

1 Josh Voorhees, State Bar No. 241436
2 Rachel Doughty, State Bar No. 255904
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 28 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 THE BOPPY COMPANY, LLC, *et al.*

18 Defendants.

Case No. RG13698459

~~PROPOSED~~ JUDGMENT PURSUANT
TO PROPOSITION 65 SETTLEMENT
AND CONSENT JUDGMENT AS TO
DEFENDANT THE BOPPY COMPANY,
LLC

Date: March 28, 2014

Time: 10:00 a.m.

Dept.: 17

Judge: Hon. George C. Hernandez, Jr.

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

7
8 **IT IS SO ORDERED.**

9
10 Dated: MAR 28 2014

GEORGE C. HERNANDEZ, JR.

JUDGE OF THE SUPERIOR COURT

Exhibit 1
(To Judgment)

1 Rachel Doughty, State Bar No. 255904
2 THE CHANLER GROUP
3 2560 Ninth Street
4 Parker Plaza, Suite 214
Berkeley, CA 94710
Telephone: (510) 848-8880
Facsimile: (510) 848-8118

5 Attorneys for Plaintiff
6 LAURENCE VINOUCUR

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF ALAMEDA - UNLIMITED CIVIL JURISDICTION
9

10 LAURENCE VINOUCUR
11 Plaintiff,

12 v.

13 The Boppy Company, LLC; et al.,
14 Defendants.
15

Case No. RG 13698459

**[PROPOSED] CONSENT JUDGMENT AS
TO THE BOPPY COMPANY, LLC,**

(Health & Safety Code § 25249.6 *et seq.*)
16
17

1 **1. INTRODUCTION**

2 **1.1. Parties**

3 This Consent Judgment is entered into by and between plaintiff Laurence Vinocur
4 (“Vinocur” or “Plaintiff”) and The Boppy Company, LLC. (“Boppy” or “Defendant”), with
5 Plaintiff and Boppy 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. Settling Defendant**

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

14 **1.4. General Allegations**

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

19 **1.5. Notice of Violation**

20 On April 11, 2013, Plaintiff served Boppy, Toys “R” Us, Inc. (“Toys “R” Us”), and certain
21 requisite public enforcement agencies with a “60-Day Notice of Violation” (“Notice”) that provided
22 recipients with notice of alleged violations of Proposition 65 based on Boppy’s and Toys “R” Us’s
23 alleged failure to warn their customers and consumers that their pregnancy pillows and cushions
24 made with foam padding (“Foam Pregnancy Cushions”) expose users in California to TDCPP. To
25 the best of the Parties’ knowledge, no public enforcer has commenced or is diligently prosecuting
26 the allegations set forth in the Notice.

1 dibromopropyl)phosphate (“TDBPP”) in any material, component, or constituent of a subject
2 product, when analyzed pursuant to EPA testing methodologies 3545 and 8270C, or equivalent
3 methodologies utilized by federal or state agencies to determine the presence, and measure the
4 quantity, of TDCPP, TCEP, and TDBPP in a solid substance, by a laboratory accredited by the
5 State of California, Consumer Products Safety Commission, Federal Drug Administration, and/or
6 National Voluntary Laboratory Accreditation Program (“NVLAP”).

7 **2.2. Effective Date**

8 “Effective Date” shall mean January 1, 2014.

9 **2.3. Entry Date**

10 “Entry Date” is the date upon which the Court approves and enters this Consent Judgment.

11 **2.4. Listed Chemicals**

12 TDCPP, TDBPP, and TCEP collectively shall hereinafter be referred to as the “Listed
13 Chemicals.”

14 **2.5. Reformulated Products**

15 “Reformulated Products” shall mean any product that contains no Detectable amount each
16 of TDCPP, TDBPP, or TCEP.

17 **2.6. Reformulation Standard**

18 The “Reformulation Standard” shall mean containing no Detectable amount each of
19 TDCPP, TDBPP, or TCEP.

20 **3. INJUNCTIVE RELIEF: REFORMULATION**

21 **3.1. Reformulation Commitment**

22 Commencing on December 24, 2013, Settling Defendant shall not manufacture or import for
23 distribution or sale in the United States, or cause to be manufactured or imported for distribution or
24 sale in the United States, any Product unless it is a Reformulated Product.

25 **3.2. Vendor Notification/Certification**

26 On or before January 17, 2014, Boppy shall provide written notice to all of its then-current
27 vendors of Foam Pregnancy Cushions, instructing each such vendor to use reasonable efforts to

1 provide only Reformulated Products. In addressing the obligation set forth in this Section, Boppy
2 shall not employ statements that will encourage a vendor to delay compliance with the
3 Reformulation Standard. Boppy shall subsequently obtain written certifications, no later than April
4 1, 2014, from such vendors, and any vendors engaged subsequent to the Effective Date and before
5 April 1, 2014, that the Foam Pregnancy Cushions manufactured by such vendors are in compliance
6 with the Reformulation Standard. Certifications shall be held by Boppy for at least two years after
7 their receipt and shall be made available to Vinocur upon request.

8 **4. MONETARY PAYMENTS**

9 In settlement of all the claims referred to in this Consent Judgment, Boppy shall pay civil
10 penalties and the fees and costs incurred by Vinocur in bringing and prosecuting this action. Each
11 payment shall be made within fourteen business days of the date it is due and be delivered to the
12 addresses listed in Section 4.5 below. Boppy shall be liable for payment of interest, at a rate of
13 10% simple interest, for all amounts due and owing under Section 4 that are not received within
14 fourteen business days of the due date.

15 **4.1. Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

16 Boppy shall make a civil penalty payment in the amount of \$8,000. The portion of the civil
17 penalty due to Vinocur shall be delivered within fourteen days of the Effective Date; the portion
18 due to OAHHA shall be delivered within fourteen days of the Entry Date.

19 The civil penalty payment will be allocated in accordance with California Health & Safety
20 Code section 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of
21 Environmental Health Hazard Assessment ("OEHHA"), and the remaining 25% of the penalty
22 remitted to "The Chanler Group in Trust for Vinocur."

23 **4.2. Representation**

24 Boppy represents that the sales data and other information concerning its size, knowledge of
25 Listed Chemicals, and prior reformulation efforts that it provided to Vinocur was truthful to its
26 knowledge and a material factor upon which Vinocur has relied to determine the amount of civil
27 penalties assessed pursuant to Health & Safety Code section 25249.7 in this Consent Judgment. If,
28

1 within one year of the Effective Date, Vinocur discovers and presents to Boppy, evidence
2 demonstrating that the preceding representation and warranty was materially inaccurate, then
3 Boppy shall have thirty days to meet and confer regarding Vinocur's contention. Should this thirty
4 day period pass without any such resolution between Vinocur and Boppy, Vinocur shall be entitled
5 to file a formal legal claim including, but not limited to, a claim for damages for breach of contract.

6 **4.3. Stipulated Penalties for Certain Violations of the Reformulation Standard**

7 If Vinocur provides notice and appropriate supporting information to Boppy that the
8 Reformulation Standard has been exceeded in any Product manufactured after December 24, 2013,
9 then Boppy may elect to pay a stipulated penalty to relieve any further potential liability under
10 Proposition 65 or sanction under this Consent Judgment as to the Product or Foam Pregnancy
11 Cushions sourced from the vendor in question and identified by Vinocur as failing to meet the
12 Reformulation Standard ("Unreformulated Product"). Boppy shall have fourteen calendar days to
13 respond to any notice issued by Vinocur pursuant to this Section. The stipulated penalty shall be
14 \$1,500 if the concentration of any one or more of the Listed Chemicals is Detectable but less than
15 100 ppm each, and \$3,000 if the concentration of any one or more of the Listed Chemicals is
16 between 100 ppm and 249 ppm each.

17 In order to elect payment of stipulated penalties in lieu of defending an enforcement action
18 by Vinocur, Boppy must provide notice and appropriate supporting information relating to its
19 purchase of the Unreformulated Product, including but not limited to, the following, as available:
20 vendor name and contact information including the name of an appropriate representative of the
21 vendor, purchase order, certification (if any) received from the vendor covering the Unreformulated
22 Product, and test results. Boppy shall also provide to Vinocur, within thirty calendar days of the
23 date of election to pay a stipulated penalty, certification from counsel for or an officer or director of
24 Boppy attesting to the information provided.

25 Vinocur shall be entitled to reimbursement of his expense associated with Boppy's election
26 pursuant to this Section in an amount not to exceed \$6,000 regardless of the stipulated penalty level.
27

1 Vinocur shall provide appropriate documentation for any associated expenses for which it seeks
2 reimbursement pursuant to this Section.

3 This Section shall not be applicable where the vendor in question had previously been found
4 by Boppy to provide unreliable certifications as to meeting the Reformulation Standard in its
5 products. Notwithstanding the foregoing, a stipulated penalty for a second exceedance by Boppy's
6 vendor at a level between 100 and 249 ppm shall not be available after March 15, 2014. Stipulated
7 penalties shall not be available for Unreformulated Products containing any one or more of the
8 Listed Chemicals in excess of 249 ppm.

9 Nothing in this section shall be construed as a waiver of any rights or defenses of Boppy in
10 the event that Boppy declines to elect to pay a stipulated penalty and an enforcement action or other
11 is instituted. Boppy reserves all rights with respect thereto.

12 4.4. Reimbursement of Fees and Costs

13 The Parties acknowledge that Vinocur and his counsel offered to resolve this dispute
14 without reaching terms on the amount of fees and costs to be reimbursed to Vinocur, thereby
15 leaving this fee reimbursement issue to be resolved after the material terms of the agreement had
16 been settled. Shortly after the other settlement terms had been finalized, Boppy expressed a desire
17 to resolve the fee and cost issue. Boppy then agreed to pay Vinocur and his counsel under general
18 contract principles and the private attorney general doctrine codified at California Code of Civil
19 Procedure section 1021.5 for all work performed through the mutual execution of this agreement,
20 including the fees and costs incurred as a result of investigating, bringing this matter to Boppy's
21 attention, negotiating a settlement in the public interest, and seeking court approval of the same.
22 Boppy agreed, upon the Court's approval and entry of this Consent Judgment, to pay Vinocur's
23 counsel the amount of fees and costs in the amount of \$40,000. Boppy further agreed to tender, and
24 shall tender, its full required payment under this Section to a trust account at The Chanler Group
25 (checks made payable "In Trust for The Chanler Group") within fourteen business days of the
26 Effective Date. Such funds shall be released from the trust account on or after the Entry Date.

1 **4.5. Payment Procedures**

2 **4.5.1. Issuance of Payments**

3 (a) All payments owed to Vinocur and his counsel shall be delivered to
4 the following payment address:

5 The Chanler Group
6 Attn: Proposition 65 Controller
7 2560 Ninth Street
8 Parker Plaza, Suite 214
9 Berkeley, CA 94710

10 (b) All payments owed to OEHHA (EIN: 68-0284486) shall be delivered
11 directly to OEHHA (Memo line "Prop 65 Penalties") at one of the following addresses, as
12 appropriate:

13 For United States Postal Service Delivery:

14 Mike Gyurics
15 Fiscal Operations Branch Chief
16 Office of Environmental Health Hazard Assessment
17 P.O. Box 4010
18 Sacramento, CA 95812-4010

19 For Non-United States Postal Service Delivery:

20 Mike Gyurics
21 Fiscal Operations Branch Chief
22 Office of Environmental Health Hazard Assessment
23 1001 I Street
24 Sacramento, CA 95814

25 **4.5.2. Proof of Payment to OEHHA**

26 A copy of each check payable to OEHHA shall be mailed, simultaneous with payment, to
27 The Chanler Group at the address set forth in Section 4.6.1(a) above, as proof of payment to
28 OEHHA.

29 **4.5.3. Tax Documentation**

30 Boppy shall issue a separate 1099 form for each payment required by this Section to: (a)
31 Laurence Vinocur, whose address and tax identification number shall be furnished upon request
32 after this Consent Judgment has been fully executed by the Parties; (b) OEHHA, who shall be
33 identified as "California Office of Environmental Health Hazard Assessment" (EIN: 68-0284486)

1 in the 1099 form, to be delivered directly to OEHHA, P.O. Box 4010, Sacramento, CA 95814, and
2 (c) "The Chanler Group" (EIN: 94-3171522) to the address set forth in Section 4.6.1(a) above.

3 **5. CLAIMS COVERED AND RELEASED**

4 **5.1. Plaintiff's Release of Proposition 65 Claims**

5 Vinocur, acting on his own behalf and in the public interest, releases Boppy, its parents,
6 subsidiaries, affiliated entities under common ownership, directors, officers, agents employees,
7 attorneys, and each entity to whom Boppy directly or indirectly distributes or sells Product
8 including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees,
9 cooperative members, and licensees (collectively, "Releasees"), from all claims for violations of
10 Proposition 65 through the Effective Date based on unwarned exposures to TDCPP in the Product.
11 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
12 with respect to exposures to TDCPP from the Product. The Parties further understand and agree
13 that this Section 5.1 release shall not extend upstream to any entities that manufactured the Product
14 or any component parts thereof, or any distributors or suppliers who sold the Product or any
15 component parts thereof to Boppy.

16 **5.2. Plaintiff's Individual Releases of Claims**

17 Vinocur, in his individual capacity only and *not* in his representative capacity, provides a
18 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
19 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
20 liabilities, and demands of Plaintiff of any nature, character, or kind, whether known or unknown,
21 suspected or unsuspected, limited to and arising out of alleged or actual exposures to the Listed
22 Chemicals in the Product manufactured, imported, distributed, or sold by Boppy prior to the
23 Effective Date. The Parties further understand and agree that this Section 5.2 release shall not
24 extend upstream to any entities that manufactured the Products, or any component parts thereof, or
25 any distributors or suppliers who sold the Product, or any component parts thereof to Boppy.
26 Nothing in this Section 5 affects Plaintiff's rights to commence or prosecute an action under
27 Proposition 65 against a Releasee that does not involve Boppy's Product.

1 **5.3. Defendant's Release of Plaintiff**

2 Boppy, on behalf of itself, its past and current agents, representatives, attorneys, successors,
3 and assignees, hereby waives any and all claims against Vinocur and his attorneys and other
4 representatives, for any and all actions taken or statements made (or those that could have been
5 taken or made) by Vinocur and his attorneys and other representatives, whether in the course of
6 investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with
7 respect to the Product.

8 **6. COURT APPROVAL**

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

24 **7. GOVERNING LAW**

25 The terms of this Consent Judgment shall be governed by the laws of the State of California.
26 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by
27 reason of law generally, or if any of the provisions of this Consent Judgment are rendered

1 inapplicable or are no longer required as a result of any such repeal or preemption, or rendered
2 inapplicable by reason of law generally as to the Product and/or the Foam Pregnancy Cushions,
3 then Boppy may provide written notice to Vinocur of any asserted change in the law, and shall have
4 no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
5 Product and/or Foam Pregnancy Cushions are so affected. Nothing in this Consent Judgment shall
6 be interpreted to relieve Boppy from any obligation to comply with any pertinent state or federal
7 law or regulation.

8 **8. NOTICES**

9 Unless specified herein, all correspondence and notices required to be provided pursuant to
10 this Consent Judgment shall be in writing and sent by: (i) personal delivery, (ii) first-class
11 registered or certified mail, return receipt requested; or (iii) overnight courier to a party by another
12 party at the following addresses:

13 To Boppy:

14 The Boppy Company, LLC
15 c/o Nancy Bartley
16 560 Golden Ridge Road, Suite 150
17 Golden, CO 80401

To Plaintiff:

Proposition 65 Coordinator
The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

18 with a copy to:

19 Collie F. James, Esq.
20 Morgan Lewis & Bockius LLP
21 5 Park Plaza, suite 1750
Irvine, CA 92614

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

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

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

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

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

4 **11. POST EXECUTION ACTIVITIES**

5 Vinocur and Bopy agree to support the entry of this agreement as a Consent Judgment and
6 obtain approval of the Consent Judgment by the Court in a timely manner. The Parties
7 acknowledge that, pursuant to California Health & Safety Code section 25249.7, a noticed motion is
8 required to obtain judicial approval of this Consent Judgment, which Plaintiff shall draft and file. If
9 any third party objection to the noticed motion is filed, Vinocur and Bopy shall work together to
10 file a reply and appear at any hearing before the Court. This provision is a material component of
11 the Consent Judgment and shall be treated as such in the event of a breach.

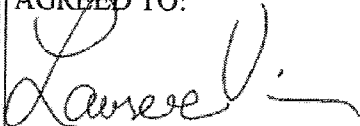
12 **12. MODIFICATION**

13 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
14 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
15 of any party and entry of a modified Consent Judgment by the Court.
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **13. 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.

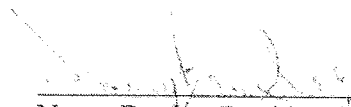
6 AGREED TO:

7 

8 _____
9 Plaintiff Laurence Vinocur

10 Date: January 14, 2014

6 AGREED TO:

7 

8 _____
9 Nancy Bartley, President
10 The Boppy Company, LLC

11 Date: January 10, 2014