

1 Troy C. Bailey, State Bar No. 277424
2 Ryan C. Oca, State Bar No. 303113
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 LAURENCE VINOCUR

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF ALAMEDA
14 UNLIMITED CIVIL JURISDICTION
15

16 LAURENCE VINOCUR,

17 Plaintiff,

18 v.

19 HOUSTON'S, INC.; and DOES 1-150,
20 inclusive,

21 Defendants.
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Case No.

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Parties**

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

6 **1.2 Plaintiff**

7 Vinocur is a resident of the State of California who seeks to promote awareness of
8 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful
9 substances contained in consumer and commercial products.

10 **1.3 Defendant**

11 Houston’s 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 and
13 Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Vinocur alleges that Houston manufactures, imports, sells and/or distributes for sale in
16 California, products containing di(2-ethylhexyl)phthalate (“DEHP”) and tris(1,3-dichloro-2-propyl)
17 phosphate (“TDCPP”), and that it does so without providing the health hazard warning that Vinocur
18 alleges is required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical
19 known to the State of California to cause birth defects and other reproductive harm, and TDCPP is
20 listed pursuant to Proposition 65 as a chemical known to cause cancer.

21 **1.5 Product Description**

22 The products covered by this Consent Judgment are chairs with vinyl/PVC upholstery
23 containing DEHP and chairs with foam padding containing TDCPP including, but not limited to,
24 *Attco Quality Chair Product*, #27032 that are manufactured, imported, distributed, sold and/or
25 offered for sale by Houston’s in the State of California, hereinafter the “Products.”

26 **1.6 Notice of Violation**

27 On or about September 29, 2016, Vinocur served Houston’s and the requisite public
28 enforcement agencies with a Supplemental 60-Day Notice of Violation (the “Notice”), alleging that

1 Houston violated Proposition 65 when it failed to warn its customers and consumers in California
2 that the Products expose users to DEHP and/or TDCPP. To the best of the Parties' knowledge, no
3 public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

4 **1.7 Complaint**

5 On December 14, 2016, Vinocur commenced the instant action, naming Houston's as one of
6 the defendants for the alleged violations of Proposition 65 that are the subject of the Notice.

7 **1.8 No Admission**

8 Houston's denies the material, factual, and legal allegations contained in the Notice and
9 Complaint, and maintains that all of the products that it has sold and/or distributed for sale in
10 California, including the Products, have been, and are, in compliance with all laws. Nothing in this
11 Consent Judgment shall be construed as an admission by Houston's of any fact, finding, conclusion
12 of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute
13 or be construed as an admission by Houston's of any fact, finding, conclusion of law, issue of law,
14 or violation of law. Nothing in this Consent Judgment shall prejudice, waive or impair any right,
15 remedy, argument or defense Houston's may have in any other legal proceeding. This Section shall
16 not, however, diminish or otherwise affect Houston's obligations, responsibilities, and duties under
17 this Consent Judgment.

18 **1.9 Jurisdiction**

19 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
20 jurisdiction over Houston's as to the allegations contained in the Complaint, that venue is proper in
21 the County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of
22 this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

23 **1.10 Effective Date**

24 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that
25 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.
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1 **2. INJUNCTIVE SETTLEMENT TERMS**

2 **2.1 Reformulation Standards**

3 “Reformulated Products” are defined as those Products containing DEHP in concentrations
4 less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental
5 Protection Agency testing methodologies 3580A and 8270C or any other methodology utilized by
6 federal or state agencies for the purpose of determining the DEHP content in a solid substance and
7 that contain no more than 25 parts per million (0.0025%) each of TDCPP, Tris(2-chloroethyl)
8 phosphate (“TCEP”) and/or tris(2, 3-dibromopropyl)phosphate (“TDBPP”) when analyzed pursuant
9 to Environmental Protection Agency testing methodologies 8545 and 8270C, or alternative
10 methodologies used by state or federal agencies for determining TDCPP, TCEP and/or TDBPP
11 content in a solid substance.

12 **2.2 Reformulation Commitment**

13 As of the Effective Date all Products manufactured, imported, distributed, sold and/or
14 offered for sale in the State of California by Houston’s shall be Products that qualify as
15 Reformulated Products as defined in Section 2.1, or shall carry appropriate health hazard warnings
16 per section 2.3, below.

17 **2.3 Product Warnings**

18 Commencing on or before the Effective Date, Houston’s shall provide clear and reasonable
19 warnings for all Products as set forth in subsections 2.3(a) and (b) for all products that do not
20 qualify as Reformulated Products. Each warning shall be prominently placed with such
21 conspicuousness as compared with other words, statements, designs, or devices as to render it likely
22 to be read and understood by an ordinary individual under customary conditions before purchase or
23 use. Each warning shall be provided in a manner such that the consumer or user understands to
24 which *specific* Product the warning applies, so as to minimize the risk of consumer confusion.

25 **(a) Retail Store Sales.**

26 **(i) Product Labeling.** Houston’s shall affix a warning to the packaging,
27 labeling, or directly on each Product provided for sale in retail outlets in California that states:
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2 WARNING: This product contains chemicals known
3 to the State of California to cause cancer and
4 birth defects and other reproductive harm.

5 (ii) **Point-of-Sale Warnings.** Alternatively, Houston's may provide warning
6 signs in the form below to its customers in California with instructions to post the warnings in close
7 proximity to the point of display of the Products. Such instruction sent to Houston's customers
8 shall be sent by certified mail, return receipt requested.

9 WARNING: This product contains chemicals known
10 to the State of California to cause cancer and
11 birth defects and other reproductive harm.

12 Where more than one Product is sold in proximity to other like items or to those that do not
13 require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement
14 shall be used:¹

15 WARNING: The following products contains chemicals
16 known to the State of California to cause cancer and
17 birth defects and other reproductive harm:
18 [*list products for which warning is required*]

19 (b) **Mail Order Catalog and Internet Sales.** In the event that Houston's sells Products
20 via mail order catalog and/or the internet, to customers located in California, after the Effective
21 Date, that are not Reformulated Products, Houston's shall provide warnings for such Products sold
22 via mail order catalog or the internet to California residents. Warnings given in the mail order
23 catalog or on the internet shall identify the *specific* Product to which the warning applies as further
24 specified in Sections 2.3(b)(i) and (ii).

25 (i) **Mail Order Catalog Warning.** Any warning provided in a mail order
26 catalog shall be in the same type size or larger than the Product description text within the catalog.
27 The following warning shall be provided on the same page and in the same location as the display
28 and/or description of the Product:

¹For purposes of the Consent Judgment, "sold in proximity" shall mean that the Product and another similar product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

1 WARNING: This product contains chemicals known
2 to the State of California to cause cancer and
3 birth defects and other reproductive harm.

4 Where it is impracticable to provide the warning on the same page and in the same location
5 as the display and/or description of the Product, Houston's may utilize a designated symbol to cross
6 reference the applicable warning and shall define the term "designated symbol" with the following
7 language on the inside of the front cover of the catalog or on the same page as any order form for
8 the Product(s):

9 WARNING: Certain products identified with this symbol ▼
10 and offered for sale in this catalog contain
11 chemicals known to the State of California to
12 cause cancer and birth defects and other reproductive harm.

13 The designated symbol must appear on the same page and in close proximity to the display
14 and/or description of the Product. On each page where the designated symbol appears, Houston's
15 must provide a header or footer directing the consumer to the warning language and definition of
16 the designated symbol.

17 (ii) **Internet Website Warning.** A warning shall be given in conjunction with
18 the sale of the Products via the internet, which warning shall appear either: (a) on the same web
19 page on which a Product is displayed; (b) on the same web page as the order form for a Product; (c)
20 on the same page as the price for any Product; or (d) on one or more web pages displayed to a
21 purchaser during the checkout process. The following warning statement shall be used and shall
22 appear in any of the above instances adjacent to or immediately following the display, description,
23 or price of the Product for which it is given in the same type size or larger than the Product
24 description text:

25 WARNING: This product contains chemicals known
26 to the State of California to cause cancer and
27 birth defects and other reproductive harm.

28 Alternatively, the designated symbol may appear adjacent to or immediately following the
display, description, or price of the Product for which a warning is being given, provided that the
following warning statement also appears elsewhere on the same web page, as follows:

1 WARNING: This product contains chemicals known
2 to the State of California to cause cancer and
3 birth defects and other reproductive harm.

3. **MONETARY SETTLEMENT TERMS**

3.1 **Payments Pursuant to Health and Safety Code Section 25249.7(b)(2)**

4 Pursuant to Health and Safety Code section 25249.7(b)(2), Houston shall pay civil penalties
5 in the amount of \$3,250. The penalty payment shall be allocated according to Health and Safety
6 Code sections 25249.12(c)(1) and (d), with 75% of the penalty amount paid to the California Office
7 of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty
8 paid to Vinocur. Within two (2) business days of the Effective Date, Houston shall issue two (2)
9 separate checks, a check payable to "The Chanler Group, Laurence Vinocur Client Trust Account"
10 in the amount of \$812.50 and a check made payable to "OEHHA" in the amount of \$2,437.50,
11 delivered to the address in Section 3.3 below. Vinocur's counsel shall be responsible for remitting
12 Houston's penalty payment under this Consent Judgment to OEHHA.

3.2 **Reimbursement of Attorneys' Fees and Costs**

14 The Parties acknowledge that Vinocur and his counsel offered to resolve this dispute
15 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
16 the issue to be resolved after the material terms of the agreement had been settled. Shortly after
17 the other settlement terms had been finalized, Houston's expressed a desire to resolve Vinocur's
18 fees and costs. The Parties then negotiated a resolution of the compensation due to Vinocur and
19 his counsel under general contract principles and the private attorney general doctrine codified at
20 California Code of Civil Procedure section 1021.5. For all work performed through the mutual
21 execution of this agreement and the Court's approval of the same, but exclusive of fees and costs
22 on appeal, if any, Houston's shall reimburse Vinocur and his counsel \$29,750. Houston's payment
23 shall be delivered to the address in Section 3.3 in the form of a check payable to "The Chanler
24 Group" within two (2) business days of the Effective Date. The reimbursement shall cover all fees
25 and costs incurred by Vinocur investigating, bringing this matter to Houston's attention, litigating,
26 and negotiating a settlement of the matter in the public interest.
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1 **3.3 Payment Address**

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

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

9 **4. CLAIMS COVERED AND RELEASED**

10 **4.1 Vinocur's Release of Proposition 65 Claims**

11 Vinocur, acting on his own behalf and in the public interest, releases Houston's and its
12 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
13 and attorneys ("Releasees") and each entity to whom Houston's directly or indirectly distributes or
14 sells the Products including, but not limited to, its downstream distributors, wholesalers, customers,
15 retailers (including Smart & Final Stores, Inc.), franchisers, cooperative members, licensors and
16 licensees ("Downstream Releasees") for any violations arising under Proposition 65 that was or
17 could have been asserted based on failure to warn of alleged exposures to DEHP and/or TDCPP
18 from the Products manufactured, imported, distributed and/or sold by Houston's prior to the
19 Effective Date, as set forth in the Notice. The Parties further understand and agree that this Section
20 4.1 release shall not extend upstream to any entities that manufactured the Products or any
21 component parts thereof, or any distributors or suppliers who sold the Products or any component
22 parts thereof to Houston's. Compliance with the terms of this Consent Judgment constitutes
23 compliance with Proposition 65 by Houston's with respect to the alleged or actual failure to warn
24 about exposures to DEHP and/or TDCPP from Products manufactured, sold and/or distributed for
25 sale by Houston's after the Effective Date.

26 **4.2 Vinocur's Individual Release of Claims**

27 Vinocur, in his individual capacity only and *not* in his representative capacity, also provides
28 a release to Houston's, Releasees, and Downstream Releasees which shall be effective as a full and
final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,

1 attorneys' fees, damages, losses, claims, liabilities and demands of Vinocur of any nature, character
2 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
3 exposures to DEHP, TDCPP, TCEP, and TDBPP in Products manufactured, imported, distributed
4 or sold by Houston's before the Effective Date. The Parties further understand and agree that this
5 Section 4.2 release shall not extend upstream to any entities that manufactured the Products or any
6 component parts thereof, or any distributors or suppliers who sold the Products or any component
7 parts thereof to Houston's.

8 **4.3 Houston's Release of Vinocur**

9 Houston's, on its own behalf and on behalf of its past and current agents, representatives,
10 attorneys, successors and/or assignees, hereby waive any and all claims against Vinocur and his
11 attorneys and other representatives, for any and all actions taken or statements made (or those that
12 could have been taken or made) by Vinocur and his attorneys and other representatives, whether in
13 the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this
14 matter, or with respect to the Products.

15 **5. COURT APPROVAL**

16 This Consent Judgment is not effective until it is approved and entered by the Court and
17 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
18 after it has been fully executed by all Parties. Vinocur and Houston's agree to support the entry of
19 this agreement as a judgment, and to obtain the Court's approval of their settlement in a timely
20 manner. The Parties acknowledge that, pursuant to California Health and Safety Code section
21 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment, which
22 motion Vinocur shall draft and file and Houston's shall support, appearing at the hearing if so
23 requested. If any third-party objection to the motion is filed, Vinocur and Houston's agree to work
24 together to file a reply and appear at any hearing. This provision is a material component of this
25 Consent Judgment and shall be treated as such in the event of a breach.

1 **6. SEVERABILITY**

2 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment,
3 any provision of this Consent Judgment is held by a court to be unenforceable, the validity of the
4 remaining provisions shall not be adversely affected.

5 **7. GOVERNING LAW**

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

13 **8. NOTICE**

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

18 To Houston's:

19 John J. Allen, Esq.
20 Allen Matkins Leck Gamble
21 Mallory & Natsis LLP
22 865 South Figueroa Street, Suite 2800
Los Angeles, CA 90017-2543

To Vinocur:

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

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

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

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

1 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

2 Vinocur and his counsel agree to comply with the reporting form requirements referenced in
3 California Health and Safety Code section 25249.7(f).

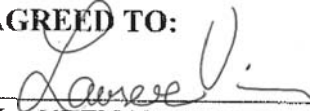
4 **11. MODIFICATION**

5 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
6 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion of
7 any party and the entry of a modified Consent Judgment by the Court thereon.

8 **12. AUTHORIZATION**

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

12
13 **AGREED TO:**

14 
15 LAURENCE VINOCUR

16 Dated: 1/13/17

AGREED TO:


HOUSTON'S, INC.

By: Jennifer Vigil
(Print Name)

Its: President
(Title)

Dated: 1/10/17