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10 Attorneys for Defendant
WAYNE/SCOTT FETZER COMPANY

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12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF ALAMEDA

15 UNLIMITED CIVIL JURISDICTION
16

17 LAURENCE VINO CUR,

18 Plaintiff,

19 v.

20
21 THE SCOTT FETZER COMPANY;
WAYNE/SCOTT FETZER COMPANY; and
22 DOES 1-150, inclusive,

23 Defendants.
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25
26
27
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Case No. RG15776637

Assigned for All Purposes to:
Hon. Winifred Y. Smith
Department 21

**[PROPOSED] CONSENT JUDGMENT AS
TO WAYNE/SCOTT FETZER COMPANY**

1 **1. INTRODUCTION**

2 **1.1. Parties**

3 This Consent Judgment is entered into by and between Laurence Vinocur (“Vinocur”) and
4 Wayne/Scott Fetzer Company (“Wayne/Scott”), with Vinocur and Wayne/Scott each individually
5 referred to as a “Party” and 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 Wayne/Scott employs ten or more individuals and is a “person in the course of doing business”
12 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code
13 § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4. General Allegations**

15 Vinocur alleges that Wayne/Scott manufactures, imports, sells, or distributes for sale in
16 California, vinyl/PVC tubing that contain di(2-ethylhexyl)phthalate (“DEHP”) without first providing
17 the exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a
18 chemical 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 limited to the *Wayne Utility Pump Drill*
21 *Power Fluid Transfer Kit, Model # DPFTK1, # 62027-WYN1, UPC 0 40066 20618 3*, manufactured,
22 imported, sold, or distributed for sale in California by Wayne/Scott, hereinafter the “Products”.

23 **1.6. Notice of Violation**

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

1 **1.7. Complaint**

2 On July 6, 2015, Vinocur filed the instant action (“Complaint”), naming Wayne/Scott as a
3 defendant for its alleged violations of Health and Safety Code § 25249.6 that are the subject of the
4 Notice.

5 **1.8. No Admission**

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

14 **1.9. Jurisdiction**

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

19 **1.10. Effective Date**

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

23 **2. INJUNCTIVE RELIEF: REFORMULATION**

24 **2.1. Reformulated Products**

25 Commencing on May 30, 2016, and continuing thereafter, Wayne/Scott shall only purchase for
26 sale in California, or manufacture for sale in California, or otherwise sell in California “Reformulated
27 Products.” Reformulated Products are Products that contain less than 0.1 percent (1,000 parts per
28 million) DEHP when analyzed pursuant to U.S. Environmental Protection Agency testing

1 methodologies 3580A and 8270C or other methodology utilized by federal or state government agencies
2 for the purpose of determining DEHP content in a solid substance.

3 **3. MONETARY SETTLEMENT TERMS**

4 **3.1. Civil Penalty Payments**

5 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in this
6 Consent Judgment, Wayne/Scott shall pay a total of \$3,000 in civil penalties within two (2) days after
7 the Effective Date in two separate checks with one payable to “OEHHA” in the amount of \$2,250 and
8 the other payable to “Laurence Vinocur Client Trust Account” in the amount of \$750 in accordance
9 with Health and Safety Code § 25249.12(c)(1) and (d), seventy-five percent (75%) of the total civil
10 penalty amount remitted to the California Office of Environmental Health Hazard Assessment
11 (“OEHHA”) and twenty-five percent (25%) retained by Vinocur.

12 **3.2. Reimbursement of Attorney’s Fees and Costs**

13 The parties acknowledge that Vinocur and his counsel offered to resolve this dispute without
14 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to be
15 resolved after the material terms of this Consent Judgment had been settled. Shortly after the other
16 settlement terms had been finalized, Wayne/Scott expressed a desire to resolve Vinocur’s fees and costs.
17 The Parties then attempted to (and did) reach an accord on the compensation due to Vinocur and his
18 counsel under general contract principles and the private attorney general doctrine codified at California
19 Code of Civil Procedure § 1021.5 for all work performed through the mutual execution of this Consent
20 Judgment. Within two (2) days after the Effective Date, Wayne/Scott shall pay \$17,000 in a single
21 check made payable to “The Chanler Group” for the fees and costs incurred by Vinocur investigating,
22 bringing this matter to Wayne/Scott’s attention, litigating and negotiating a settlement in the public
23 interest. Payment shall be sent to the address set forth in Section 3.4 below.

24 **3.3. Payments Held in Trust**

25 Wayne/Scott shall deliver all payments required by this Consent Judgment to its counsel within
26 one week of the date that this agreement is fully executed by the Parties. Wayne/Scott’s counsel shall
27 confirm receipt of settlement funds in writing to Vinocur’s counsel and, thereafter, hold the amounts
28 paid in trust until such time as the Court grants the motion for approval of the Parties’ settlement

1 contemplated by Section 5. Within two (2) days of the Effective Date, Wayne/Scott's counsel shall
2 deliver all settlement payments it has held in trust to Vinocur's counsel at the address provided in
3 Section 3.4.

4 **3.4. Payment Address**

5 All payments to Vinocur and his counsel required by this Consent Judgment shall be delivered
6 to the following address:

7 The Chanler Group
8 Attn: Proposition 65 Controller
9 2560 Ninth Street
10 Parker Plaza, Suite 214
11 Berkeley, CA 94710

12 **4. CLAIMS COVERED AND RELEASED**

13 **4.1. Vinocur's Public Release of Proposition 65 Claims**

14 Vinocur, acting on his own behalf and in the public interest, releases Wayne/Scott and its
15 parents, subsidiaries, affiliated entities under common ownership or control, directors, officers,
16 employees, and attorneys ("Releasees") and each entity to whom it directly or indirectly distributes or
17 sells the Products including, but not limited to, its downstream distributors, wholesalers, customers,
18 retailers, franchisers, cooperative members, licensors and licensees ("Downstream Releasees") for any
19 violations arising under Proposition 65 for unwarned exposures to DEHP from Products sold by
20 Wayne/Scott prior to the Effective Date as set forth in the Notice as it pertains to the Products.

21 **4.2. Vinocur's Individual Release of Claims**

22 Vinocur, in his individual capacity only and *not* in his representative capacity, also provides a
23 release to Wayne/Scott, Releasees, and Downstream Releasees which shall be effective as a full and
24 final accord and satisfaction, as a bar to all actions, causes of action, obligations, damages, losses,
25 claims, liabilities and demands of Vinocur of any nature, character or kind, whether known or unknown,
26 suspected or unsuspected, arising out of alleged or actual violations of Proposition 65 or exposures to
27 DEHP in the Products sold or distributed for sale by Wayne/Scott before the Effective Date with the
28 exception that Vinocur's claim for compensation due to Vinocur and his counsel under the private
attorney general doctrine codified at Code of Civil Procedure § 1021.5, as set forth in Section 3.2 above.

1 **4.3. Wayne/Scott's Release of Vinocur**

2 Wayne/Scott, on its own behalf, and on behalf of its past and current agents, representatives,
3 attorneys, successors, and assignees, hereby waives any and all claims against Vinocur and his attorneys
4 and other representatives, for any and all actions taken or statements made by Vinocur and his attorneys
5 and other representatives, whether in the course of investigating claims, and seeking to enforce
6 Proposition 65 against Wayne/Scott in this matter with respect to the Products.

7 **5. COURT APPROVAL**

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

11 **6. SEVERABILITY**

12 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any
13 provision is determined by a court to be unenforceable, the parties shall give full meaning to the intent
14 of the parties to resolve and settle all this matter in its entirety, and the validity of the remaining
15 provisions shall not be adversely affected.

16 **7. GOVERNING LAW**

17 The terms of this Consent Judgment shall be governed by the laws of the state of California and
18 apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
19 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Wayne/Scott
20 may provide written notice to Vinocur of any asserted change in the law, and shall have no further
21 injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
22 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Wayne/Scott
23 from any obligation to comply with any pertinent state or federal toxics control laws.

24 **8. NOTICE**

25 Unless specified herein, all correspondence and notice required by this Consent Judgment shall
26 be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail, return receipt
27 requested; or (iii) a recognized overnight courier with delivery confirmation to the following addresses:
28

1 **Wayne/Scott Fetzer Company**

2 Duane Johnson, President
3 Wayne/Scott, Fetzer Company
4 28800 Clemens Road
5 Westlake, OH 44145

 Peter W. McGaw, Esq.
 Archer Norris
 2033 North Main Street, Suite 800
 Walnut Creek, CA 94596

6 **Laurence Vinocur**

7 The Chanler Group
8 Attn: Proposition 65 Coordinator
9 2560 Ninth Street
10 Parker Plaza, Suite 214
11 Berkeley, CA 94710-2565

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

14 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

18 **10. POST EXECUTION ACTIVITIES**

19 Vinocur agrees to comply with the reporting form requirements referenced in Health and Safety
20 Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
21 § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In furtherance
22 of obtaining such approval, Vinocur and Wayne/Scott agree to mutually employ their best efforts, and
23 those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial
24 approval of their settlement in a timely manner. For purposes of this Section, “best efforts” shall means
25 cooperating on the drafting and filing of the necessary moving papers, supporting the motion, and
26 appearing at the hearing before the Court.

27 **11. MODIFICATION**

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

1 **12. AUTHORIZATION**

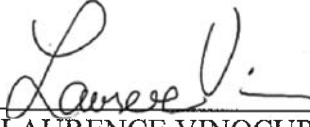
2 The undersigned are authorized to execute this Consent Judgment and have read, understood,
3 and agree to all of the terms and conditions contained herein.

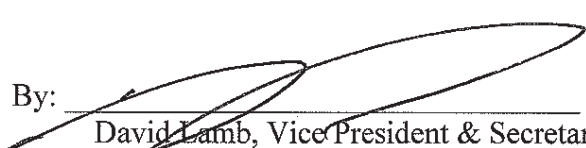
4 **AGREED TO:**

AGREED TO:

5 Date: 10/19/2016

6 Date: 11.2.16

7
8 By: 
LAURENCE VINOUCUR

9 By: 
David Lamb, Vice President & Secretary
WAYNE/SCOTT FETZER COMPANY

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