

1 Brian C. Johnson, State Bar No. 235965
2 THE CHANLER GROUP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, CA 94710-2565
4 Telephone: (510) 848-8880
Facsimile: (510) 848-8118

5 Attorneys for Plaintiff
6 LAURENCE VINOCUR

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA
10 UNLIMITED CIVIL JURISDICTION
11

12 LAURENCE VINOCUR, *et al.*,

13 Plaintiffs,

14 v.

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

16 Defendants.

Case No. RG14710984

[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT POMONA QUALITY
FOAM, INC.

1 **1. INTRODUCTION**

2 1.1. This Consent Judgment is entered into by plaintiff Laurence Vinocur (“Vinocur”) and
3 defendant Pomona Quality Foam, Inc. (“Pomona”) to settle claims asserted by Vinocur against
4 Pomona as set forth in the Complaint filed in the captioned action. Vinocur and Pomona are referred
5 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 Pomona, the
7 California Attorney General, and the other requisite public enforcers, alleging that Pomona violated
8 Proposition 65 when it failed to warn its customers and consumers in California of the health hazards
9 associated with exposures to tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”), a toxic flame retardant
10 chemical applied to certain “Foam” (as defined herein) used as padding in upholstered furniture and
11 other consumer products sold by Pomona in California.

12 1.3. Pomona 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 Pomona as to the acts alleged in the Complaint; (ii) venue is proper in the County of
19 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 Pomona.

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 Pomona 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. Pomona denies the material, factual, and legal

1 allegations in the Notice and Complaint and expressly denies any wrongdoing whatsoever. Except as
2 specifically and expressly provided herein, nothing in this Consent Judgment shall prejudice, waive,
3 or impair any right, remedy, argument, or defense either Party may have in this or any other pending
4 or future legal proceedings. This Consent Judgment is the product of negotiation and compromise and
5 is accepted by the Parties solely for purposes of settling, compromising, and resolving issues disputed
6 in this Action.

7 **2. DEFINITIONS**

8 2.1. "Covered Products" means Foam containing TDCPP used as padding in upholstered
9 furniture manufactured, distributed, and/or sold by Pomona in California.

10 2.2. "Effective Date" means the date on which the Court enters this Consent Judgment.

11 2.3. "Foam" means polyurethane foam manufactured, distributed and/or sold by Pomona
12 for use as a raw material in the manufacture or fabrication of various consumer products sold in
13 California, including, but not limited to (1) foam-cushioned upholstered furniture, such as, by way of
14 example only, foam-cushioned chairs, ottomans, sofas, futons, and back cushions; (2) foam-cushioned
15 pads for infants and children to lie on, such as foam-cushioned pads and mats used for sleeping or
16 resting, diaper changing pads, infant walkers, and/or car safety seats; and (3) foam-cushioned mattress
17 toppers.

18 2.4. "Listed Chemical Flame Retardants" means Tris(1,3-dichloro-2-propyl) phosphate
19 ("TDCPP"), Tris(2-chloroethyl) phosphate ("TCEP"), and Tris(2,3-dibromopropyl)phosphate
20 ("TDBPP").

21 **3. INJUNCTIVE RELIEF**

22 3.1. **Reformulation of Foam and Covered Products.** Pomona shall comply with the
23 following requirements to reformulate the Foam and Covered Products:

24 3.1.1. **TDCPP in Covered Products.** As of the Effective Date, Pomona shall not
25 distribute, sell, or offer for sale in California any Covered Product that has been treated with any
26 TDCPP and which has a manufacture date that is on or later than the Effective Date.

27 3.1.2. **TDCPP in Foam.** As of the Effective Date, Pomona shall not distribute, sell,
28 or offer for sale in California any Foam for use in products that, to Pomona's knowledge will be, or

1 are reasonably likely to be, sold in California that have been treated with TDCPP and which have a
2 manufacture date that is on or later than the Effective Date.

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

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

17 **3.1.5. Warning Letter to Foam Customers.** Within 30 days following the Effective
18 Date, Pomona shall provide a warning letter to each of its customers that are located in California, as
19 well as its customers located outside California, that Pomona reasonably believes sell products
20 containing Foam in California, to whom Pomona reasonably believes it sold Foam that contained
21 intentionally added TDCPP within the 12 months prior to the Effective Date, to the extent that such
22 notice has not already been provided. The warning letter shall inform the customer that, to the extent
23 the customer purchased Foam to meet California fire safety standards, the Foam sold by Pomona
24 contains tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”), a chemical known to the State of
25 California to cause cancer. The letter shall further inform the customer that to the extent it sells
26 products containing Foam in California, the products containing Foam must be accompanied by clear
27 and reasonable Proposition 65 warnings as set forth in Section 3.1.6.

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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
 State of California to cause cancer.¹

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

14 3.2 **Optional Additional Reformulation for Listed Chemical Flame Retardants in**
15 **Covered Products.** In order for Pomona to be eligible for a waiver of the additional penalty/payment
16 in lieu of penalty payments set forth in Section 4.1.5 below, Pomona shall undertake the additional
17 actions to reduce or eliminate the use of, in addition to TDCPP, TCEP and TDBPP. Pomona shall not
18 manufacture for sale in California any Covered Product that has been treated with TDCPP, TCEP or
19 TDBPP after the Effective Date. In order to avoid the additional payments, within 150 days following
20 the Effective Date, Pomona must provide written certification to Vinocur of its commitment to no
21 longer sell in California any Covered Product that has been treated with TDCPP, TCEP, and/or
22 TDBPP. The written certification may be satisfied by letter to Vinocur, c/o The Chanler Group.

23 **4. PENALTIES AND PAYMENT**

24 4.1. Pomona shall pay to Vinocur the total sum of thirteen thousand dollars (\$13,000),
25 which shall be allocated as follows:

26 ¹ The regulatory safe harbor warning language specified in 27 CCR § 25603.2 may also be used if Pomona employed it for
27 Covered Products prior to the Effective Date. If Pomona seeks to use alternative warning language, other than the
28 language specified above or the safe harbor warning specified in 27 CCR § 25603.2, or seeks to use an alternate method of
transmission of the warning, it must obtain the Court’s approval of any proposed alternative and provide all Parties and the
Office of the Attorney General with timely notice and the opportunity to comment or object before the Court acts on its
request. (Warning notices sent by Pomona prior to the Effective Date have been provided to plaintiff’s counsel and
approved, and will satisfy the warning language required in this section.)

1 4.1.1. \$2,000 shall constitute a civil penalty pursuant to California Health & Safety
2 Code § 25249.7(b), such money to be apportioned by Vinocur in accordance with Cal. Health &
3 Safety Code § 25249.12(c)(1) and (d), with 75% of the penalty payment going to the California Office
4 of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty paid
5 to Vinocur.

6 4.1.2. \$11,000 shall constitute reimbursement of Vinocur’s reasonable attorneys’ fees
7 and costs.

8 4.1.3. The payments required under Sections 4.1.1-4.1.2 shall be made in three
9 separate checks, all to be delivered within 10 days following the Effective Date. The payments
10 required pursuant to Sections 4.1.1 shall each be in the form of two checks for the following amounts
11 made payable to: (a) “OEHHA” in the amount of \$1,500; and (b) “Laurence Vinocur, Client Trust
12 Account” in the amount of \$500. The payment required pursuant to Section 4.1.2 shall be made
13 payable to The Chanler Group. All settlement payments shall be tendered in accordance with Section
14 8 of this Consent Judgment.

15 4.1.4. In the event that Pomona elects not to certify its compliance with Section 3.2 in
16 accordance with that Section, within 150 days following the Effective Date, Pomona must make an
17 additional civil penalty payment of \$4,000. The additional penalty payment shall be allocated
18 according to Health & Safety Code § 25249.12(c) (1) and (d), and provided in two checks made
19 payable to: (a) “OEHHA” in the amount of \$3,000; and (b) “Laurence Vinocur, Client Trust Account”
20 in the amount of \$1,000.

21 **5. ENFORCEMENT OF CONSENT JUDGMENT**

22 5.1. Vinocur may, by motion or application for an order to show cause before the Superior
23 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.
24 Prior to bringing any motion or application to enforce the requirements of Section 3 above, Vinocur
25 shall provide Pomona with a Notice of Violation and a copy of any test result(s) which purportedly
26 support Vinocur’s Notice of Violation. The Parties shall then meet and confer regarding the basis for
27 Vinocur’s anticipated motion or application in an attempt to resolve the alleged violation informally,
28 including providing Pomona a reasonable opportunity of at least thirty (30) days to cure any alleged

1 violation. Should the Parties' attempts at an informal resolution fail, Vinocur may file his
2 enforcement motion or application. The prevailing party on any motion to enforce this Consent
3 Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a result of such
4 motion or application. This Consent Judgment may only be enforced by the Parties.

5 **6. MODIFICATION OF CONSENT JUDGMENT**

6 6.1. This Consent Judgment may only be modified by a written agreement of the Parties,
7 and entry of a modified consent judgment by the Court thereon, or upon a motion or application
8 brought by any Party, and entry of a modified consent judgment by a Court thereon.

9 **7. CLAIMS COVERED AND RELEASES**

10 7.1. This Consent Judgment is a full, final, and binding resolution and release between
11 Vinocur acting in the public interest and Pomona and Pomona's parents, officers, directors,
12 shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, entities under common
13 ownership, and their respective successors and assigns (inclusively and collectively, the "Defendant
14 Releasees") and all entities to whom Defendant Releasees directly or indirectly distribute or sell, or
15 have distributed or sold, Covered Products, including, but not limited to, distributors, wholesalers,
16 customers, retailers, franchisees, cooperative members, and licensees ("Downstream Releasees"), of
17 all claims alleged in the Notice or Complaint in this Action arising from any violation of Proposition
18 65 that have been or could have been asserted in the public interest against Pomona, Defendant
19 Releasees, and Downstream Releasees, regarding the failure to warn about exposures to TDCPP in
20 Covered Products manufactured, distributed, or sold by Pomona prior to the Effective Date.

21 7.2. This Consent Judgment is also a full, final, and binding resolution and release between
22 Vinocur acting in the public interest and Pomona with regard to Pomona's manufacture, distribution
23 and sale of Foam of all claims alleged in the Notice or Complaint in this Action arising from any
24 violation or alleged violation of Proposition 65 that have been or could have been asserted in the
25 public interest against Pomona, Defendant Releasees, and Downstream Releasees regarding the failure
26 to warn about exposures to TDCPP in Foam manufactured, distributed, or sold by Pomona prior to the
27 Effective Date. Compliance with the terms of this Consent Judgment by Pomona shall constitute
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1 compliance with Proposition 65 with respect to any alleged failure to warn about TDCPP in Covered
2 Products and Foam manufactured, distributed, or sold by Pomona after the Effective Date.

3 7.3. This is a full and final release applying to all unknown and unanticipated injuries or
4 damages relating to or arising out of the claims alleged in the Notice and Complaint, as well as those
5 now known, whether or not disclosed, and Vinocur, on his own behalf only, hereby relinquishes and
6 waives all rights or benefits conferred upon him by the provisions of Section 1542 of the California
7 Civil Code, which reads as follows:

8 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH
9 THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN
10 HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE,
11 WHICH IF KNOWN BY HIM, MUST HAVE MATERIALLY
12 AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

11 8. PROVISION OF NOTICE

12 8.1. When any Party is entitled to receive any notice under this Consent Judgment, the
13 notice shall be sent by first class mail as follows:

14 8.1.1. **Notice to Pomona.** The persons for Pomona to receive notices pursuant to this
15 Consent Judgment shall be:

16 Damien Morozumi, Esq.
17 The Law Offices of Damien Morozumi
18 44 Montgomery Street, Suite 1750
19 San Francisco, CA 94104

20 8.1.2. **Notice to Vinocur.** The persons for Vinocur to receive notices pursuant to this
21 Consent Judgment shall be:

22 Attn: Prop 65 Coordinator
23 The Chanler Group
24 2560 Ninth Street
25 Parker Plaza Suite 214
26 Berkeley, CA 94710

27 8.2. Any Party may, from time to time, modify the person and/or address to whom the
28 notice is to be sent by sending notice to the other Party by first class and electronic mail.

1 **9. COURT APPROVAL**

2 9.1. This Consent Judgment shall become effective on the Effective Date, provided
3 however, that Vinocur shall prepare and file a Motion for Approval of this Consent Judgment and
4 Pomona shall support approval of such Motion.

5 9.2. If this Consent Judgment is not entered by the Court, it shall be of no force or effect
6 and shall not be introduced into evidence or otherwise used in any proceeding for any purpose.

7 **10. GOVERNING LAW AND CONSTRUCTION**

8 10.1. The terms and obligations arising from this Consent Judgment shall be construed and
9 enforced in accordance with the laws of the State of California.

10 **11. ENTIRE AGREEMENT**

11 11.1. This Consent Judgment contains the sole and entire agreement and understanding of
12 Vinocur and Pomona with respect to the entire subject matter hereof, and any and all prior
13 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged
14 herein and therein.

15 11.2. There are no warranties, representations, or other agreements between Vinocur and
16 Pomona except as expressly set forth herein. No representations, oral or otherwise, express or
17 implied, other than those specifically referred to in this Consent Judgment have been made by any
18 Party hereto.

19 11.3. No other agreements not specifically contained or referenced herein, oral or otherwise,
20 shall be deemed to exist or to bind any Party. Any agreements specifically contained or referenced
21 herein, oral or otherwise, shall be deemed to exist or to bind any Party hereto only to the extent that
22 they are expressly incorporated herein.

23 11.4. No supplementation, modification, waiver, or termination of this Consent Judgment
24 shall be binding unless executed in writing by the Party to be bound thereby.

25 11.5. No waiver of any of the provisions of this Consent Judgment shall be deemed or shall
26 constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver
27 constitute a continuing waiver.

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12. RETENTION OF JURISDICTION

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

13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT

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

14. NO EFFECT ON OTHER SETTLEMENTS

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

15. EXECUTION IN COUNTERPARTS

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

AGREED TO:

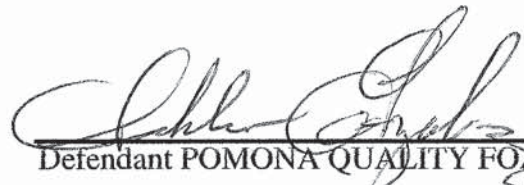
Dated: December 7, 2015



Plaintiff LAURENCE VINOCUR

AGREED TO:

Dated: NOV. 19, 2015



Defendant POMONA QUALITY FOAM, INC.
SALVADOR GONZALES
Printed Name
PRESIDENT
Title