

1 Josh Voorhees, State Bar No. 241436
 Troy C. Bailey, State Bar No. 277424
 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
 8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 9 COUNTY OF ALAMEDA
 10 UNLIMITED CIVIL JURISDICTION

12 LAURENCE VINO CUR

13 Plaintiff,

14 v.

15 STUDIO DESIGNS, INC.; DICK BLICK
 16 HOLDINGS, INC.; ONTEL PRODUCTS
 CORPORATION; et al.,

17 Defendant.
 18
 19

) Case No. RG13700786
)
)

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

) **[PROPOSED] CONSENT JUDGMENT AS
 TO ONTEL PRODUCTS CORP.**

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Laurence Vinocur
4 (“Vinocur”) and the defendant Ontel Products Corporation (“Ontel”) with Vinocur and Ontel
5 collectively referred to as the “Parties.”

6 **1.2 Laurence Vinocur**

7 Vinocur 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 Ontel Products Corp.**

11 Ontel 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 Vinocur alleges that Ontel manufactured, imported, sold and/or distributed
16 for sale in California, orthopedic seat cushions with foam padding containing tris(1,3-dichloro-2-
17 propyl) phosphate (“TDCPP”) and tris(2-chloroethyl) phosphate (“TCEP”) without the requisite
18 Proposition 65 health hazard warnings. Vinocur alleges that TDCPP and TCEP escape from foam
19 padding, leading to human exposures.

20 1.4.2. Pursuant to Proposition 65, on April 1, 1992, California identified and listed
21 TCEP as a chemical known to cause cancer. TCEP became subject to the “clear and reasonable
22 warning” requirements of Proposition 65 one year later on April 1, 1993. Cal. Code Regs., tit. 27, §
23 27001(c); Health & Safety Code §§ 25249.8 and 25249.10(b).

24 1.4.3 Pursuant to Proposition 65, on October 28, 2011, California identified and
25 listed TDCPP as a chemical known to cause cancer. TDCPP became subject to the “clear and
26 reasonable warning” requirements of Proposition 65 one year later on October 28, 2012. Cal. Code
27 Regs., tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 and 25249.10(b).

28

1 **1.5 Product Description**

2 The categories of products that are covered by this Consent Judgment as to Ontel are
3 identified on Exhibit A (hereinafter “Products”). Polyurethane foam that is supplied, shaped or
4 manufactured for use as a component of another product, such as upholstered furniture, but which is
5 not itself a finished product, is specifically excluded from the definition of Products.

6 **1.6 Notice of Violation**

7 On or about June 10, 2013, Vinocur served Ontel and certain requisite public enforcement
8 agencies with a “60-Day Notice of Violation” (“Notice”) that provided the recipients with notice of
9 alleged violations of Proposition 65 based on the alleged failure to warn customers, consumers, and
10 workers in California that Ontel’s Seat Solution Product exposes users to TDCPP and TCEP. To
11 the best of the Parties’ knowledge, no public enforcer has commenced or is diligently prosecuting
12 the allegations set forth in the Notice.

13 **1.7 No Admission**

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

22 **1.8 Consent to Jurisdiction**

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

27

28

1 **2. DEFINITIONS**

2 **2.1 California Customers**

3 “California Customer” shall mean any customer that Ontel 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
8 of .0025%) of any one chemical in any material, component, or constituent of a
9 subject product, when analyzed pursuant to EPA testing methodologies 3545 and 8270C, or
10 equivalent methodologies utilized by federal or state agencies to determine the presence, and
11 measure the quantity, of TDCPP and/or TCEP in a solid substance.

12 **2.3 Effective Date**

13 “Effective Date” shall mean June 1, 2014.

14 **2.4 Reformulated Products**

15 “Reformulated Products” shall mean Products that contain no Detectable amount of each
16 TDCPP and TCEP.

17 **2.5 Reformulation Standard**

18 The “Reformulation Standard” shall mean containing no more than 25 ppm for each TDCPP
19 and TCEP.

20 **2.6 Retailer**

21 “Retailer” means an individual or entity that offers a Product for retail sale to consumers in
22 the State of California.

23 **3. INJUNCTIVE RELIEF: REFORMULATION**

24 **3.1 Reformulation Commitment**

25 On or before the Effective Date, Ontel shall not manufacture or import for distribution or
26 sale to California Customers, or cause to be manufactured or imported for distribution or sale to
27 California Customers, any Products that are not Reformulated Products. Further, Ontel shall not
28 manufacture, or import for distribution or sale to California Customers, or cause to be manufactured

1 or imported for distribution or sale to California Customers, any Products containing tris(2,3-
2 dibromopropyl)phosphate (“TDBPP”).

3 **3.2 Vendor Notification/Certification**

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

14 **3.3 Current and Future Inventory**

15 Ontel does not have any Products in, or manufactured and en route to, Ontel’s inventory that
16 do not qualify as Reformulated Products and that Ontel has reason to believe may be sold or
17 distributed for sale in California. As of the Effective Date and continuing into the future, Ontel
18 agrees to only manufacture or import for distribution or sale to California Customers, or cause to be
19 manufactured or imported for distribution or sale to California Customers, Reformulated Products.

20 **4. MONETARY PAYMENTS**

21 **4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

22 In settlement of all the claims referred to in this Consent Judgment, Ontel shall pay the civil
23 penalties shown on Exhibit A in accordance with this Section. The penalty payment will be
24 allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with 75%
25 of the funds remitted to the California Office of Environmental Health Hazard Assessment
26 (“OEHHA”), and 25% of the penalty remitted to Vinocur.

27 The penalty payment shall be made by Ontel delivering, on or before the Effective Date, to
28 its legal counsel, Venable LLP, two separate checks, one made payable to “OEHHA” in the amount

1 of \$3,250 and the other made payable to "The Chanler Group in Trust for Laurence Vinocur" in the
2 amount of \$9,750. Venable LLP shall provide The Chanler Group with written confirmation within
3 five business days of receipt of the checks. Within five business days following the date that this
4 Consent Judgment is approved by the Court, Venable LLP shall mail the checks to the respective
5 payee at the addresses listed in Section 4.3 below. Ontel shall be liable for payment of interest, at a
6 rate of 10% simple interest, for all amounts due and owing under this Section that are not received
7 by the payee within five business days following the due date.

8 **4.2 Reimbursement of Fees and Costs**

9 The Parties acknowledge that Vinocur and his counsel offered to resolve this dispute
10 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
11 this fee reimbursement issue to be resolved after the material terms of the agreement had been
12 settled. Shortly after the other settlement terms had been finalized, Ontel expressed a desire to
13 resolve the fee and cost issue. Ontel then agreed to pay Vinocur and his counsel under general
14 contract principles and the private attorney general doctrine codified at California Code of Civil
15 Procedure section 1021.5 for all work performed through the mutual execution of this agreement,
16 including the fees and costs incurred as a result of investigating, bringing this matter to Ontel's
17 attention, negotiating a settlement in the public interest, and seeking court approval of the same. In
18 addition, the negotiated fee and cost figure expressly includes the anticipated significant amount of
19 time Vinocur's counsel will incur to monitor various provisions in this agreement over the next two
20 years. Ontel more specifically agreed, upon the Court's approval and entry of this Consent
21 Judgment, to pay Vinocur's counsel the amount of fees and costs indicated on Ontel's Exhibit A.
22 Ontel further agreed to tender and shall tender its full required payment under this Section to
23 Venable LLP in the form of a check made payable to The Chanler Group by on or before the
24 Effective Date. Venable LLP shall provide The Chanler Group with written confirmation within
25 five business days of receipt of the check. Within five business days following the date that this
26 Consent Judgment is approved by the Court, Venable LLP shall mail the check to The Chanler
27 Group.

28

1 **4.3 Payment Procedures**

2 4.3.1 Issuance of Payments.

3 (a) All payments owed to Vinocur and his counsel, pursuant to Sections
4 4.1 and 4.2 shall be delivered to the following payment address upon approval and entry of
5 this Consent Judgment:

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

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

14 For United States Postal Service Delivery:

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

20 For Non-United States Postal Service Delivery:

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

26 4.3.2 Proof of Payment to OEHHA. A copy of the check payable to OEHHA shall
27 be mailed, simultaneous with payment, to The Chanler Group at the address set forth in Section
28 4.3.1(a) above, as proof of payment to OEHHA.

29 4.3.3 Tax Documentation. Ontel shall issue a separate 1099 form for each
30 payment required by this Section to: (a) Laurence Vinocur, whose address and tax identification
31 number shall be furnished upon request after this Consent Judgment has been fully executed by the
32 Parties; (b) OEHHA, who shall be identified as "California Office of Environmental Health Hazard
33 Assessment" (EIN: 68-0284486) in the 1099 form, to be delivered directly to OEHHA, P.O. Box

1 4010, Sacramento, CA 95814; and (c) "The Chanler Group" (EIN: 94-3171522) to the address set
2 forth in Section 4.3.1(a) above.

3 **5. CLAIMS COVERED AND RELEASED**

4 **5.1 Vinocur's Release of Proposition 65 Claims**

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

17 **5.2 Vinocur's Individual Releases of Claims**

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

1 **5.3 Ontel's Release of Vinocur**

2 Ontel, 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 Products.

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, Vinocur or his counsel pursuant to Section 4, above, shall be refunded within 15 days
20 of the appellate decision becoming final. If the Court does not approve and enter the Consent
21 Judgment within one year of the Effective Date, any monies that have been provided to OEHHA or
22 held in trust for Vinocur or his counsel pursuant to Section 4, above, shall be refunded to Ontel
23 within 15 days.

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
28 inapplicable or are no longer required as a result of any such repeal or preemption, or rendered

1 inapplicable by reason of law generally as to the Products, then Ontel may provide written notice to
2 Vinocur of any asserted change in the law, and shall have no further obligations pursuant to this
3 Consent Judgment with respect to, and to the extent that, the Products are so affected. Nothing in
4 this Consent Judgment shall be interpreted to relieve Ontel from any obligation to comply with any
5 pertinent state or federal law or regulation.

6 **8. NOTICES**

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

11
12 To Ontel:

13 Ontel Products Corporation
14 Attn: President and Chief Financial Officer
15 21 Law Drive
16 Fairfield, New Jersey 07004

To Vinocur:

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

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

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

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

23 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

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

26 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

27 Vinocur and Ontel agree to support the entry of this agreement as a Consent Judgment and
28 obtain approval of the Consent Judgment by the Court in a timely manner. The Parties

1 acknowledge that, pursuant to California Health & Safety Code § 25249.7, a noticed motion is
2 required to obtain judicial approval of this Consent Judgment, which Vinocur shall draft and file. If
3 any third party objection to the noticed motion is filed, Vinocur and Ontel shall work together to
4 file a reply and appear at any hearing before the Court. This provision is a material component of
5 the Consent Judgment and shall be treated as such in the event of a breach.

6 **12. MODIFICATION**

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

10 **13. AUTHORIZATION**

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

14
15
16
17 AGREED TO:

18 

19
20 Plaintiff: Laurence Vinocur

21
22 Date: May 1, 2014

AGREED TO:

Defendant: Ontel Products Corporation

23
24
25
26
27
28
By: 

Name: **JASON BIZJAK**
VP, PRODUCT STRATEGY & BUSINESS DEVELOPMENT

It's:

Date: MAY 19, 2014

EXHIBIT A

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

- I. Name of Settling Defendant: ONTEL PRODUCTS CORP.
- II. Types of Covered Products Applicable to Ontel Products Corp.:
 - a) Orthopedic Seat Cushions with Foam padding containing TDCPP and/or TCEP.
- III. Ontel Products Corp. Required Settlement Payments:
 - A. Penalties of \$13,000, as follows:
 - \$3,250 to Vinocur;
 - \$9,750 to OEHHA, i.e., the "California Office of Environmental Health Hazard Assessment"
 - B. Legal Fees of \$33,000 paid to The Chanler Group for reimbursement of attorneys' fees and costs.