

1 Christopher Tuttle, State Bar No. 264545
2 THE CHANLER GROUP
3 2560 Ninth Street
4 Parker Plaza, Suite 214
5 Berkeley, CA 94710
6 Telephone: (510) 848-8880
7 Facsimile: (510) 848-8118

8 Attorneys for Plaintiff
9 LAURENCE VINOCUR

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

13 LAURENCE VINOCUR
14 Plaintiff,
15 v.
16 MACKARL ENTERPRISES INC.; and
17 DOES 1-150, inclusive,
18 Defendants.

Case No. RG15754362

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Laurence Vinocur
4 (“Vinocur”) and defendant Mackarl Enterprises, Inc. (“Mackarl”), with Vinocur and Mackarl 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 Mackarl 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 Mackarl manufactures, imports, sells and/or distributes for sale in
16 California, upholstered chairs with foam padding that contain the toxic chemicals tris(1,3-dichloro-
17 2-propyl) phosphate (“TDCPP”) and tris(2-chloroethyl) phosphate (“TCEP”), and that it does so
18 without providing the health hazard warning that Vinocur alleges is required by Proposition 65.
19 TDCPP and TCEP are each listed pursuant to Proposition 65 as a chemical that is known to cause
20 cancer.

21 **1.5 Product Description**

22 The products covered by this Consent Judgment are upholstered chairs with foam padding
23 that contain TDCPP and TCEP, including, but not limited to, the *Techno Seating Chair, 818RED,*
24 (*UPC #7 09124 81804 0*) (collectively, “Products”).

25 **1.6 Notice of Violation**

26 On July 11, 2014, Vinocur served Mackarl and the requisite public enforcement agencies
27 with a 60-Day Notice of Violation (“Notice”), alleging that Mackarl violated Proposition 65 when it
28 failed to warn its customers and consumers in California that the Products expose users to TDCPP

1 and TCEP. To the best of the Parties' knowledge, no public enforcer has commenced and is
2 diligently prosecuting an action to enforce the allegations set forth in the Notice.

3 **1.7 Complaint**

4 On January 12, 2015, Vinocur commenced the instant action, naming Mackarl as a
5 defendant for the alleged violations of Proposition 65 that are the subject of the Notice.

6 **1.8 No Admission**

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

15 **1.9 Jurisdiction**

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

20 **1.10 Effective Date**

21 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that
22 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

23 **2. INJUNCTIVE SETTLEMENT TERMS**

24 Commencing on the Effective Date and continuing thereafter, Mackarl shall only
25 manufacture for sale, or purchase for sale in California, Reformulated Products. For purposes of
26 this Consent Judgment, "Reformulated Products" are defined as Products with a maximum TDCPP,
27 TCEP and/or tris(2, 3-dibromopropyl)phosphate ("TDBPP") concentration of 25 parts per million
28 each when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies

1 8141, 3545 and/or 8270C, or other methodologies utilized by state or federal agencies for the
2 purpose of determining TDCPP and TCEP, and/or TDBPP content in a solid substance. As of the
3 Effective Date, Mackarl represents that it is not currently offering the Products for sale in
4 California, but agrees that if it recommences sales of the Products, MacKarl will only offer
5 Reformulated Products. Before recommencement of sales of the Products, an officer of Mackarl
6 will provide Vinocur with an original, signed written certification that all of the Products it ships for
7 sale or distributes for sale in California as of the date of its certification are Reformulated Products,
8 and that Mackarl will, with regard to the Products, continue to offer only Reformulated Products in
9 California in the future.

10 **3. MONETARY SETTLEMENT TERMS**

11 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

12 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
13 claims referred to in this Consent Judgment, Mackarl shall pay \$3,000 in civil penalties in
14 accordance with this Section. The penalty payment will be allocated in accordance with California
15 Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California
16 Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the
17 penalty remitted to Vinocur. Vinocur’s counsel shall be responsible for remitting Mackarl’s penalty
18 payment(s) under this Consent Judgment to OEHHA. Mackarl shall provide its payment in a single
19 check made payable to “Laurence Vinocur, Client Trust Account” to be delivered to the address
20 provided in Section 3.4, below.

21 **3.2 Reimbursement of Attorneys’ Fees and Costs**

22 The Parties acknowledge that Vinocur and his counsel offered to resolve this dispute
23 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
24 the issue to be resolved after the material terms of the agreement had been settled. Shortly after
25 the other settlement terms had been finalized, Mackarl expressed a desire to resolve Vinocur’s fees
26 and costs. The Parties then negotiated a resolution of the compensation due to Vinocur and his
27 counsel under general contract principles and the private attorney general doctrine codified at
28 California Code of Civil Procedure § 1021.5. For all work performed through the mutual

1 execution of this agreement and the Court's approval of the same, but exclusive of fees and costs
2 on appeal, if any, Mackarl shall reimburse Vinocur and his counsel \$25,500. Mackarl's payment
3 shall be delivered to the address in Section 3.4 in the form of a check payable to "The Chanler
4 Group." The reimbursement shall cover all fees and costs incurred by Vinocur investigating,
5 bringing this matter to Mackarl's attention, litigating, and negotiating a settlement of the matter in
6 the public interest.

7 **3.3 Payment Timing; Payments Held In Trust**

8 Mackarl shall deliver all payments required by this Consent Judgment to its counsel within
9 one week of the date that this agreement is fully executed by the Parties. Mackarl's counsel shall
10 confirm receipt of settlement funds in writing to Vinocur's counsel and, thereafter, hold the
11 amounts paid in trust until such time as the Court grants the motion for approval of the Parties'
12 settlement contemplated by Section 5. Within two business days of the Effective Date, Mackarl's
13 counsel shall mail or personally deliver all settlement payments it has held in trust to Vinocur's
14 counsel at the address provided in Section 3.4.

15 **3.4 Payment Address**

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

18 The Chanler Group
19 Attn: Proposition 65 Controller
20 2560 Ninth Street
21 Parker Plaza, Suite 214
22 Berkeley, CA 94710

23 **4. CLAIMS COVERED AND RELEASED**

24 **4.1 Vinocur's Release of Proposition 65 Claims**

25 Vinocur, acting on his own behalf and in the public interest, releases Mackarl and its
26 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
27 and attorneys ("Releasces") and each entity to whom Mackarl directly or indirectly distributes or
28 sells the Products including, but not limited to, its downstream distributors, wholesalers, customers,
retailers, franchisers, cooperative members, licensors and licensees ("Downstream Releasees") for

1 any violations arising under Proposition 65 for unwarned exposures to TDCPP and TCEP from the
2 Products manufactured, imported, distributed or sold by Mackarl prior to the Effective Date, as set
3 forth in the Notice. Compliance with the terms of this Consent Judgment constitutes compliance
4 with Proposition 65 by Mackarl with respect to the alleged or actual failure to warn about exposures
5 to TDCPP and TCEP from Products manufactured, sold or distributed for sale by Mackarl after the
6 Effective Date.

7 **4.2 Vinocur's Individual Release of Claims**

8 Vinocur, in his individual capacity only and *not* in his representative capacity, also provides
9 a release to Mackarl, Releasees, and Downstream Releasees which shall be effective as a full and
10 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
11 attorneys' fees, damages, losses, claims, liabilities and demands of Vinocur of any nature, character
12 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
13 exposures to TDCPP, TCEP and TDBPP in Products manufactured, imported, distributed or sold by
14 Mackarl before the Effective Date.

15 **4.3 Mackarl's Release of Vinocur**

16 Mackarl, on its own behalf and on behalf of its past and current agents, representatives,
17 attorneys, successors and/or assignees, hereby waives any and all claims against Vinocur and his
18 attorneys and other representatives, for any and all actions taken or statements made (or those that
19 could have been taken or made) by Vinocur and his attorneys and other representatives in the
20 course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or with
21 respect to the Products.

22 **5. COURT APPROVAL**

23 This Consent Judgment is not effective until it is approved and entered by the Court and
24 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
25 after it has been fully executed by all Parties. Vinocur and Mackarl agree to support the entry of
26 this agreement as a judgment, and to obtain the Court's approval of their settlement in a timely
27 manner. The Parties acknowledge that, pursuant to California Health and Safety Code section
28 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment, which

1 motion Vinocur shall draft and file and Mackarl shall support, appearing at the hearing if so
2 requested. If any third-party objection to the motion is filed, Vinocur and Mackarl agree to work
3 together to file a reply and appear at any hearing. This provision is a material component of the
4 Consent Judgment and shall be treated as such in the event of a breach.

5 **6. SEVERABILITY**

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

9 **7. GOVERNING LAW**

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

17 **8. NOTICE**

18 Unless specified herein, all correspondence and notice required by this Consent Judgment
19 shall be in writing and sent by: (i) personal delivery, (ii) first-class registered or certified mail,
20 return receipt requested; (iii) regular U.S. mail; or (iv) a recognized overnight courier to any Party
21 by the other at the following addresses:

22 To Mackarl:

23 Frank Liu, President
24 Mackarl Enterprises Inc.
25 16960 Gale Avenue
City of Industry, CA 91745

26 ///

27 ///

28 ///

To Vinocur:

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

1 With a copy to:

2 Chris Evans, Esq.
3 Gupta Legal Center
4 402 W. Broadway, Suite 400
5 San Diego, CA 92101

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

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

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

12 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

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

15 **11. MODIFICATION**

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

19 **12. AUTHORIZATION**

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

23 **AGREED TO:**

24 
25 LAURENCE VINO CUR

26 Dated: 11/18/2015

AGREED TO:

27 
28 MACKARL ENTERPRISES, INC.

By: Frank K. Liu
(Print Name)

Its: CEO
(Title)

Dated: 11/18/15