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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF ALAMEDA  
12 UNLIMITED CIVIL JURISDICTION

13 LAURENCE VINOCUR, *et al.*,

14 Plaintiffs,

15 v.

16 ABAD FOAM, INC., *et al.*,

17 Defendants.

Case No. RG14710984

*Assigned for all purposes to the Honorable  
George C. Hernandez, Jr., Department 17*

**[PROPOSED] CONSENT JUDGMENT AS  
TO DEFENDANT ABAD FOAM, INC.**

1           **1. INTRODUCTION**

2           1.1. This Consent Judgment is entered into by plaintiff Laurence Vinocur (“Vinocur”) and  
3 defendant Abad Foam, Inc. (“Abad Foam”) to settle claims asserted by Vinocur against Abad Foam as  
4 set forth in the Complaint filed by Vinocur in the captioned action. Vinocur and Abad Foam are  
5 referred to individually as a “Party” and collectively as the “Parties.”

6           1.2. On June 14, 2013, Vinocur served a 60-Day Notice of Violation, on Abad Foam, the  
7 California Attorney General, and the other requisite public enforcers, alleging that Abad Foam  
8 violated Proposition 65 when it failed to warn its customers and consumers in California of the health  
9 hazards associated with exposures to tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”), a toxic flame  
10 retardant chemical applied to certain “Foam” (as defined herein) (as defined herein) used as padding  
11 in upholstered furniture and other consumer products sold by Pomona in California.

12           1.3. Abad Foam is a “person in the course of doing business” as that phrase is defined by  
13 Proposition 65, that employs ten (10) or more persons, and that manufactures, distributes, and/or sells  
14 Covered Products (as defined in Section 2.2 herein) containing Foam (as defined in Section 2.4  
15 herein) in the State of California.

16           1.4. For purposes of this Consent Judgment only, the Parties stipulate that: (i) this Court has  
17 jurisdiction over the allegations of violations contained in the Notice and Complaint and personal  
18 jurisdiction over Abad Foam as to the acts alleged in the Complaint; (ii) venue is proper in the County  
19 of Alameda; and (iii) this Court has jurisdiction to enter this Consent Judgment as a full and final  
20 resolution of all claims which were or could have been raised in the Complaint based on the facts  
21 alleged in the Notice and Complaint with respect to Foam manufactured, sold and/or distributed for  
22 Sale in California by Abad Foam.

23           1.5. The Parties enter into this Consent Judgment as a full and final settlement of all claims  
24 which were or could have been raised in the Complaint or Notice arising out of the facts or conduct  
25 related to Abad Foam alleged therein. By execution of this Consent Judgment and agreeing to comply  
26 with its terms, the Parties do not admit any fact, conclusion of law, or violation of law, nor shall  
27 compliance with the Consent Judgment constitute or be construed as an admission by the Parties of  
28 any fact, conclusion of law, or violation of law. Abad Foam denies the material, factual, and legal



1 allegations in the Notice and Complaint and expressly denies any wrongdoing whatsoever. Abad  
2 Foam further represents that it does not believe that it sold Covered Products that contained or may  
3 have contained TDCPP within the twelve (12) months prior to the Effective Date. Except as  
4 specifically and expressly provided herein, nothing in this Consent Judgment shall prejudice, waive,  
5 or impair any right, remedy, argument, or defense either Party may have in this or any other pending  
6 or Abad legal proceedings. This Consent Judgment is the product of negotiation and compromise and  
7 is accepted by the Parties solely for purposes of settling, compromising, and resolving issues disputed  
8 in this Action.

## 9 2. DEFINITIONS

10 2.1. "Chemical Flame Retardant" means any halogenated or phosphorous-based chemical  
11 compound used for the purpose of resisting or retarding the spread of fire. "Chemical Flame  
12 Retardant" does not include any chemical that has been rated as a Benchmark 4 chemical pursuant to  
13 Clean Production Action's GreenScreen (<http://www.cleanproduction.org/Green/Greenscreen.php>).

14 2.2. "Covered Products" means foam containing TDCPP that is manufactured, distributed,  
15 and/or sold by Abad Foam in California and used, or intended for use as padding in upholstered  
16 furniture.

17 2.3. "Effective Date" means the date on which the Court approves this Consent Judgment.

18 2.4. "Foam" means polyurethane foam manufactured, distributed and/or sold by Abad  
19 Foam for use as a component material in the manufacture or fabrication of various consumer products  
20 sold in California, including, but not limited to (1) foam-cushioned upholstered furniture, such as, by  
21 way of example only, foam-cushioned chairs, ottomans, sofas, futons, and back cushions; (2) foam-  
22 cushioned pads for infants and children to lie on, such as foam-cushioned pads and mats used for  
23 sleeping or resting, diaper changing pads, infant walkers, and/or car safety seats; and (3) foam-  
24 cushioned mattress toppers.

25 2.5. "Listed Chemical Flame Retardants" means Tris(1,3-dichloro-2-propyl) phosphate  
26 ("TDCPP"), Tris(2-chloroethyl) phosphate ("TCEP"), and Tris(2,3-dibromopropyl)phosphate  
27 ("TDBPP").  
28

1           2.6.   “TB 117” means Technical Bulletin No. 117, entitled “Requirements, Test Procedures  
2 and Apparatus for Testing the Flame Retardance of Filling Materials Used in Upholstered Furniture,”  
3 dated March 2000.

4           2.7.   “TB 117-2013” means Technical Bulletin 117-2013, entitled “Requirements, Test  
5 Procedures and Apparatus for Testing the Smolder Resistance of Materials Used in Upholstered  
6 Furniture,” approved by the State of California on November 21, 2013.

7           2.8.   “TB 117-2013 Effective Date” means January 1, 2015.

8           2.9.   “Treated” means the intentional addition or application of any Chemical Flame  
9 Retardant to any polyurethane foam used as filling material in any Covered Product.

10          2.10. “Untreated Foam” means polyurethane foam that has not been Treated with any  
11 Chemical Flame Retardant.

### 12           **3.    INJUNCTIVE RELIEF**

13          3.1.   **Reformulation of Foam and Covered Products.** Abad Foam shall comply with the  
14 following requirements to reformulate the Foam and Covered Products. With respect to the 25 parts  
15 per million (“ppm”) (.0025%) reformulation standard applicable to each Listed Chemical Flame  
16 Retardant, the amount of a Listed Chemical Flame retardant present in any Foam or Covered Product  
17 sold by Abad after the Effective Date shall determined pursuant to EPA testing methodologies 3545  
18 and 8270C, or equivalent methodologies utilized by federal or California agencies to determine the  
19 presence or measure the amount of TDCPP, TCEP, and/or TDBPP in a solid substance.

20               3.1.1. **Listed Chemical Flame Retardants – Covered Products.** As of the Effective  
21 Date, Abad Foam shall not distribute, sell, or offer for sale in California any Covered Product that  
22 contains any Listed Chemical Flame Retardant in a concentration greater than 25 ppm, and which has  
23 a manufacture date that is on or later than the Effective Date.

24               3.1.2. **Listed Chemical Flame Retardants – Foam.** As of the Effective Date, Abad  
25 Foam shall not distribute, sell, or offer for sale in California any Foam for use in products that, to  
26 Abad Foam’s knowledge, will be or are reasonably likely to be sold in California that contains any  
27 Listed Chemical Flame Retardant in a concentration greater than 25 ppm and which has a manufacture  
28 date that is on or later than the Effective Date.



1                   **3.1.3. Interim Compliance – TDCPP.** Any Covered Products in which the  
2 polyurethane foam has intentionally added TDCPP and which is distributed, sold, or offered for sale  
3 by Abad Foam in California after the Effective Date shall be accompanied by a Clear and Reasonable  
4 Warning that complies with Section 3.1.6.

5                   **3.1.4. Warnings for Covered Products in the Stream of Commerce.** Within 30  
6 days following the Effective Date, Abad Foam shall provide clear and reasonable Proposition 65  
7 warning materials to each of its California retailers or distributors to whom Abad Foam reasonably  
8 believes it sold Covered Products that contained or may have contained TDCPP within the twelve (12)  
9 months prior to the Effective Date. Such warning materials shall include a reasonably sufficient  
10 number of warning labels in order to permit the retailer or distributor to place a warning label on each  
11 Covered Product such customer has purchased from Abad Foam. The warning label shall contain the  
12 warning language set forth in Section 3.1.6. The warning materials shall also include a letter of  
13 instruction for the placement of the warning label, and a Notice and Acknowledgment postcard.  
14 However, at this time Abad Foam does not believe that it sold Covered Products that contained or  
15 may have contained TDCPP within the twelve (12) months prior to the Effective Date.

16                   **3.1.5. Warning Letter to Foam Customers.** Within 30 days following the Effective  
17 Date, Abad Foam shall provide a letter to each of its customers that are located in California as well as  
18 its customers located outside California that Abad Foam has reason to believe sells products  
19 containing Foam in California, and to whom Abad Foam reasonably believes it sold Foam that  
20 contained intentionally added TDCPP after October 31, 2012, if any, and to the extent that such notice  
21 has not already been provided. The warning letter shall inform the customer that, to the extent the  
22 customer purchased Foam to meet California fire safety standards, the Foam sold by Abad Foam  
23 contains tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”), a chemical known to the State of  
24 California to cause cancer. The letter shall further inform the customer that to the extent it sells  
25 products containing Foam in California, the products containing Foam must be accompanied by clear  
26 and reasonable Proposition 65 warnings as set forth in Section 3.1.6. However, at this time Abad  
27 Foam does not believe that it sold Foam that contained intentionally added TDCPP after October 31,  
28 2012.

1                   3.1.6. **Proposition 65 Warnings.** A clear and reasonable warning under this Consent  
2 Judgment shall state:

3                   **WARNING:** This product contains tris(1,3-dichloro-2-propyl)  
4   phosphate (TDCPP), a chemical known to the  
5   State of California to cause cancer.

6 A clear and reasonable warning shall not be preceded by, surrounded by, or include any additional  
7 words or phrases that contradict, obfuscate, or otherwise undermine the warning. The warning  
8 statement shall be prominently displayed on the Covered Product or the packaging of the Covered  
9 Product with such conspicuousness, as compared with other words, statements, or designs as to render  
10 it likely to be read and understood by an ordinary individual prior purchase. For internet, catalog, or  
11 any other sale where the consumer is not physically present and cannot see a warning displayed on the  
12 Covered Product or the packaging of the Covered Product prior to purchase or payment, the warning  
13 statement shall be displayed in such a manner that it is likely to be read and understood prior to the  
14 authorization of or actual payment.<sup>1</sup>

15                   3.2     **Making Untreated FOAM Available to Customers.** After the Effective Date, Abad  
16 Foam will continue to offer and make available for sale Untreated Foam to all of its customers located  
17 in California as well as those customers located outside California on the same basis as it currently  
18 offers customers.

19                   3.3     **Optional Additional Reformulation for Covered Products – Use of Untreated**  
20 **Foam.** In order for Abad Foam to be eligible for a waiver of the additional penalty/payment in lieu of  
21 penalty payments set forth in Section 4.1.5 below, Abad Foam shall undertake the additional actions  
22 to reduce or eliminate the use of Chemical Flame Retardants set forth herein. As of the TB117-2013  
23 Effective Date, Abad Foam shall not manufacture for sale in California any Covered Product that has  
24 been Treated. In order to avoid the additional payments, within 30 days following the TB117-2013  
25 Effective Date, Abad Foam must provide written certification to Vinocur of its use of only Untreated  
26 Foam in Covered Products.

27 <sup>1</sup> The regulatory safe harbor warning language specified in 27 CCR § 25603.2 may also be used if Abad Foam employed it  
28 prior to the Effective Date. Should Abad Foam seek to use alternative warning language, other than the language specified  
above or the safe harbor warning specified in 27 CCR § 25603.2, or seek to use an alternate method of warning  
transmission, it must obtain Court approval of its proposed alternate warning and/or transmission method, and shall  
provide Vinocur, and the Office of the Attorney General with timely notice and the opportunity to comment or object  
before the Court acts on its request.



1           **4.       PENALTIES AND PAYMENT**

2           4.1.    Abad Foam shall initially pay to Vinocur the total sum of twenty-thousand dollars  
3 (\$20,000), which shall be allocated as follows:

4                   4.1.1.   \$2,500 shall constitute a civil penalty pursuant to California Health & Safety  
5 Code § 25249.7(b), such money to be apportioned by Vinocur in accordance with Cal. Health &  
6 Safety Code § 25249.12(c)(1) and (d), with 75% of the penalty payment going to the California Office  
7 of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty paid  
8 to Vinocur. Vinocur’s counsel shall be responsible for delivering OEHHA its share of any civil  
9 penalty payment(s) under this Consent Judgment.

10                   4.1.2.   \$17,500 shall constitute reimbursement of Vinocur’s reasonable attorneys’ fees  
11 and costs.

12                   4.1.3.   The payments required under Sections 4.1.1-4.1.3 shall be made according to  
13 the following payment schedule:

14                           (a) The payments required pursuant to Section 4.1.1 are due within two days of  
15 the Effective Date, and shall be in the form of a single check made payable  
16 to: “Laurence Vinocur, Client Trust Account” in the amount of \$2,500.

17                           (b) The payment required pursuant to Section 4.1.3 shall be tendered in 16  
18 separate, monthly installments of \$1,093.75 each in a check made payable  
19 to “The Chanler Group,” each delivered on or before the first of each month  
20 following the Effective Date.

21 In the event that Abad Foam remits any of the above installment payments on a date that is more than  
22 15 days after the payment due date, all unpaid amounts due under this Consent Judgment shall  
23 become immediately due and owing.

24                   4.1.4.   If Abad Foam elects not to certify its compliance with Section 3.3, above, in  
25 accordance with that Section, within 150 days following the Effective Date, Abad Foam must make an  
26 additional civil penalty payment of \$7,500. The additional penalty payment shall also be allocated  
27 according to Health & Safety Code § 25249.12(c)(1) and (d) with 75% paid to OEHHA and the  
28

1 remaining 25% paid to Vinocur. Unless waived, Abad Foam shall deliver the additional payment in a  
2 single check made payable to "Laurence Vinocur, Client Trust Account."

3 **5. ENFORCEMENT OF CONSENT JUDGMENT**

4 5.1. Vinocur may, by motion or application for an order to show cause before the Superior  
5 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.  
6 Prior to bringing any motion or application to enforce the requirements of Section 3 above, Vinocur  
7 shall provide Abad Foam with a Notice of Violation and a copy of any test result(s) which purportedly  
8 support Vinocur's Notice of Violation. The Parties shall then meet and confer regarding the basis for  
9 Vinocur's anticipated motion or application in an attempt to resolve the alleged violation informally,  
10 including providing Abad Foam a reasonable opportunity of at least thirty (30) days to cure any  
11 alleged violation. Should the Parties' attempts at an informal resolution fail, Vinocur may file his  
12 enforcement motion or application. The prevailing party on any motion to enforce this Consent  
13 Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a result of such  
14 motion or application. This Consent Judgment may only be enforced by the Parties.

15 **6. MODIFICATION OF CONSENT JUDGMENT**

16 6.1. This Consent Judgment may only be modified only by a written agreement of the  
17 Parties, and entry of a modified consent judgment by the Court thereon, or upon a motion or  
18 application brought by any Party, and entry of a modified consent judgment by a Court thereon.

19 **7. CLAIMS COVERED AND RELEASED**

20 7.1. This Consent Judgment is a full, final, and binding resolution and release between  
21 Vinocur acting in the public interest and Abad Foam and Abad Foam's parents, officers, directors,  
22 shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, entities under common  
23 ownership, and their respective successors and assigns (inclusively and collectively, the "Defendant  
24 Releasees") and all entities to whom Defendant Releasees directly or indirectly distribute or sell, or  
25 have distributed or sold, Covered Products, including, but not limited to, distributors, wholesalers,  
26 customers, retailers, franchisees, cooperative members, and licensees ("Downstream Releasees"), of  
27 all claims alleged in the Notice or Complaint arising from any violation of Proposition 65 that has  
28 been or could have been asserted in the public interest against Abad Foam, Defendant Releasees, and



1 Downstream Releasees, regarding the failure to warn about exposures to TDCPP in Covered Products  
2 manufactured, distributed, or sold by Abad Foam prior to the Effective Date.

3 7.2. This Consent Judgment is also a full, final, and binding resolution and release between  
4 Vinocur acting in the public interest and Abad Foam with regard to Abad Foam's manufacture,  
5 distribution and sale of Foam of all claims alleged in the Notice or Complaint in this Action arising  
6 from any violation or alleged violation of Proposition 65 that have been or could have been asserted in  
7 the public interest against Abad Foam, Defendant Releasees, and Downstream Releasees regarding the  
8 failure to warn about exposures to TDCPP in Foam manufactured, distributed, or sold by Abad Foam  
9 prior to the Effective Date. Compliance with the terms of this Consent Judgment by Abad Foam shall  
10 constitute compliance with Proposition 65 with respect to any alleged failure to warn about TDCPP in  
11 Covered Products and Foam manufactured, distributed, or sold by Abad Foam after the Effective  
12 Date.

13 7.3 The Parties each acknowledge that he/it is familiar with Section 1542 of Civil Code,  
14 which provides as follows:

15 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH  
16 THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS  
17 OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE,  
18 WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY  
AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

19 The Parties, each on his/its own behalf, and on behalf of his/its past and current agents,  
20 representatives, attorneys, successors, and/or assignees, and in Vinocur's case, in his individual  
21 capacity only and not in any representative capacity or in the public interest, expressly waives and  
22 relinquishes any and all rights and benefits which he/it may have under, or which may be conferred on  
23 him/it by the provisions of Civil Code § 1542 as well as under any other state or federal statute or  
24 common law principle of similar effect, to the fullest extent that he/it may lawfully waive such rights  
25 or benefits pertaining to the released matters, which are defined as Abad Foam's alleged or actual  
26 failure to warn about exposures to TDCPP in its Foam, and Vinocur and Vinocur's counsel's  
27 statements and actions made or taken in connection with the investigation or enforcement of  
28 Vinocur's claims, as alleged in the Notice and Complaint.

1  
2 **8. PROVISION OF NOTICE**

3 8.1. When any Party is entitled to receive any notice under this Consent Judgment, the  
4 notice shall be sent by first class and electronic mail as follows:

5 8.1.1. **Notice to Abad Foam.** The persons for Abad Foam to receive notices pursuant  
6 to this Consent Judgment shall be:

7 Robert Von Esch  
8 Von Esch Law Group  
9 500 N. State College Blvd., Suite 1210  
10 Orange, CA 92868  
11 Tel 714.456.9118 Fax: 714.456.9119  
12 Email: rob@voneschlaw.com

13 8.1.2. **Notice to Vinocur.** The persons for Vinocur to receive notices pursuant to this  
14 Consent Judgment shall be:

15 Attn: Prop 65 Coordinator  
16 The Chanler Group  
17 2560 Ninth Street  
18 Parker Plaza Suite 214  
19 Berkeley, CA 94710  
20 Email: brian@chanler.com

21 8.2. Any Party may, from time to time, modify the person and/or address to whom the  
22 notice is to be sent by sending notice to the other Party by first class and electronic mail.

23 **9. COURT APPROVAL**

24 9.1. This Consent Judgment shall become effective on the Effective Date, provided  
25 however, that Vinocur shall prepare and file a Motion for Approval of this Consent Judgment and  
26 Abad Foam shall support approval of such Motion.

27 9.2. If this Consent Judgment is not entered by the Court, it shall be of no force or effect  
28 and shall not be introduced into evidence or otherwise used in any proceeding for any purpose.

**10. GOVERNING LAW AND CONSTRUCTION**

10.1. The terms and obligations arising from this Consent Judgment shall be construed and  
enforced in accordance with the laws of the State of California.



1           **11. ENTIRE AGREEMENT**

2           11.1. This Consent Judgment contains the sole and entire agreement and understanding of  
3 Vinocur and Abad Foam with respect to the entire subject matter hereof, and any and all prior  
4 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged  
5 herein and therein.

6           11.2. There are no warranties, representations, or other agreements between Vinocur and  
7 Abad Foam except as expressly set forth herein. No representations, oral or otherwise, express or  
8 implied, other than those specifically referred to in this Consent Judgment have been made by any  
9 Party hereto.

10          11.3. No other agreements not specifically contained or referenced herein, oral or otherwise,  
11 shall be deemed to exist or to bind any Party. Any agreements specifically contained or referenced  
12 herein, oral or otherwise, shall be deemed to exist or to bind any Party hereto only to the extent that  
13 they are expressly incorporated herein.

14          11.4. No supplementation, modification, waiver, or termination of this Consent Judgment  
15 shall be binding unless executed in writing by the Party to be bound thereby.

16          11.5. No waiver of any of the provisions of this Consent Judgment shall be deemed or shall  
17 constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver  
18 constitute a continuing waiver.

19           **12. RETENTION OF JURISDICTION**

20          12.1. This Court shall retain jurisdiction of this matter to enforce or modify this Consent  
21 Judgment pursuant to the agreement of the Parties, Proposition 65 and Code of Civil Procedure  
22 section 664.6.

23           **13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

24          13.1. Each signatory to this Consent Judgment certifies that he or she is fully authorized by  
25 the Party he or she represents to stipulate to this Consent Judgment, and to enter into and execute the  
26 Consent Judgment on behalf of the Party represented and to legally bind that Party.

1 **14. NO EFFECT ON OTHER SETTLEMENTS**

2 14.1. Nothing in this Consent Judgment shall preclude Vinocur from resolving any claim  
3 against another entity on terms that are different from those contained in this Consent Judgment.

4 **15. EXECUTION IN COUNTERPARTS**

5 15.1. The stipulations to this Consent Judgment may be executed in counterparts and by  
6 means of facsimile, which taken together shall be deemed to constitute one document.

7 **AGREED TO:**

8  
9 Dated: 3/2 <sup>2015</sup>~~2014~~

  
\_\_\_\_\_  
Plaintiff LAURENCE VINCOUR

11 **AGREED TO:**

12  
13 Dated: 3/2 <sup>2015</sup>~~2014~~

  
\_\_\_\_\_  
Defendant ABAD FOAM, INC.

Cesar Chavez  
Printed Name

Vice President  
Title