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9  
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11 LAURENCE VINOUCUR

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

11 LAURENCE VINOUCUR,  
12 Plaintiff,  
13 v.  
14 ESSENTIAL MEDICAL SUPPLY, INC.;  
15 et al.  
16 Defendants.

Case No. RG13676698

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

**[PROPOSED] CONSENT JUDGMENT AS  
TO ESSENTIAL MEDICAL SUPPLY, INC.**

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

Complaint Filed: April 23, 2013

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Laurence Vinocur  
4 (“Plaintiff”) and Essential Medical Supply, Inc. (“EMS”), with Plaintiff and the EMS collectively  
5 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 EMS**

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

18 1.4.3 Pursuant to Proposition 65, on October 28, 2011, California identified and  
19 listed TDCPP as a chemical known to cause cancer. TDCPP became subject to the “clear and  
20 reasonable warning” requirements of Proposition 65 one year later on October 28, 2012. Cal. Code  
21 Regs., tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 and 25249.10(b). TDCPP is  
22 hereinafter referred to as the “Listed Chemical.” Plaintiff alleges that the Listed Chemical escapes  
23 from foam padding, leading to human exposures.

24 **1.5 Product Description**

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

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

3 **1.6 Notice of Violation**

4 On February 8, 2013, Plaintiff served EMS 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 the Listed Chemical. To the best of the  
8 Parties’ knowledge, no public enforcer has commenced or is diligently prosecuting the allegations  
9 set forth in the Notice.

10 **1.7 Complaint**

11 On April 23, 2013, Plaintiff filed a Complaint in the Superior Court in and for the County of  
12 Alameda against the EMS and Does 1 through 150, *Laurence Vinocur v. Essential Medical Supply,*  
13 *Inc., et al.*, Case No. RG 13-676698, alleging violations of Proposition 65, based in part on the  
14 alleged unwarned exposures to TDCPP contained in the Products.

15 **1.8 No Admission**

16 EMS denies the material factual and legal allegations contained in Plaintiff’s Notice and  
17 Complaint and maintain that all products that it has manufactured, imported, distributed, and/or sold  
18 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 EMS of any fact, finding, conclusion,  
20 issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be  
21 construed as an admission by EMS of any fact, finding, conclusion, issue of law, or violation of  
22 law. However, this Section shall not diminish or otherwise affect EMS’ obligations,  
23 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 EMS as to the allegations contained in the Complaint, that venue is proper in the  
27 County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions of this  
28 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 EMS reasonably understands is located  
4 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  
8 of .0025%) of any one chemical in any material, component, or constituent of a subject product,  
9 when 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, tris(2-chloroethyl) phosphate (“TCEP”), and/or tris(2,3-  
12 dibromopropyl)phosphate (“TDBPP”) in a solid substance.

13 **2.3 Effective Date**

14 “Effective Date” shall mean September 30, 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 TCEP or TDBPP.

22 **2.6 Reformulation Standard**

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

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, EMS shall not manufacture or import for distribution or  
4 sale to California Customers, or cause to be manufactured or imported for distribution or sale to  
5 California Customers, any Products that are not Reformulated Products.

6 **3.2 Vendor Notification/Certification**

7 On or before the Effective Date, EMS shall provide written notice to all of its then-current  
8 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, EMS shall not employ statements that will encourage a vendor to delay compliance with  
12 the Reformulation Standard. EMS shall subsequently obtain written certifications, no later than  
13 April 1, 2014, from such vendors, and any newly engaged vendors, that the Products manufactured  
14 by such vendors are in compliance with the Reformulation Standard. Certifications shall be held by  
15 EMS for at least two years after their receipt and shall be made available to Plaintiff upon request.

16 **3.3 Products No Longer in EMS' Control**

17 No later than 30 days after the Effective Date, EMS shall send a letter, electronic or  
18 otherwise ("Notification Letter") to: (1) each California Customer and/or Retailer which it, after  
19 October 28, 2011, supplied the item for resale in California described as an exemplar in the Notice  
20 EMS received from Plaintiff ("Exemplar Product"); and (2) any California Customer and/or  
21 Retailer that EMS reasonably understands or believes had any inventory for resale in California of  
22 Exemplar Products as of the Notice's date. The Notification Letter shall advise the recipient that  
23 the Exemplar Product "contains TDCPP, a chemical known to the State of California to cause  
24 cancer," and request that the recipient either: (a) label the Exemplar Products remaining in  
25 inventory for sale in California, or to California Customers, pursuant to Section 3.5; or (b) return, at  
26 EMS' sole expense, all units of the Exemplar Product held for sale in California, or to California  
27 Customers, to EMS or a party EMS has otherwise designated. The Notification Letter shall require  
28 a response from the recipient within 20 days confirming whether the Exemplar Product will be

1 labeled or returned. EMS shall maintain records of all correspondence or other communications  
2 generated pursuant to this Section for two years after the Effective Date and shall promptly produce  
3 copies of such records upon Plaintiff's written request.

#### 4 3.4 Current Inventory

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

#### 9 3.5 Product Warnings

##### 10 3.5.1 Product Labeling

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

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

18 **WARNING:** This product contains TDCPP, a flame  
19 retardant chemical known to the State  
of California to cause cancer.<sup>1</sup>

20 Attached as Exhibit B are template warnings developed by Plaintiff that are deemed to be  
21 clear and reasonable for purposes of this Consent Judgment.<sup>2</sup> Provided that the other requirements

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22 <sup>1</sup> Alternative warning language that meets the requirements of 27 CCR § 25601, et seq. may  
23 also be used if EMS had begun to use it, prior to the Effective Date. A copy of said alternative  
24 warning shall be provided to Plaintiff upon request. If Plaintiff reasonably contends that the  
25 alternative warning does not comply with 27 CCR § 25601, et seq., then the language must  
26 thereafter be modified by EMS to Plaintiff's reasonable satisfaction relative to 27 CCR § 25601, et  
27 seq.'s requirements. Also, the warning language required by this Section may be modified into a  
28 hybrid warning statement, subject to Plaintiff's approval, which shall not be unreasonably withheld,  
to the extent EMS elects to warn for chemicals listed under Proposition 65 in addition to the Listed  
Chemical. The Parties agree that the following hybrid warning language shall not be deemed to  
meet the requirements of 27 CCR § 25601, et seq. 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 set forth in this Section are addressed, including obtaining Plaintiff's approval where required, if  
2 EMS elects not to utilize the template warnings it remains free to provide a warning in any other  
3 manner meeting the requirements of 27 CCR § 25601, et seq..

#### 4 3.5.2 Internet Website Warning

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

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

#### 14 3.6 Alternatives to Interim Warnings

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

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24 <sup>2</sup> 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 <sup>3</sup> 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, EMS shall pay the civil  
4 penalties shown for it on Exhibit A in accordance with this Section. Each penalty payment will be  
5 allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with 75%  
6 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. EMS shall be liable for payment of interest, at a rate of  
10 10% simple interest, for all amounts due and owing under this Section that are not received within  
11 two business days of the due date.

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

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

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

22 4.1.4 Reductions to Civil Penalty Payment Amounts. EMS may reduce the amount  
23 of the second and/or third civil penalty payments identified on EMS’ 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 EMS’ civil penalty payment constitute material terms of  
27 this Consent Judgment, and with regard to such terms, time is of the essence.  
28



1                                   4.1.4(i)    **Partial Penalty Waiver for Accelerated Reformulation of**  
2 **Products Sold or Offered for Sale in California.**

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

10                                   4.1.4(ii)   **Partial Penalty Waiver for Accelerated Nationwide**  
11 **Reformulation.**

12           As shown on EMS' Exhibit A, a portion of the third civil penalty shall be waived, to the  
13 extent that it has agreed that, as of March 15, 2014, and continuing into the future, it shall only  
14 manufacture or import for distribution or sale in the United States or cause to be manufactured or  
15 imported for distribution or sale in the United States, Reformulated Products. An officer or other  
16 authorized representative of EMS that has exercised this election shall provide Plaintiff with a  
17 written certification confirming compliance with such conditions, which certification must be  
18 received by Plaintiff's counsel on or before November 15, 2014.

19                                   4.1.4(iii)   **Partial Penalty Waiver for Withdrawal of Unreformulated**  
20 **Exemplar Products from the California Market.**

21           As shown on EMS' Exhibit A, a portion of the second civil penalty shall be waived, if an  
22 officer or other authorized representative of EMS provides Plaintiff with written certification, by  
23 December 15, 2013, confirming that each individual or establishment in California to which it  
24 supplied the Exemplar Product after October 28, 2011, has elected, pursuant to Section 3.3, to  
25 return all Exemplar Products held for sale in California.<sup>4</sup>

26 \_\_\_\_\_  
27 <sup>4</sup> For purposes of this Section, the term Exemplar Products shall further include Products for  
28 which Plaintiff has, prior to **September 15, 2013**, provided EMS 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                                   4.1.4(iv) **Partial Penalty Waiver for Termination of Distribution to**  
2 **California of Unreformulated Inventory.**

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

8                   4.2       **Representation**

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

19                   4.3       **Stipulated Penalties for Certain Violations of the Reformulation Standard.**

20                   If Plaintiff provides notice and appropriate supporting information to EMS that levels of a  
21 Listed Chemical in excess of the Reformulation Standard have been detected in one or more  
22 Products labeled or otherwise marked in an identifiable manner as manufactured or imported after a  
23 deadline for meeting the Reformulation Standard has arisen for EMS under Sections 3.1 or 3.6  
24 above, EMS may elect to pay a stipulated penalty to relieve any further potential liability under  
25 Proposition 65 or sanction under this Consent Judgment as to Products sourced from the vendor in  
26  
27  
28

1 question.<sup>5</sup> The stipulated penalty shall be \$1,500 if the violation level is below 100 ppm and \$3,000  
2 if the violation level is between 100 ppm and 249 ppm, this being applicable for any amount in  
3 excess of the Reformulation Standards but under 250 ppm.<sup>6</sup> Plaintiff shall further be entitled to  
4 reimbursement of their associated expense in an amount not to exceed \$5,000 regardless of the  
5 stipulated penalty level. EMS under this Section must provide notice and appropriate supporting  
6 information relating to the purchase (e.g. vendor name and contact information including  
7 representative, purchase order, certification (if any) received from vendor for the exemplar or  
8 subcategory of products), test results, and a letter from a company representative or counsel  
9 attesting to the information provided, to Plaintiff within 30 calendar days of receiving test results  
10 from Plaintiff's counsel. Any violation levels at or above 250 ppm shall be subject to the full  
11 remedies provided pursuant to this Consent Judgment and at law.

#### 12 4.4 Reimbursement of Fees and Costs

13 The Parties acknowledge that Plaintiff and his counsel offered to resolve this dispute  
14 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving  
15 this fee reimbursement issue to be resolved after the material terms of the agreement had been  
16 settled. Shortly after the other settlement terms had been finalized, EMS expressed a desire to  
17 resolve the fee and cost issue. EMS then agreed to pay Plaintiff and his counsel under general  
18 contract principles and the private attorney general doctrine codified at California Code of Civil  
19 Procedure § 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 EMS'  
21 attention, negotiating a settlement in the public interest, and seeking court approval of the same.  
22 EMS more specifically agreed, upon the Court's approval and entry of this Consent Judgment, to  
23 pay Plaintiff's counsel the amount of fees and costs indicated on EMS' Exhibit A. EMS further

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

<sup>6</sup> 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 agreed to tender and shall tender its full required payment under this Section to a trust account at  
2 The Chanler Group (made payable “In Trust for The Chanler Group”) within two business days of  
3 the Effective Date. Such funds shall be released from the trust account upon the Court’s approval  
4 and entry of this Consent Judgment.

5 **4.5 Payment Procedures**

6 4.5.1 Issuance of Payments.

7 (a) All payments owed to Plaintiff and his counsel, pursuant to Sections  
8 4.1, 4.3 and 4.4 shall be delivered to the following payment address:

9 The Chanler Group  
10 Attn: Proposition 65 Controller  
11 2560 Ninth Street  
12 Parker Plaza, Suite 214  
13 Berkeley, CA 94710

14 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to  
15 Sections 4.1 and 4.3, shall be delivered directly to OEHHA (Memo line “Prop 65 Penalties”) at one  
16 of the following addresses, as appropriate:

17 For United States Postal Service Delivery:

18 Mike Gyurics  
19 Fiscal Operations Branch Chief  
20 Office of Environmental Health Hazard Assessment  
21 P.O. Box 4010  
22 Sacramento, CA 95812-4010

23 For Non-United States Postal Service Delivery:

24 Mike Gyurics  
25 Fiscal Operations Branch Chief  
26 Office of Environmental Health Hazard Assessment  
27 1001 I Street  
28 Sacramento, CA 95814

4.5.2 Proof of Payment to OEHHA. A copy of each check payable to OEHHA  
shall be mailed, simultaneous with payment, to The Chanler Group at the address set forth in  
Section 4.5.1(a) above, as proof of payment to OEHHA.

4.5.3 Tax Documentation. EMS shall issue a separate 1099 form for each payment  
required by this Section to: (a) Laurence Vinocur, whose address and tax identification number  
shall be furnished upon request after this Consent Judgment has been fully executed by the Parties;

1 (b) OEHHA, who shall be identified as “California Office of Environmental Health Hazard  
2 Assessment” (EIN: 68-0284486) in the 1099 form, to be delivered directly to OEHHA, P.O. Box  
3 4010, Sacramento, CA 95814, and (c) “The Chanler Group” (EIN: 94-3171522) to the address set  
4 forth in Section 4.5.1(a) above.

5 **5. CLAIMS COVERED AND RELEASED**

6 **5.1 Plaintiff’s Release of Proposition 65 Claims**

7 Plaintiff, acting on his own behalf and in the public interest, releases EMS, its parents,  
8 subsidiaries, affiliated entities under common ownership, directors, officers, agents employees,  
9 attorneys, and each entity to whom EMS directly or indirectly distributes or sells Products,  
10 including, but not limited, to downstream distributors, wholesalers, customers, retailers,  
11 franchisees, cooperative members, and licensees (collectively, “Releasees”), from all claims for  
12 violations of Proposition 65 through the Effective Date based on unwarned exposures to the Listed  
13 Chemical in the Products, as set forth in the Notice. Compliance with the terms of this Consent  
14 Judgment constitutes compliance with Proposition 65 with respect to exposures to the Listed  
15 Chemical from the Products, as set forth in the Notice. The Parties further understand and agree  
16 that this Section 5.1 release shall not extend upstream to any entities, other than EMS, that  
17 manufactured the Products or any component parts thereof, or any distributors or suppliers who  
18 sold the Products or any component parts thereof to EMS, except that any entity upstream of EMS  
19 that is a Retailer of a Private Labeled Covered Product shall be released as to the Private Labeled  
20 Covered Products offered for sale in California, or to California Customers, by the Retailer in  
21 question.

22 **5.2 Plaintiff’s Individual Releases of Claims**

23 Plaintiff, in his individual capacity only and *not* in his representative capacity, provides a  
24 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all  
25 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,  
26 liabilities, and demands of Plaintiff of any nature, character, or kind, whether known or unknown,  
27 suspected or unsuspected, limited to and arising out of alleged or actual exposures to TDCPP,  
28 TCEP, and/or TDBPP in the Products or Additional Products (as defined in Section 11.1 and

1 delineated on EMS' Exhibit A) manufactured, imported, distributed, or sold by EMS prior to the  
2 Effective Date.<sup>7</sup> The Parties further understand and agree that this Section 5.2 release shall not  
3 extend upstream to any entities that manufactured the Products or Additional Products, or any  
4 component parts thereof, or any distributors or suppliers who sold the Products or Additional  
5 Products, or any component parts thereof to EMS, except that any entities upstream of EMS that is  
6 a Retailer of a Private Labeled Covered (or Additional) Product shall be released as to the Private  
7 Labeled Covered (or Additional) Products offered for sale in California by the Retailer in question.  
8 Nothing in this Section affects Plaintiff's rights to commence or prosecute an action under  
9 Proposition 65 against a Releasee that does not involve EMS' Products or Additional Products.

10 **5.3 EMS' Release of Plaintiff**

11 EMS, on behalf of itself, its past and current agents, representatives, attorneys, successors,  
12 and assignees, hereby waives any and all claims against Plaintiff and his attorneys and other  
13 representatives, for any and all actions taken or statements made (or those that could have been  
14 taken or made) by Plaintiff and his attorneys and other representatives, whether in the course of  
15 investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with  
16 respect to the Products and Additional Products.

17 **6. COURT APPROVAL**

18 This Consent Judgment is not effective until it is approved and entered by the Court and  
19 shall be null and void if, for any reason, it is not approved and entered by the Court within one year  
20 after it has been fully executed by all Parties. If the Court does not approve the Consent Judgment,  
21 the Parties shall meet and confer as to whether to modify the language or appeal the ruling. If the  
22 Parties do not jointly agree on a course of action to take, then the case shall proceed in its normal  
23 course on the Court's trial calendar. If the Court's approval is ultimately overturned by an appellate  
24 court, the Parties shall meet and confer as to whether to modify the terms of this Consent Judgment.  
25 If the Parties do not jointly agree on a course of action to take, then the case shall proceed in its  
26 normal course on the Court's trial calendar. In the event that this Consent Judgment is entered by

27 \_\_\_\_\_  
28 <sup>7</sup> The injunctive relief requirements of Section 3 shall apply to Additional Products as otherwise specified.

1 the Court and subsequently overturned by any appellate court, any monies that have been provided  
2 to OEHHA, Plaintiff or his counsel pursuant to Section 4, above, shall be refunded within 15 days  
3 of the appellate decision becoming final. If the Court does not approve and enter the Consent  
4 Judgment within one year of the Effective Date, any monies that have been provided to OEHHA or  
5 held in trust for Plaintiff or his counsel pursuant to Section 4, above, shall be refunded to EMS  
6 within 15 days.

7 **7. GOVERNING LAW**

8 The terms of this Consent Judgment shall be governed by the laws of the State of California.  
9 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by  
10 reason of law generally, or if any of the provisions of this Consent Judgment are rendered  
11 inapplicable or are no longer required as a result of any such repeal or preemption, or rendered  
12 inapplicable by reason of law generally as to the Products, then EMS may provide written notice to  
13 Plaintiff of any asserted change in the law, and shall have no further obligations pursuant to this  
14 Consent Judgment with respect to, and to the extent that, the Products are so affected. Nothing in  
15 this Consent Judgment shall be interpreted to relieve EMS from any obligation to comply with any  
16 pertinent state or federal law or regulation.

17 **8. NOTICES**

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

22 To EMS:

23 At the address shown on Exhibit A

To Plaintiff:

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

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

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

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

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

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

8 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

9 11.1 In addition to the Products, where EMS has identified on Exhibit A additional  
10 products that contain TDCPP, TCEP and/or TDBPP and that are sold or offered for sale by it in  
11 California, or to California Customers, (“Additional Products”), then by no later than October 15,  
12 2013, EMS may provide Plaintiff with additional information or representations necessary to enable  
13 them to issue a 60-Day Notice of Violation and valid Certificate of Merit therefore, pursuant to  
14 Health & Safety Code § 25249.7, that includes the Additional Products. Polyurethane foam that is  
15 supplied, shaped or manufactured for use as a component of a product, such as seat cushions, is  
16 specifically excluded from the definition of Additional Products and shall not be identified by EMS  
17 on Exhibit A as an Additional Product. Except as agreed upon by Plaintiff, EMS shall not include a  
18 product, as an Additional Product, that is the subject of an existing 60-day notice issued by Plaintiff  
19 or any other private enforcer at the time of execution. After receipt of the required information,  
20 Plaintiff agrees to issue a supplemental 60-day notice in compliance with all statutory and  
21 regulatory requirements for the Additional Products. Plaintiff will, and in no event later than  
22 October 1, 2014, prepare and file an amendment to this Consent Judgment to incorporate the  
23 Additional Products within the defined term “Products” and, upon the Court’s approval thereof, the  
24 Additional Products shall become subject to Section 5.1 in addition to Section 5.2. EMS shall, at  
25 the time it elects to utilize this Section and tenders the additional information or representations  
26 regarding the Additional Products to Plaintiff, tender to The Chanler Group’s trust account an  
27 amount not to exceed \$8,750 as stipulated penalties and attorneys’ fees and costs incurred by  
28 Plaintiff in issuing the new notice and engaging in other reasonably related activities, which may be



1 released from the trust as awarded by the Court upon Plaintiff's application. (Any tendered funds  
2 remaining in the trust thereafter shall be refunded to EMS within 15 days). Such payment shall be  
3 made to "in trust for The Chanler Group" and delivered as per Section 4.5.1(a) above.

4 11.2 Plaintiff and EMS agree to support the entry of this agreement as a Consent  
5 Judgment and obtain approval of the Consent Judgment by the Court in a timely manner. The  
6 Parties acknowledge that, pursuant to California Health & Safety Code § 25249.7, a noticed motion  
7 is required to obtain judicial approval of this Consent Judgment, which Plaintiff shall draft and file.  
8 If any third party objection to the noticed motion is filed, Plaintiff and EMS shall work together to  
9 file a reply and appear at any hearing before the Court. This provision is a material component of  
10 the Consent Judgment and shall be treated as such in the event of a breach.

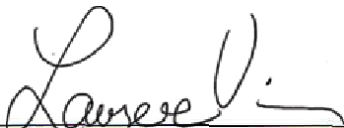
11 **12. MODIFICATION**

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


15 **13. AUTHORIZATION**

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

19  
20 AGREED TO:

21   
22 \_\_\_\_\_  
23 Plaintiff Laurence Vinocur

AGREED TO:

21   
22 \_\_\_\_\_  
23 Michael Hoepner, President  
Essential Medical Supply, Inc.

24  
25 Date: September 10, 2013

Date: September 5, 2013

EXHIBIT A

I. Name of Settling Defendant (Mandatory):

Essential Medical Supply, Inc.  
6420 Hazeltine National Drive  
Orlando, FL 32822

II. Names of Releasees (Optional; May be Partial): N/A

III. Types of Covered Products Applicable to Essential Medical Supply, Inc.  
(Check All That Match 60-Day Notice or Supplemental Notice Received)

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

Upholstered furniture

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

Car seats, strollers

Other (specify): Seat Cushions

IV. Types of Additional Products EMS Elects to Address (if any):

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V. Essential Medical Supply, Inc.'s Required Settlement Payments:

A. Penalties for Essential Medical Supply, Inc. as a De Minimis Defendant are \$53,000, as follows:

\$15,000 initial payment due on or before the Effective Date;

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

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

VI. Payment to The Chanler Group for reimbursement of attorneys' fees and costs:

A. Fees and Costs for Essential Medical as a De Minimis Defendant: \$35,000.

VII. Person(s) to receive Notices pursuant to Section 8:

Michael Hoepner, President  
Essential Medical Supply, Inc.  
6420 Hazeltine National Drive  
Orlando, FL 32822

Melissa A. Jones  
STOEL RIVES LLP  
500 Capitol Mall, Suite 1600  
Sacramento, CA 95814  
*Attorneys for Essential Medical Supply, Inc.*

EXHIBIT B  
(ILLUSTRATIVE WARNINGS)

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