

5
6 **AGREED TO:**

7
8
9 _____
Plaintiff Laurence Vinocur

10
11 Date: October __, 2013

AGREED TO:

12
13
14 
15 _____
16 **EDWARD KIM**
17 Cherry Man Industries, Inc.

18
19
20
21
22
23
24
25
26
27
28 Date: October 2, 2013

1 EXHIBIT A

2
3 I. Name of Settling Defendant

4 Cherry Man Industries, Inc.
1421 Charles Willard Street
5 Carson, CA 90746

6 II. Names of Releasees (Optional; May be Partial)

7
8 III. Types of Covered Products Applicable to Cherry Man

9 Foam-cushioned pads for children and infants to lie on, such as rest mats

10 Upholstered furniture

11 Foam-filled mattresses, mattress toppers, pillows, cushions, travel beds

12 Car seats, strollers

13 Other (specify):

14 IV. Types of Additional Products Cherry Man Elects to Address (if any):

15
16
17 V. Cherry Man's Required Settlement Payments

18 A. Penalties:

19 \$20,000 initial payment due on or before the Effective Date;

20 \$24,000 second payment due on or before January 15, 2014, of which \$14,000 may be
21 waived pursuant to Section 4.1.4(i) and \$10,000 may be waived pursuant to Section
4.1.4(iii); and

22 \$14,000 third payment due on or before November 30, 2014, of which \$8,000 may be
23 waived pursuant to Section 4.1.4(ii) and \$6,000 may be waived pursuant to Section
4.1.4(iv).

24 VI. Payment to The Chanler Group for reimbursement of attorneys' fees and costs: \$48,500

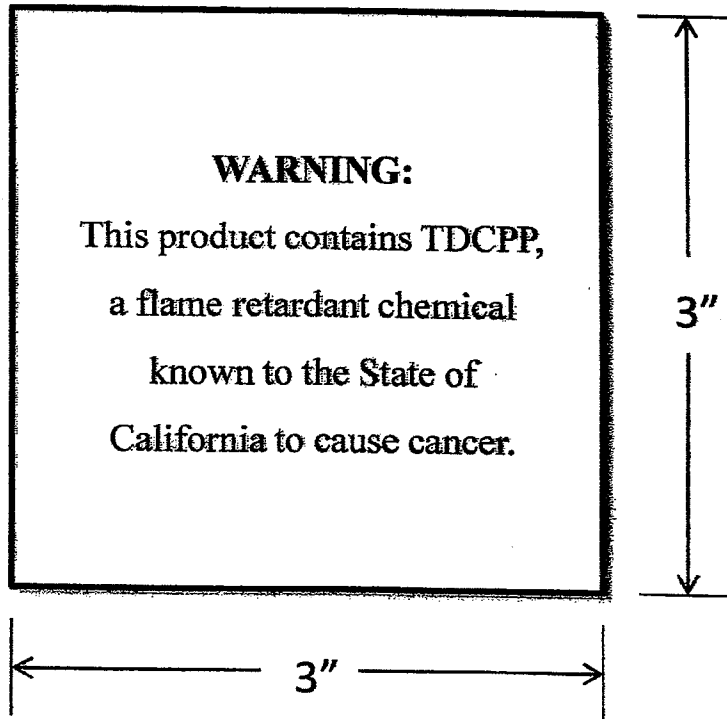
25 VII. Person(s) to receive notices on behalf of Cherry Man pursuant to Section 8:

26 Edward Kim
27 Cherryman Industries, Inc.
1421 Charles Willard Street
28 Carson, CA 90746

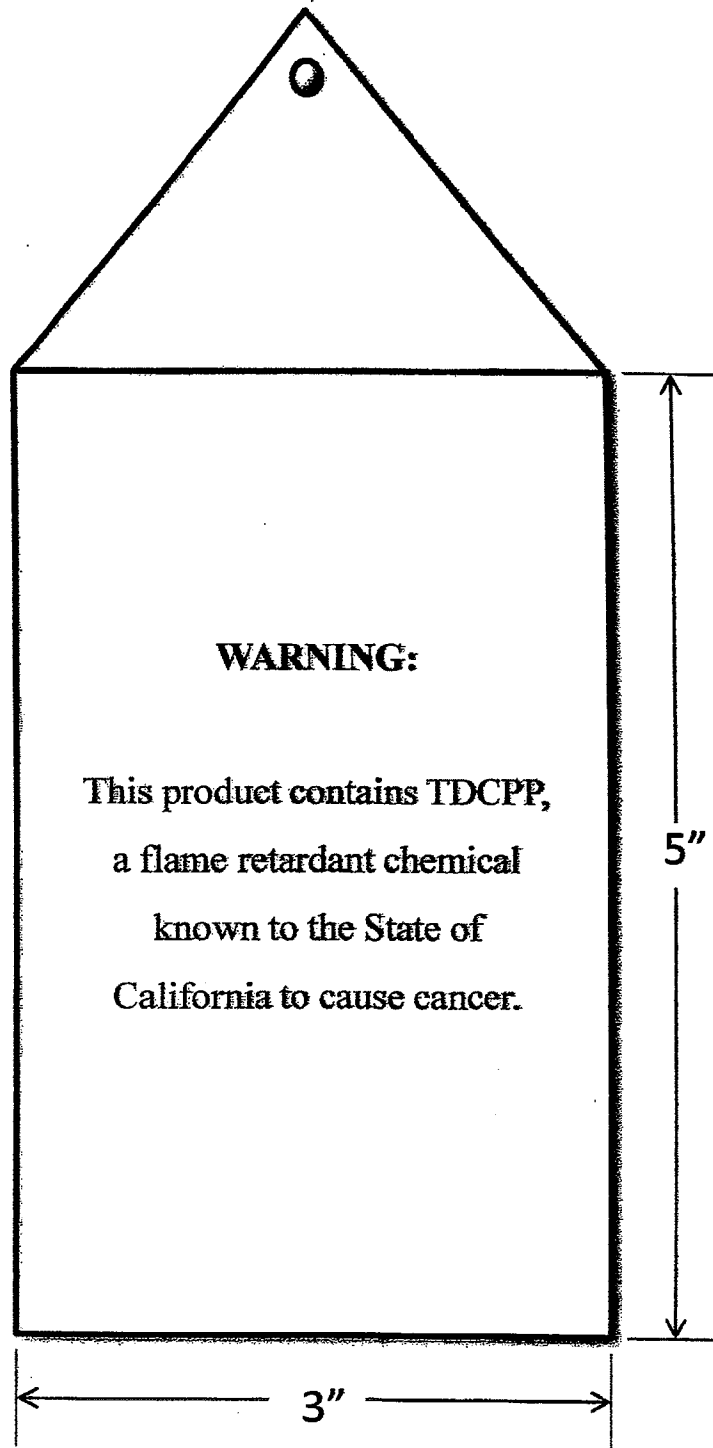
Bruce Nye
adams | nye | becht LLP
222 Kearny Street, 7th Floor
San Francisco, CA 94108-4521

EXHIBIT B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



INSTRUCTIONS: Minimum 12 pt. font. "WARNING:" text must be bold.



INSTRUCTIONS: Print warning on each side of hang tag.
Minimum 12 pt. font. "WARNING:" text must be bold.

WARNING:

This product contains TDDCPP, a flame retardant

8.5"

chemical known to the State of California to

cause cancer.

11"

INSTRUCTIONS:

Minimum 32 pt. Font. "WARNING:" text must be bold and underlined.