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9 Attorneys for Plaintiff  
10 LAURENCE VINOUCUR

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

14 LAURENCE VINOUCUR,  
15 Plaintiff,  
16 v.  
17 BERGAN, LLC,  
18 Defendant.

Case No. \_\_\_\_\_

**[PROPOSED] CONSENT JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.*)

1           **1. INTRODUCTION**

2                   **1.1 Parties**

3                   This Consent Judgment is entered into by and between plaintiff, Laurence Vinocur  
4 (“Vinocur”), and defendant, Bergan, LLC (“Bergan”), with Vinocur and Bergan 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  
8 to toxic chemicals and improve human health by reducing or eliminating hazardous substances  
9 contained in consumer products.

10                   **1.3 Defendant**

11                   Bergan 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, Health and Safety Code  
13 section 25249.6 *et seq.* (“Proposition 65”).

14                   **1.4 General Allegations**

15                   Vinocur alleges that Bergan sold pet carriers with handles containing di(2-  
16 ethylhexyl)phthalate (“DEHP”) without first providing the exposure warning required by Proposition  
17 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the state of California to cause  
18 birth defects or other reproductive harm.

19                   **1.5 Product Description**

20                   The products that are covered by this Consent Judgment are pet carriers with handles that are  
21 imported, manufactured, sold, or distributed for sale by Bergan in California including, but not  
22 limited to, the *Bergan Elite Pet Carrier, #70511 (#8 79213 00511 5)* and the *Bergan Comfort*  
23 *Carrier, #88036 (#8 79213 00036 3)* (collectively “Products”).

24                   **1.6 Notice of Violation**

25                   On or about November 21, 2012, Vinocur served Bergan and certain requisite public  
26 enforcement agencies with a “60-Day Notice of Violation” (“Notice”) alleging that Bergan was in  
27 violation of Proposition 65 for failing to warn its customers and consumers in California that the  
28 Products with vinyl/PVC handles expose users to DEHP. On or about April 11, 2013, Vinocur

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2 served Bergan and certain requisite public enforcement agencies with a Supplemental Notice  
3 alleging that Bergan was in violation of Proposition 65 for failing to warn its customers and  
4 consumers in California that the Products with all types of handles expose users to DEHP (the Notice  
5 and the Supplemental Notice together the “Notices”).

6 **1.7 Complaint**

7 On or about March 29, 2013, Vinocur, who alleges that he was and is acting in the interest of  
8 the general public in California, filed the instant action against Bergan (“Complaint”) for the alleged  
9 violations of Health and Safety Code section 25249.6 that are the subject of the Notice. Following  
10 the expiration of more than sixty-six (66) days after Vinocur’s service of the Supplemental Notice,  
11 and upon entry of this Consent Judgment, the Complaint shall be deemed amended *nunc pro tunc* to  
12 include pet carriers with all types of handles containing DEHP sold, manufactured or distributed by  
13 Bergan in California and the violations of Proposition 65 alleged in the Supplemental Notice,  
14 provided that no public enforcer has diligently prosecuted any of the allegations set forth in the  
15 Supplemental Notice.

16 **1.8 No Admission**

17 Bergan denies the material, factual, and legal allegations contained in the Notice and  
18 Complaint, and it maintains that all of the products that it has sold and distributed for sale in  
19 California, including the Products, have been, and are, in compliance with all laws. Nothing in this  
20 Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of  
21 law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed  
22 as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This  
23 Section shall not, however, diminish or otherwise affect Bergan’s obligations, responsibilities, and  
24 duties under this Consent Judgment.

25 **1.9 Consent to Jurisdiction**

26 For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
27 jurisdiction over Bergan as to the allegations in the Complaint, that venue is proper in Alameda  
28 County, and that this Court has jurisdiction to enter and enforce the provisions of this Consent  
Judgment.

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2       **1.10 Effective Date**

3       For purposes of this Consent Judgment, the term “Effective Date” shall mean August 15,  
4 2013.

5       **2. INJUNCTIVE RELIEF: REFORMULATION**

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7       **2.1** For purposes of this Consent Judgment, “Reformulated Products” are those Products that  
8 contain a maximum of 1,000 parts per million (0.1%) DEHP content in any accessible component  
9 analyzed pursuant to EPA testing methodologies 3580A and 8270C, or equivalent methodologies  
10 utilized by state or federal agencies for the purpose of determining DEHP content in a solid  
11 substance.

12       **2.2 Product Warnings:**

13       Commencing on the Effective Date, Bergan shall provide Proposition 65 warnings with  
14 respect to all Products shipped, sold, or offered for sale in California, as follows:

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

16                       (i)     **Product Labeling.** Bergan may affix a warning to the packaging,  
17 labeling, or directly on each Product sold in retail outlets in California by Bergan or its agents,  
18 containing the following language:

19                               **WARNING:** This product contains DEHP, a chemical  
20   known to the State of California to cause  
21   cancer and/or birth defects and other  
22   reproductive harm.

23                               **Point-of-Sale Warnings.** Alternatively, Bergan may provide warning signs in  
24 the form below to its customers in California with instructions to post the warnings in close proximity  
25 to the point of display of the Products.

26                               **WARNING:** This product contains DEHP, a chemical known  
27   to the State of California to cause cancer and/or  
28   birth defects and other reproductive harm.

1  
2 Where more than one Product is sold in proximity to other like items or to those that do not  
3 require a warning (e.g., Reformulated Products as defined in Section 2.1 or Products distributed prior  
4 to the Effective Date), the following statement must be used:<sup>1</sup>

5 **WARNING:** These products contain DEHP, a chemical known  
6 to the State of California to cause cancer and/or  
7 birth defects and other reproductive harm.

8 [list products for which warning is required]

9 **(b) Mail Order Catalog and Internet Sales.** In the event that Bergan sells  
10 Products via mail order catalog or internet to customers located in California after the Effective Date  
11 that are not Reformulated Products, Bergan shall provide a warning for Products sold via mail order  
12 catalog or the Internet to California residents: (1) in the mail order catalog; or (2) on the website.  
13 Warnings given in the mail order catalog or on the website shall identify the *specific* Product to  
14 which the warning applies as further specified in Sections 2.2(b)(i) and (ii).

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

19 **WARNING:** This product contains DEHP, a chemical known  
20 to the State of California to cause cancer and/or  
21 birth defects and other reproductive harm.

22 Where it is impracticable to provide the warning on the same page and in the same location as  
23 the display and/or description of the Product, Bergan may utilize a designated symbol to cross-  
24 reference the applicable warning and shall define the term “designated symbol” with the following  
25 language on the inside of the front cover of the catalog or on the same page as any order form for the  
26 Product(s):

27 **WARNING:** Certain products identified with this symbol  
28 ▼ and offered for sale in this catalog contain  
DEHP, a chemical known to the State of

<sup>1</sup>For purposes of the consent judgment, “sold in proximity” shall mean that the Product and another 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.

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2 California to cause cancer and/or birth defects  
and other reproductive harm.

3  
4 The designated symbol must appear on the same page and in close proximity to the display  
5 and/or description of the Product. On each page where the designated symbol appears, Bergan must  
6 provide a header or footer directing the consumer to the warning language and definition of the  
7 designated symbol.

8 If Bergan elects to provide warnings in the mail order catalog, then the warnings must be  
9 included in all catalogs offering to sell one or more Products printed after the Effective Date.

10 (ii) **Internet Website Warning.** A warning may be given in conjunction  
11 with the sale of the Product via the Internet, provided it appears either: (a) on the same web page on  
12 which the Product is displayed; (b) on the same web page as the order form for the Product; (c) on the  
13 same page as the price for any Product; or (d) on one or more web pages displayed to a purchaser  
14 during the checkout process. The following warning statement shall be used and shall appear in any  
15 of the above instances adjacent to or immediately following the display, description, or price of the  
16 Product for which it is given in the same type size or larger than the Product description text:

17 **WARNING:** This product contains DEHP, a chemical known  
18 to the State of California to cause cancer and/or  
birth defects and other reproductive harm.

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

22 **WARNING:** Products identified on this page with the  
23 following symbol contain DEHP, a chemical  
24 known to the State of California to cause  
cancer and/or birth defects and other  
reproductive harm: ▼

### 25 **2.3 Exceptions To Warning Requirements**

26 The warning requirements set forth in Section 2.2 shall not apply to:

- 27 (i) Reformulated Products (as defined in Section 2.1 above); or  
28 (ii) Products that are in inventory or otherwise in the stream of commerce prior to  
the Effective Date.

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3 **3. MONETARY SETTLEMENT TERMS**

4 **3.1 Payments pursuant to Health and Safety Code § 25249.7(b)**

5 In settlement of all the claims referred to in this Consent Judgment, Bergan shall pay  
6 up to \$17,000 in civil penalties as set forth in this Section 3.1. Each civil penalty payment shall be  
7 allocated according to Health and Safety Code section 25249.7(c)(1) and (d) with seventy-five  
8 percent (75%) of the funds paid to the California Office of Environmental Health Hazard Assessment  
9 and twenty-five percent (25%) of the funds remitted to Vinocur. All civil penalty payments shall be  
10 delivered to the payment addresses provided in section 3.3.1.

11 **3.1.1 Initial Civil Penalty**

12 Within five days after the Effective Date, Bergan shall make an initial civil penalty  
13 payment of \$5,000. Bergan shall provide its payment in two checks for the following amounts made  
14 payable to: (a) "OEHHA" in the amount of \$3,750; and (b) "The Chanler Group in Trust for  
15 Laurence Vinocur" in the amount of \$1,250.

16 **3.1.2 Final Civil Penalty**

17 On or before October 15, 2013, Bergan shall make a final civil penalty payment of  
18 \$12,000. Pursuant to title 11 California Code of Regulations, section 3203(c), the final civil penalty  
19 payment shall be (1) waived in its entirety if, no later than September 30, 2013, an officer of Bergan  
20 provides Vinocur with written certification that as of September 30, 2013 all of the Products  
21 purchased for sale or manufactured for sale in California are Reformulated Products, and that Bergan  
22 will continue to offer only Reformulated Products in California ("Final Penalty Waiver"), or (b)  
23 reduced to \$5,000 if, no later than September 30, 2013, an officer of Bergan provides Vinocur with  
24 written certification that as of September 30, 2013 at least 75% but less than 100% all of the Products  
25 purchased for sale or manufactured for sale in California are Reformulated Products, and that Bergan  
26 will continue to offer only Reformulated Products in California at such levels ("Final Penalty  
27 Reduction"). The written certification of reformulation in lieu or reduction of the final civil penalty  
28 payment required by this section is a material term, and time is of the essence. If neither a Final  
Penalty Waiver nor Final Penalty Reduction is applicable, Bergan shall issue two checks for the

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2 following amounts payable to: (a) "OEHHA" in the amount of \$9,000; and (b) "The Chanler Group  
3 in Trust for Laurence Vinocur" in the amount of \$3,000. If a Final Penalty Reduction applies,  
4 Bergan shall issue two checks for the following amounts payable to: (a) "OEHHA" in the amount of  
5 \$3,750; and (b) "The Chanler Group in Trust for Laurence Vinocur" in the amount of \$1,250.

6 **3.2 Reimbursement of Fees and Costs**

7 The parties acknowledge that Vinocur and his counsel offered to resolve the non-monetary  
8 terms of this dispute before reaching terms on the amount of fees and costs to be reimbursed to them,  
9 thereby leaving the fee and cost issue to be resolved after the material terms of this Consent Judgment  
10 had been agreed to in principle. The Parties then agreed to resolve the fee and cost issue shortly after  
11 the other settlement terms had been tentatively finalized, subject to agreement on fees and costs. The  
12 Parties then attempted to (and did) reach an accord on the compensation due to Vinocur and his  
13 counsel under general contract principles and the private attorney general doctrine codified at  
14 California Code of Civil Procedure section 1021.5 for all work performed in this matter. Bergan  
15 shall pay \$30,000 for fees and costs incurred (and yet to be incurred) as a result of investigating,  
16 bringing this matter to Bergan's attention, negotiating a settlement in the public interest, and  
17 obtaining the Court's approval of this Consent Judgment. Bergan's payment of fees and costs shall  
18 be delivered in five (5) payments as follows, to the payment address provided in section 3.3.1.

- 19 (a) Payment 1: \$6,000 to be paid within five (5) days after the Effective Date.  
20 (b) Payment 2: \$6,000 to be paid within thirty (30) days after Payment 1 is made.  
21 (c) Payment 3: \$6,000 to be paid within thirty (30) days after Payment 2 is made.  
22 (d) Payment 4: \$6,000 to be paid within thirty (30) days after Payment 3 is made.  
23 (e) Payment 5: \$6,000 to be paid within thirty (30) days after Payment 4 is made.  
24

25 **3.3 Payment Procedures**

26 **3.3.1. Payment Address**

27 (a) All payments to Vinocur and The Chanler Group shall be delivered to the  
28 following address:

The Chanler Group



1  
2 Attn: Proposition 65 Controller  
3 2560 Ninth Street  
4 Parker Plaza, Suite 214  
5 Berkeley, CA 94710

6 (b) All payments to OEHHA (EIN: 68-0284486) made pursuant to section 3.1,  
7 shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at the following address:

8 Mike Gyrics  
9 Fiscal Operations Branch Chief  
10 Office of Environmental Health Hazard Assessment  
11 P.O. Box 4010  
12 Sacramento, CA 95812-4010

13 With a copy of the checks payable to OEHHA mailed to The Chanler Group at the address payment  
14 address provided in section 3.3.1(a), as proof of payment to OEHHA.

### 15 **3.3.2 Required Tax Documentation**

16 (a) Bergan agrees to provide when reasonably available appropriate 1099 form  
17 documentation for the civil penalties paid to OEHHA. The form shall be transmitted to the "Office  
18 of Environmental Health Hazard Assessment," 1001 I Street, Sacramento, CA 95814 (EIN: 68-  
19 0284486);

20 (b) For the civil penalties paid to Vinocur, Bergan agrees to issue when  
21 reasonably available a 1099 form to "Laurence Vinocur," whose address and tax identification  
22 number shall be furnished to Bergan within five (5) days after this Consent Judgment is fully  
23 executed by the Parties.

24 (b) For the reimbursement of fees and costs pursuant to section 3.2, Bergan shall  
25 issue a separate 1099 form to "The Chanler Group" (EIN: 94-3171522).

## 26 **4. CLAIMS COVERED AND RELEASED**

### 27 **4.1 Full, Final and Binding Resolution of Proposition 65 Allegations.**

28 This Consent Judgment is a full, final and binding resolution between Vinocur, on behalf of  
himself and the general public, and Bergan, for any violation of Proposition 65 that was or could  
have been asserted by Vinocur against Bergan, and its parent companies, corporate affiliates,  
subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders, agents,  
and employees ("Releasees"), and each entity to or through whom Bergan directly or indirectly sells  
Products, including, but not limited to, Bergan's past and current downstream distributors,

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2 wholesalers, licensors, licensees, auctioneers, retailers, franchisers, cooperative members, dealers,  
3 customers, owners, purchasers, users, parent companies, corporate affiliates, and subsidiaries  
4 (“Downstream Releasees”), based on their failure to warn about alleged exposures to DEHP  
5 contained in the Products that were manufactured, distributed, sold, or offered for sale by Bergan.

#### 6 **4.2 Vinocur’s Public Release of Releasees and Downstream Releasees**

7 Vinocur, on his own behalf, his past and current agents, representatives, attorneys,  
8 successors, and/or assignees, and the general public, hereby and waives all rights to institute or  
9 participate in, directly or indirectly, any form of legal action and releases all claims, including  
10 without limitation, all actions, causes of action, suits, liabilities, demands, obligations, damages,  
11 costs, fines, penalties, losses, and/or expenses (including but not limited to, investigation fees,  
12 expert fees, and attorneys’ fees) or any nature whatsoever, whether fixed or contingent, at law or in  
13 equity (collectively “Claims”), against the Releasees and Downstream Releasees arising under  
14 Proposition 65 with respect to DEHP contained in or associated with the Products sold by Bergan  
15 prior to the Effective Date, as set forth in the Notices.

16 Compliance with the terms of this Consent Judgment constitutes compliance with  
17 Proposition 65 with respect to exposures to DEHP from the Products.

#### 18 **4.3 Vinocur’s Individual Release of Claims**

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

#### 25 **4.3 Bergan’s Release of Vinocur**

26 Bergan, on its own behalf, and on behalf of its past and current agents, representatives,  
27 attorneys, successors, and assignees, hereby waives any and all claims against Vinocur and his  
28 attorneys and other representatives, for any and all actions taken or statements made by Vinocur and

1  
2 his attorneys and other representatives, whether in the course of investigating claims, otherwise  
3 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

4 **5. COURT APPROVAL**

5 This Consent Judgment is not effective until it is approved and entered by the Court and shall  
6 be null and void if, for any reason, it is not approved and entered by the Court within one year after it  
7 has been fully executed by the Parties (the "Approval Period"). If the Court does not approve and  
8 enter this Consent Judgment by the end of the Approval Period, all payments made by Defendant  
9 shall be returned to counsel for Defendant within ~~fifteen~~ (15) days after the end of the Approval  
10 Period.

11 **6. SEVERABILITY**

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

15 **7. GOVERNING LAW**

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

23 **8. NOTICES**

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

27 For Bergan:

28 Eric Elmburg, President  
Bergan, LLC  
27600 South Hwy 125

1 Afton, OK 74331

2 with a copy to:

3 Joshua A. Bloom, Esq.  
4 Barg Coffin Lewis & Trapp, LLP  
5 350 California Street, 22<sup>nd</sup> Floor  
6 Sacramento, CA 95814

7 For Vinocur:

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

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

15 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

19 **10. POST EXECUTION ACTIVITIES**

20 Vinocur agrees to comply with the reporting form requirements referenced in Health and  
21 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety  
22 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement,  
23 which motion shall be prepared and filed by Vinocur, provided that Vinocur shall give Bergan a final  
24 draft of such motion in advance of filing to provide Bergan a reasonable opportunity to review and  
25 comment on the motion. In furtherance of obtaining such approval, Vinocur and Bergan agree to  
26 mutually employ their best efforts, and that of their counsel, to support the entry of this agreement as  
27 judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of this  
28 Section, "best efforts" shall include, at a minimum, cooperating on Vinocur's drafting and filing of  
the necessary moving papers, and supporting the motion for judicial approval.

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**12. MODIFICATION**

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

**13. AUTHORIZATION**


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


**AGREED TO:**

**AGREED TO:**

Date: June 3, 2013

Date: 5/31/13

By:   
Laurence Vinocur

By:   
Eric Elmburg  
Bergan, LLC