

1 Jonathan Bornstein, State Bar No. 196345
Josh Voorhees, State Bar No. 241436
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 **FOR THE COUNTY OF MARIN**

10
11 LAURENCE VINOCUR,
12 Plaintiff,
13 v.
14 SDI TECHNOLOGIES, INC., and DOES 1
through 150, inclusive,
15 Defendants.

CASE NO: CV1502446

Assigned for All Purposes to:
Hon. Paul M. Haakenson
Courtroom E

**[PROPOSED] CONSENT JUDGMENT AS TO
SDI TECHNOLOGIES, INC.**

Date:
Time:
Dept.:

Complaint Filed: July 1, 2015
Trial Date: Not set.

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1 **1. INTRODUCTION**

2 **1.1. Parties**

3 This Consent Judgment is entered into by and between Laurence Vinocur (“Vinocur”) and SDI
4 Technologies, Inc. (“SDI”), with Vinocur and SDI each individually referred to as a “Party” and
5 collectively as the “Parties.”

6 **1.2. Plaintiff**

7 Vinocur is an individual residing in California who seeks to promote awareness of exposures to
8 toxic chemicals and to improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3. Defendant**

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

14 **1.4. General Allegations**

15 Vinocur alleges that SDI manufactures, imports, sells, or distributes for sale in California,
16 vinyl/PVC earbud pouches that contain di(2-ethylhexyl)phthalate (“DEHP”) without first providing the
17 exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical
18 known to the State of California to cause birth defects or other reproductive harm.

19 **1.5. Product Description**

20 The products covered by this Consent Judgment are vinyl/PVC earbud pouches that contain
21 DEHP including, but not limited to, the *New Balance 2-in-1 Sport Earbuds with Removable Earbuds*
22 *Carrying Pouch, NB439B, UPC 0 47532 89444 8*, manufactured, imported, sold, or distributed for sale
23 in California by SDI, hereinafter the “Products”.

24 **1.6. Notice of Violation**

25 On or about March 13, 2015, Vinocur served SDI and certain requisite public enforcement
26 agencies with a “60-Day Notice of Violation” (“Notice”) alleging that SDI violated Proposition 65 by
27 failing to warn its customers and consumers in California that the Products expose users to DEHP. To
28 the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the

1 allegations set forth in the Notice.

2 **1.7. Complaint**

3 On June 26, 2015, Vinocur filed the instant action (“Complaint”), naming SDI as a defendant for
4 its alleged violations of Health and Safety Code section 25249.6 that are the subject of the Notice.

5 **1.8. No Admission**

6 SDI denies the material, factual, and legal allegations contained in the Notice and Complaint,
7 and it maintains that all of the products that it has sold and distributed for sale in California, including
8 the Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall
9 be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law,
10 nor shall compliance with this Consent Judgment constitute or be construed as an admission of any fact,
11 finding, conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish
12 or otherwise affect SDI’s obligations, responsibilities, and duties under this Consent Judgment.

13 **1.9. Jurisdiction**

14 For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction
15 over SDI as to the allegations contained in the Complaint, that venue is proper in the County of Marin,
16 and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment
17 pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

18 **1.10. Effective Date**

19 For purposes of this Consent Judgment, the term “Effective Date” means the date on which the
20 Motion to Approve the Consent Judgment is granted by the Court, including any tentative rulings not
21 opposed by the Parties.

22 **2. INJUNCTIVE RELIEF: REFORMULATION**

23 **2.1. Reformulated Products**

24 Commencing on December 31, 2015, and continuing thereafter, SDI shall only purchase for
25 sale, or manufacture for sale in California, or otherwise sell in California “Reformulated Products.”
26 Reformulated Products are Products that contain DEHP in concentrations less than 0.1 percent (1,000
27 parts per million) when analyzed pursuant to U.S. Environmental Protection Agency testing
28 methodologies 3580A and 8270C or other methodology utilized by federal or state government agencies

1 for the purpose of determining DEHP content in a solid substance.

2 **3. MONETARY SETTLEMENT TERMS**

3 **3.1. Civil Penalty Payments**

4 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in this
5 Consent Judgment, SDI shall pay \$15,000 in civil penalties. Each civil penalty payment shall be
6 allocated according to Health and Safety Code section 25249.12(c)(1) and (d) with seventy-five percent
7 (75%) of the funds paid to the California Office of Environmental Health Hazard Assessment
8 (“OEHHA”) and twenty-five percent (25%) of the funds remitted to Vinocur. Vinocur’s counsel shall
9 be responsible for remitting SDI’s penalty payment(s) under this Consent Judgment to OEHHA.

10 **3.1.1. Initial Civil Penalty**

11 SDI shall make an initial civil penalty payment, within two (2) days after the Effective
12 Date, of \$5,000. SDI shall provide its payment in a single check made payable to “Laurence Vinocur,
13 Client Trust Account” to be delivered to the address provided in Section 3.4, below.

14 **3.1.2. Final Civil Penalty**

15 On or before November 15, 2015, SDI shall make a final civil penalty payment of
16 \$10,000 Pursuant to title 11 California Code of Regulations, section 3203(c), Vinocur agrees that the
17 final civil penalty payment shall be waived in its entirety if, no later than November 1, 2015, an officer
18 of SDI provides Vinocur with written certification that all of the Products manufactured after the
19 Effective Date that are sold, or otherwise for sale or distribution in California are Reformulated
20 Products as defined by Section 2.1, and that SDI will continue to offer only Reformulated Products for
21 sale in California in the future. The option to certify expedited reformulation in lieu of making the final
22 civil penalty payment required by this Section is a material term, and with regard to such term, time is
23 of the essence. SDI shall deliver its certificate, if any, to Vinocur’s counsel at the address provided in
24 Section 3.4 below. In the event that SDI does not timely certify its compliance or make the final civil
25 penalty payment required by this Section, the Parties agree that Vinocur may file a motion or
26 application seeking an order compelling SDI’s compliance with this Section. If successful, the Parties
27 further agree that Vinocur shall be entitled to his reasonable attorneys’ fees and costs pursuant to
28 general contract principles and Code of Civil Procedure section 1021.5.

1 **3.2. Reimbursement of Attorney’s Fees and Costs**

2 The parties acknowledge that Vinocur and his counsel offered to resolve this dispute without
3 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to be
4 resolved after the material terms of this Consent Judgment had been settled. Shortly after the other
5 settlement terms had been finalized, SDI expressed a desire to resolve Vinocur’s fees and costs. The
6 Parties then attempted to (and did) reach an accord on the compensation due to Vinocur and his counsel
7 under general contract principles and the private attorney general doctrine codified at California Code of
8 Civil Procedure section 1021.5 for all work performed through the mutual execution of this Consent
9 Judgment. Within two (2) days after the Effective Date, SDI shall pay \$35,000 for the fees and costs
10 incurred by Vinocur investigating, bringing this matter to SDI’s attention, litigating and negotiating a
11 settlement in the public interest. Payment shall be sent to the address set forth in Section 3.4 below.

12 **3.3. Payments Held in Trust**

13 With the exception of the final civil penalty payment required by Section 3.1.2, SDI shall deliver
14 all payments required by this Consent Judgment to its counsel within one week of the date that this
15 agreement is fully executed by the Parties. SDI’s counsel shall confirm receipt of settlement funds in
16 writing to Vinocur’s counsel and, thereafter, hold the amounts paid in trust until such time as the Court
17 grants the motion for approval of the Parties’ settlement contemplated by Section 5. Within five
18 (5) days of the Effective Date, SDI’s counsel shall deliver all settlement payments it has held in trust to
19 Vinocur’s counsel at the address provided in Section 3.4. In the event the final civil penalty payment
20 required by Section 3.1.2 becomes due prior to the Effective Date, then SDI shall deliver the final civil
21 penalty payment to its attorney to be held in trust until, and disbursed within two days after, the
22 Effective Date.

23 **3.4. Payment Address**

24 All payments required by this Consent Judgment shall be delivered to the following address:

25 The Chanler Group
26 Attn: Proposition 65 Controller
27 2560 Ninth Street
28 Parker Plaza, Suite 214
 Berkeley, CA 94710

1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1. Vinocur’s Public Release of Proposition 65 Claims**

3 Vinocur, acting on his own behalf and in the public interest, releases SDI and its parents,
4 subsidiaries, affiliated entities under common ownership or control, directors, officers, employees, and
5 attorneys (“Releasees”) and each entity to whom it directly or indirectly distributes or sells the Products
6 including, but not limited to, its downstream distributors, wholesalers, customers, retailers, franchisers,
7 cooperative members, licensors and licensees (“Downstream Releasees”) for any violations arising
8 under Proposition 65 for unwarned exposures to DEHP from Products sold by SDI prior to the Effective
9 Date, as set forth in the Notice.

10 **4.2. Vinocur’s Individual Release of Claims**

11 Vinocur, in his individual capacity only and *not* in his representative capacity, also provides a
12 release to SDI, Releasees, and Downstream Releasees which shall be effective as a full and final accord
13 and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees,
14 damages, losses, claims, liabilities and demands of Vinocur of any nature, character or kind, whether
15 known or unknown, suspected or unsuspected, arising out of alleged or actual violations of Proposition
16 65 or exposures to DEHP in the Products sold or distributed for sale by SDI before the Effective Date.

17 **4.3. SDI’s Release of Vinocur**

18 SDI, on its own behalf, and on behalf of its past and current agents, representatives, attorneys,
19 successors, and assignees, hereby waives any and all claims against Vinocur and his attorneys and other
20 representatives, for any and all actions taken or statements made by Vinocur and his attorneys and other
21 representatives, whether in the course of investigating claims, and seeking to enforce Proposition 65
22 against SDI in this matter with respect to the Products.

23 **5. COURT APPROVAL**

24 This Consent Judgment is not effective until it is approved and entered by the Court and shall be
25 null and void if, for any reason, it is not approved and entered by the Court within one year after it has
26 been fully executed by the Parties.

27 **6. SEVERABILITY**

28 If, subsequent to the Court’s approval and entry of this Consent Judgment as a judgment, any

1 provision is determined by a court to be unenforceable, the parties shall give full meaning to the intent
2 of the parties to resolve and settle all this matter in its entirety, and the validity of the remaining
3 provisions shall not be adversely affected.

4 **7. GOVERNING LAW**

5 The terms of this Consent Judgment shall be governed by the laws of the state of California and
6 apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
7 otherwise rendered inapplicable by reason of law generally, or as to the Products, then SDI may provide
8 written notice to Vinocur of any asserted change in the law, and shall have no further obligations
9 pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.
10 Nothing in this Consent Judgment shall be interpreted to relieve SDI from any obligation to comply
11 with any pertinent state or federal toxics control laws.

12 **8. NOTICE**

13 Unless specified herein, all correspondence and notice required by this Consent Judgment shall
14 be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail, return
15 receipt requested; or (iii) a recognized overnight courier with delivery confirmation to the following
16 addresses:

17 **SDI**

18 SDI Technologies, Inc.
19 1299 Main Street
20 Rahway, NJ 07065
Attn: President

Mark R. Kaster
Dorsey & Whitney LLP
Suite 1500, 50 South Sixth Street
Minneapolis, MN 55402-1498

21 **Vinocur**

22 The Chanler Group
23 Attn: Proposition 65 Coordinator
24 2560 Ninth Street
25 Parker Plaza, Suite 214
Berkeley, CA 94710-2565

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

1 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

2 This Consent Judgment may be executed in counterparts and by facsimile or portable document
3 format (PDF) signature, each of which shall be deemed an original, and all of which, when taken
4 together, shall constitute one and the same document.

5 **10. POST EXECUTION ACTIVITIES**

6 Vinocur agrees to comply with the reporting form requirements referenced in Health and Safety
7 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
8 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
9 furtherance of obtaining such approval, Vinocur and SDI agree to mutually employ their best efforts,
10 and those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial
11 approval of their settlement in a timely manner. For purposes of this Section, "best efforts" shall means
12 cooperating on the drafting and filing of the necessary moving papers, supporting the motion, and
13 appearing at the hearing before the Court.

14 **11. MODIFICATION**

15 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
16 entry of a modified consent judgment by the Court; or (ii) a successful motion or application of any
17 Party, and the entry of a modified consent judgment by the Court.

18 **12. AUTHORIZATION**

19 The undersigned are authorized to execute this Consent Judgment and have read, understood,
20 and agree to all of the terms and conditions contained herein.

21 **AGREED TO:**

AGREED TO:

22
23 Date: 9/15/2015 _____

Date: _____

24
25 By:  _____
LAURENCE VINO CUR

By: _____
President, SDI Technologies, Inc.

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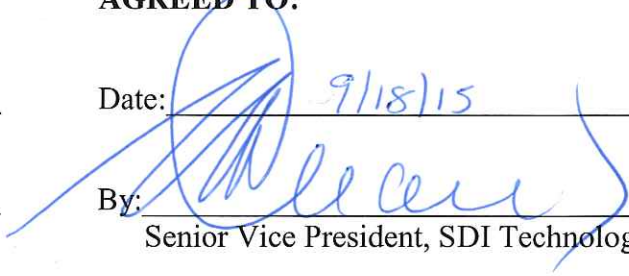
21 **AGREED TO:**

AGREED TO:

22 Date: _____

22 Date: 9/18/15

23 By: _____
24 LAURENCE VINOCUR

23 By: 
24 Senior Vice President, SDI Technologies, Inc.