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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 FOR THE COUNTY OF MARIN

10 UNLIMITED CIVIL JURISDICTION

11 LAURENCE VINOUCUR,

12 Plaintiff,

13 v.

14 APEX MEDICAL CORPORATION and DOES
15 1-150,

16 Defendants.

Case No. CIV 1300478

**CONSENT TO JUDGMENT AS TO
DEFENDANT APEX MEDICAL
CORPORATION**

1 **1. INTRODUCTION**

2 **1.1 The Parties**

3 This Consent To Judgment is entered into by and between Plaintiff Laurence Vinocur,
4 (“Vinocur” or “Plaintiff”) and Defendant Apex Medical Corporation (“Apex”) with Vinocur and
5 Apex collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Apex employs 10 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 &
13 Safety Code §§ 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Vinocur alleges that Apex manufactured, distributed and/or sold, in the State of
16 California, certain types of vinyl/PVC pill wallets/containers and medication organizers made
17 with materials containing DEHP, including the Apex 14-Day Pill Wallet (Item 70095) that
18 exposed users to DEHP, without first providing any “clear and reasonable warning” under
19 Proposition 65. DEHP is listed as a reproductive and developmental toxicant pursuant to
20 Proposition 65.

21 Vinocur further alleges that Apex manufactured, imported, sold and/or distributed for
22 sale in California, pillow products made with foam cushion components containing tris(1,3-
23 dichloro-2-propyl) phosphate (“TDCPP”), including, but not limited to, the Cozy Buddy Neck
24 Pillow, that exposed users to TDCPP without first providing any “clear and reasonable warning”
25 under Proposition 65. TDCPP is listed as a carcinogen pursuant to Proposition 65.

1 **1.5 Notices of Violation**

2 On November 21, 2012, Vinocur served Defendant and various public enforcement
3 agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that provided public
4 enforcers and these entities with notice of alleged violations of Health & Safety Code § 25249.6
5 for failing to warn consumers of the presence of DEHP, a toxic chemical found in and on
6 Defendant’s medication organizer products sold in California. To the best of the Parties’
7 knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set
8 forth in the Notice.

9 On August 16, 2013, Vinocur served Defendant and various public enforcement agencies
10 with a document entitled “Supplemental 60-Day Notice of Violation” (“Supplemental Notice”)
11 that provided public enforcers and these entities with notice of alleged violations of Health &
12 Safety Code § 25249.6 for failing to warn consumers of the presence of TDCPP, a toxic chemical
13 found in and on Defendant’s foam cushioned pillow products sold in California. To the best of
14 the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the
15 allegations set forth in the Supplemental Notice.

16 **1.6 Complaint**

17 On February 1, 2013, Vinocur, acting, in the interest of the general public in California,
18 filed a Complaint in the Superior Court of the State of California for the County of San Francisco,
19 alleging violations by Defendant of Health & Safety Code § 25249.6 based, *inter alia*, on the
20 alleged exposures to DEHP contained in the referenced medication organizer products (the
21 “Action”).

22 As part of, and upon execution of, this Consent To Judgment, the parties stipulate and
23 agree that Vinocur shall lodge, as an exhibit to his motion to approve this settlement, a First
24 Amended Complaint to include the parties, recitals, and allegations against Apex in conformity
25 with the Notice and Supplemental Notice served by Vinocur upon Apex (“FAC”). As part of
26 Vinocur’s motion to approve this settlement and enter judgment, Vinocur shall also move this
27

1 Court for an order either deeming the FAC filed as of the date of the hearing on the motion to
2 approve or an order permitting Vinocur to immediately file the FAC with the Court.

3 Apex stipulates to such filing of the FAC as part of Vinocur's motion to approve the
4 settlement and agrees to waive any service of the FAC other than such service of the FAC as an
5 exhibit to the motion to approve this settlement sent by mail to Apex's counsel of record. The
6 parties hereby stipulate that Apex's answer to the Complaint already on file in this action shall
7 be deemed to be its answer to the FAC, stipulate that the FAC shall be deemed at issue as to
8 Apex upon issuance of the order of the Court either deeming the FAC filed or permitting its
9 immediate filing, and stipulate that this Court may and shall immediately enter judgment on the
10 FAC, as against Apex, but only pursuant to these stipulations and after approval of this Consent
11 To Judgment.

12 **1.7 No Admission**

13 This Consent To Judgment resolves claims that are denied and disputed by Apex. The
14 Parties enter into this Consent To Judgment pursuant to a full and final settlement of any and all
15 claims between the Parties for the purpose of avoiding prolonged litigation. Defendant denies
16 the material factual and legal allegations contained in the Notice, Supplemental Notice, and
17 Action, maintains that it did not knowingly or intentionally expose California consumers to
18 DEHP or TDCPP through the reasonably foreseeable use of the Covered Products and otherwise
19 contends that all Covered Products it has manufactured, distributed and/or sold in California
20 have been and are in compliance with all applicable laws. Nothing in this Consent To Judgment
21 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
22 law; nor shall compliance with this Consent To Judgment constitute or be construed as an
23 admission by the Defendant of any fact, finding, conclusion, issue of law, or violation of law,
24 such being specifically denied by Defendant. However, notwithstanding the foregoing, this
25 section shall not diminish or otherwise affect Apex's obligations, responsibilities, and duties
26 under this Consent To Judgment.

1 **1.8 Consent to Jurisdiction**

2 For purposes of this Consent To Judgment only, the Parties stipulate that this Court has
3 jurisdiction over Apex as to the allegations contained in the Complaint, that venue is proper in
4 the County in which the Complaint is filed, and that this Court has jurisdiction to enter and
5 enforce the provisions of this Consent Judgment. As an express part of this Consent To
6 Judgment, pursuant to C.C.P. §664.6 the Court in which this action was filed shall retain
7 jurisdiction over the parties to enforce the settlement until performance in full of the terms of the
8 settlement.

9 **2. DEFINITIONS**

10 2.1 The term “Complaint” shall mean the FAC.

11 2.2 The term “DEHP Covered Products” means the medication wallet made of vinyl
12 or PVC faux leather materials, known as the 14 Day Pill Wallet (Item 70095). The term “TDCPP
13 Covered Products” means any and all small, non-furniture foam-containing neck, back, bottom
14 and other support pillows.

15 2.3 The term “Effective Date” shall mean August 1, 2014.

16 2.4 The term “DEHP Free” DEHP Covered Products shall mean DEHP Covered
17 Products containing materials or other components that may be handled, touched or mouthed
18 by a consumer, and which components contain less than or equal to 1,000 parts per million
19 (“ppm”) of DEHP when analyzed by a NVLAP accredited United States laboratory pursuant to
20 U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or any other
21 methodology utilized by federal or state agencies for the purpose of determining the DEHP
22 content in a consumer product.

23 2.5 The term “TDCPP Free” TDCPP Covered Products shall mean products
24 containing no more than 200 parts per million (“ppm”) (the equivalent of .002%) of TDCPP in
25 any material, component, or constituent of a subject product, when analyzed by a United States
26 accredited laboratory pursuant to EPA testing methodologies 3545 and 8270C, or equivalent
27 methodologies utilized by federal or state agencies to determine the presence, and measure the

1 quantity, of TDCPP in consumer products. This reformulation level for the neck pillow or other
2 small, intermittent use, foam-containing products is specific to these TDCPP Covered Products
3 *only* and is not intended to nor shall in any way be construed an appropriate reformulation level
4 for any other type of foam-containing product.

5 **3. INJUNCTIVE RELIEF**

6 **3.1 Formulation Commitment**

7 **3.1.1 DEHP Covered Products.**

8 Apex represents that (other than inventory which already is in the stream of commerce, if
9 any) it does not currently sell the 14-Day Pill Wallet product, Item 70095 (the DEHP Covered
10 Product). Apex has approximately 20,000 units of the 14-Day Pill Wallet product in its
11 possession. Apex has placed warnings on this inventory of products. Notwithstanding any such
12 warnings, no later than August 1, 2014, Apex shall destroy, in a manner compliant with any
13 environmental or other waste disposal regulations, all DEHP Covered Products in its possession,
14 custody or control, that are not laboratory test confirmed to be DEHP Free. If Apex sells any
15 DEHP Covered Products in the future, Apex agrees to first have a representative sampling of
16 each type of the production DEHP Covered Products tested for their DEHP concentration. Such
17 testing shall be performed by a United States accredited laboratory pursuant to EPA testing
18 methodologies 3545 and 8270C, or equivalent methodologies utilized by federal or state agencies
19 to determine the presence, and measure the quantity, of DEHP in a solid substance.

20 If Apex determines to sell a DEHP Covered Product in California in the future, Apex
21 shall evaluate whether such DEHP Covered Product exceeds the DEHP Free Standards, and for
22 those that exceed such standards, shall either reformulate such DEHP Covered Product to meet
23 the DEHP Free Standard or provide a clear and reasonable warning for each such DEHP
24 Covered Product. Apex further agrees not to order, cause to be ordered, manufacture, cause to
25 be manufactured, sell or otherwise distribute, or cause to be sold or distributed in California, any
26 DEHP Covered Products that are not DEHP Free without warnings consistent with the
27 provisions described herein.

1 For every DEHP Covered Product ordered, caused to be ordered, manufactured or
2 caused to be manufactured for distribution to or sale in California after June 1, 2014, Apex shall
3 maintain copies of any testing that demonstrates compliance with this section.

4 **3.1.2 TDCPP Covered Products**

5 Apex represents that its distribution of the Cozy Buddy Neck Support Pillow (SKU 6
6 32615 02310 7) arose out of a single purpose acquisition of this item for retailer Big Lots. Apex
7 represents that it currently has no more inventory of this Cozy Buddy product in its possession,
8 custody or control and has no current intention to acquire any further inventory of that product
9 for distribution in California.

10 If Apex sells any TDCPP Covered Products in the future, Apex agrees to first have a
11 representative sampling of each of the polyurethane foam components of each type of TDCPP
12 Covered Product tested for its TDCPP concentration. Such testing shall be performed by a
13 United States accredited laboratory pursuant to EPA testing methodologies 3545 and 8270C, or
14 equivalent methodologies utilized by federal or state agencies to determine the presence, and
15 measure the quantity, of TDCPP in a consumer product.

16 If Apex determines to sell a TDCPP Covered Product in California in the future, Apex
17 shall evaluate whether such TDCPP Covered Product exceeds the TDCPP Free Standards, and
18 for those that exceed such standards, shall either reformulate the TDCPP Covered Product to
19 meet the TDCPP Free Standard or provide a clear and reasonable warning for that TDCPP
20 Covered Product. Any TDCPP Covered Product that does not meet the TDCPP Free Standard
21 shall only be sold into California or to a retailer Apex reasonably understands has California
22 retail outlets (at which the TDCPP Covered Product(s) will be sold) with a clear and reasonable
23 warning as identified in Section 3.3. Should Apex elect to reformulate a TDCPP Covered
24 Product, then Apex shall provide the TDCPP Free Standard to its then-current vendor(s) of
25 TDCPP Covered Products that will be sold or offered for sale to California consumers and shall
26 instruct each vendor to only provide Apex with products that comply with such TDCPP Free
27

1 Standard. Upon request, Defendant shall provide Plaintiff with copies of each such Vendor
2 notification and Plaintiff shall regard such copies as confidential business information.

3 For every TDCPP Covered Product ordered, caused to be ordered, manufactured or
4 caused to be manufactured for distribution to or sale in California after June 1, 2014, Apex shall
5 maintain copies of any testing of such products demonstrating compliance with this section.

6 **3.2 Previously Obtained Covered Products.**

7 As Apex has agreed to destroy its current inventory of DEHP Covered Products (e.g., the
8 Pill Wallets), and has represented that it does not sell or otherwise distribute any other DEHP
9 Covered Product, then it shall have no warning obligation as to any such previously obtained
10 DEHP Covered Products.

11 **3.3 Product Warnings**

12 **3.3.1 TDCPP Covered Product Warnings**

13 For any election by Apex to label any future acquired TDCPP Covered Product with a
14 clear and reasonable warning, each such warning shall be prominently placed with such
15 conspicuousness as compared with other words, statements, designs, or devices as to render it
16 likely to be read and understood by an ordinary individual under customary conditions of
17 purchase or use. Each warning shall be affixed to or printed on the TDCPP Covered Product
18 itself.

19 (a) **Product Distributed To Retail Sellers.**

20 For distribution of any TDCPP Covered Products that are not certified to be
21 TDCPP Free under Section 2.5, Apex shall affix a warning to the packaging, labeling, or directly
22 on such TDCPP Covered Products that states:

23
24 **WARNING:** This product contains TDCPP, a
25 chemical known to the State of California to cause
cancer.

26 (b) **Mail Order Catalog and Internet Sales.** Apex may satisfy its Proposition
27 65 warning obligations for TDCPP Covered Products that are not certified to be TDCPP Free and

1 are sold or otherwise marketed by a printed catalogue or through an electronic internet source
2 by providing a warning: (1) in the printed catalogue as specified in Section 3.3.1(b)(i); on the
3 website as specified in Section 3.3.1(b)(ii); and by affixing the warning specified in Section
4 3.3.1(a)(i) to the packaging, labeling, or directly on any TDCPP Covered Product.

5 (i) **Printed Catalog Warning.** Any warning provided in a printed
6 catalog issued, designed, produced, ordered or otherwise controlled by Apex must be in the
7 same type size or larger than the TDCPP Covered Product description text within the catalog.
8 The following warning shall be provided on the same page and in the same location as the
9 display and/or description of the TDCPP Covered Product:

10 **WARNING:** This product contains TDCPP, a
11 chemical known to the State of California to cause
12 cancer.

13 Where it is impracticable to provide the warning on the same page and in the same
14 location as the display and/or description of the TDCPP Covered Product, Apex may utilize a
15 designated symbol to cross-reference the applicable warning and shall define the term
16 “designated symbol” with the following language on the inside of the front or back cover of the
17 catalog or on the same page as any order form for the TDCPP Covered Product:

18 **WARNING:** Certain products identified with this
19 symbol ▼ and offered for sale in this catalog
20 contain TDCPP, a chemical known to the State of
California to cause cancer.

21 The designated symbol must appear on the same page and in close proximity to the
22 display and/or description of the TDCPP Covered Product. On each page where the designated
23 symbol appears, Apex must provide a header or footer directing the consumer to the appropriate
24 warning language and definition of the designated symbol.

25 If Apex elects to provide warnings in any printed catalog, then the warnings must be
26 included in all catalogs offering to sell one or more TDCPP Covered Product printed after
27 October 1, 2014.

1 (ii) **Internet Website Warning.** A warning may be given in
2 conjunction with the marketing or sale by Apex of any TDCPP Covered Product via any website
3 or internet sales site maintained, controlled or designed by Apex, provided it appears either: (a)
4 on the same web page on which a TDCPP Covered Product is displayed; (b) on the same web
5 page as the order form for a TDCPP Covered Product; (c) on the same page as the price for any
6 TDCPP Covered Product; or (d) on one or more web pages displayed to a purchaser during the
7 checkout process. The following warning statement shall be used and shall appear in any of the
8 above instances adjacent to or immediately following the display, description, or price of the
9 TDCPP Covered Product for which it is given in the same type size or larger than the TDCPP
10 Covered Product description text:

11 **WARNING:** This product contains TDCPP, a
12 chemical known to the State of California to cause
13 cancer.

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

18 **WARNING:** Products identified on this page
19 with the following symbol ▼ contain TDCPP, a
20 chemical known to the State of California to cause
21 cancer.

22 **3.3.2 DEHP Covered Product Warnings**

23 For any election by Apex to label any future acquired DEHP Covered Product with a
24 clear and reasonable warning, each such warning shall be prominently placed with such
25 conspicuousness as compared with other words, statements, designs, or devices as to render it
26 likely to be read and understood by an ordinary individual under customary conditions of
27 purchase or use. Each warning shall be affixed to or printed on the DEHP Covered Product
28 itself.

(a) **Product Distributed To Retail Sellers.**

1 For distribution of any DEHP Covered Products that are not certified to be DEHP
2 Free under Section 2.4, Apex shall affix a warning to the packaging, labeling, or directly on such
3 DEHP Covered Products that states:

4
5 **WARNING:** This product contains DEHP, a
6 chemical known to the State of California to cause
cancer, birth defects and other reproductive harm.

7 (b) **Mail Order Catalog and Internet Sales.** Apex may satisfy its Proposition
8 65 warning obligations for DEHP Covered Products that are not certified to be DEHP Free and
9 are sold or otherwise marketed by a printed catalogue or through an electronic internet source
10 by providing a warning: (1) in the printed catalogue as specified in Section 3.3.2(b)(i); on the
11 website as specified in Section 3.3.2(b)(ii); and by affixing the warning specified in Section
12 3.2.2(a)(i) to the packaging, labeling, or directly on any DEHP Covered Product.

13 (i) **Printed Catalog Warning.** Any warning provided in a printed
14 catalog issued, designed, produced, ordered or otherwise controlled by Apex must be in the
15 same type size or larger than the DEHP Covered Product description text within the catalog.
16 The following warning shall be provided on the same page and in the same location as the
17 display and/or description of the DEHP Covered Product:

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

20 Where it is impracticable to provide the warning on the same page and in the same
21 location as the display and/or description of the DEHPP Covered Product, Apex may utilize a
22 designated symbol to cross-reference the applicable warning and shall define the term
23 "designated symbol" with the following language on the inside of the front or back cover of the
24 catalog or on the same page as any order form for the DEHP Covered Product:

25
26 **WARNING:** Certain products identified with this
27 symbol ▼ and offered for sale in this catalog
28 contain DEHP, a chemical known to the State of

1 California to cause cancer, birth defects and other
2 reproductive harm.

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

7 If Apex elects to provide warnings in any printed catalog, then the warnings must be
8 included in all catalogs offering to sell one or more DEHP Covered Product printed after October
9 1, 2014.

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

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

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

27 **WARNING:** Products identified on this page
28 with the following symbol ▼ contain DEHP, a
chemical known to the State of California to cause
cancer, birth defects and other reproductive harm.

1 Apex shall maintain records of compliance correspondence, inventory reports or other
2 communication confirming compliance with § 3.3 for two (2) years from the Effective Date and
3 shall produce copies of such records upon written request by Vinocur.

4 **4. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(B)**

5 In settlement of all the claims referred to in this Consent To Judgment, and specifically
6 based upon Apex's representations and commitments under this Agreement, Apex shall pay a
7 total civil penalty of \$30,000.00 under this Section, as follows:

8 **4.1 Initial Civil Penalty**

9 Apex shall pay an initial civil penalty in the amount of \$10,000.00 no later than fifteen (15)
10 days after the Court enters this Consent to Judgment. The civil penalty shall be apportioned in
11 accordance with California Health & Safety Code § 25249.12(c) & (d), with 75% of these funds
12 remitted to the State of California's Office of Environmental Health Hazard Assessment
13 ("OEHHA") and the remaining 25% of the penalty remitted to Vinocur. Apex shall issue two
14 separate checks for the penalty payment: (a) one check made payable to "OEHHA" in the
15 amount of \$7,500.00 representing 75% of the total penalty; and (b) one check made payable to
16 "Laurence Vinocur, Client Trust Account" in the amount of \$2,500.00, representing 25% of the
17 total penalty. Two separate 1099s shall be issued for the above payments. The checks and 1099s
18 shall be delivered to the addresses listed in Section 4.3 below.

19 **4.2 Final Civil Penalty**

20 No later than 180 days after the Court approves this settlement, Apex shall pay a final
21 civil penalty of \$20,000.00. The final civil penalty shall be waived in its entirety, however, if
22 Apex provides Vinocur, through its counsel, with written certification that Apex has elected to
23 reformulate the TDCPP Covered Products to be sold or distributed in California to meet the
24 TDCPP Free Standard specified in Section 2.5 above, such that all newly obtained TDCPP
25 Covered Products sold by Defendant after November 1, 2014, are certified by the vendor of each
26 such product to be TDCPP Free. Vinocur must receive any such certification on or before this
27 deadline and time is of the essence. Any applicable final civil penalty shall be apportioned in

1 accordance with California Health & Safety Code § 25249.12 (c)(1) & (d), with 75% of these funds
2 remitted to OEHHA and the remaining 25% of the penalty remitted to Vinocur, as provided by
3 California Health & Safety Code § 25249.12(d). Apex shall issue two separate checks for the
4 penalty payment: (a) one check made payable to "OEHHA" in the amount of \$15,000.00,
5 representing 75% of the total penalty; and (b) one check made payable to "The Chanler Group in
6 Trust for Laurence Vinocur" in the amount of \$5,000.00, representing 25% of the total penalty.
7 Two separate 1099s shall be issued for the above payments. The checks and 1099s shall be
8 delivered to the addresses listed in Section 4.3 below.

9 **4.3 Payment Procedures**

10 **4.3.1. Issuance of Payments.** Payments shall be delivered as follows:

- 11 (a) All payments owed to Vinocur, pursuant to Sections 4.1 through 4.2,
12 shall be delivered to the following payment address:

13 The Chanler Group
14 Attn: Proposition 65 Controller
15 2560 Ninth Street
16 Parker Plaza, Suite 214
17 Berkeley, CA 94710

- 18 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to
19 Sections 4.1 through 4.2, shall be delivered directly to OEHHA (Memo
20 line "Prop 65 Penalties") at the following addresses:

21 For United States Postal Service Delivery:

22 Mike Gyurics
23 Fiscal Operations Branch Chief
24 Office of Environmental Health Hazard Assessment
25 P.O. Box 4010
26 Sacramento, CA 95812-4010

27 For Non-United States Postal Service Delivery:

28 Mike Gyurics
29 Fiscal Operations Branch Chief
30 Office of Environmental Health Hazard Assessment
31 1001 I Street
32 Sacramento, CA 95814

1 With a copy of the checks payable to OEHHA mailed to The Chanler
2 Group at the address set forth above in 4.3.1(a), as proof of payment to
3 OEHHA.

4 Any failure by defendant to deliver the above-referenced payments to either OEHHA or
5 The Chanler Group within two days of the required date shall result in imposition of a 10%
6 simple interest assessment on the undelivered payment(s) until delivery.

7 **4.3.2 Issuance of 1099 Forms.**

8 After any penalty payment, Apex shall issue separate 1099 forms for each
9 payment to Vinocur, whose address and tax identification number shall be furnished upon
10 request after this Consent Judgment has been fully executed by the Parties, and OEHHA at the
11 addresses listed in Section 4.3.1 above.

12 **5. REIMBURSEMENT OF FEES AND COSTS**

13 The parties acknowledge that Vinocur and his counsel offered to resolve this dispute
14 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
15 leaving this fee issue to be resolved after the material terms of the agreement had been settled.
16 Vinocur then expressed a desire to resolve the fee and cost issue shortly after the other
17 settlement terms had been finalized. The parties then attempted to (and did) reach an accord on
18 the compensation due to Vinocur and his counsel under general contract principles and the
19 private attorney general doctrine codified at California Code of Civil Procedure (CCP) § 1021.5,
20 for all work performed through the mutual execution of this Consent To Judgment. Apex shall
21 pay \$50,000.00 for fees and costs incurred as a result of investigating, bringing this matter to
22 Apex's attention, and negotiating a settlement in the public interest. Apex shall issue a separate
23 1099 for fees and costs (EIN: 94-3171522), shall make the check payable to "The Chanler Group"
24 and shall deliver payment no later than ten (10) days after the date the Court approves this
25 settlement, to the following address:

26 The Chanler Group
27 Attn: Proposition 65 Controller
28 2560 Ninth Street

1 Parker Plaza, Suite 214
Berkeley, CA 94710-2565

2 Any failure by defendant to deliver the above-referenced payments to The Chanler
3 Group within two days of the required date shall result in imposition of a 10% simple interest
4 assessment on the undelivered payment(s) until delivery.
5

6 **6. CLAIMS COVERED AND RELEASE**

7 **6.1 Vinocur's Releases of Apex**

8 **6.1.1** This Consent To Judgment is a full, final, and binding resolution between
9 Vinocur, on behalf of himself, his past and current agents, representatives, attorneys, successors,
10 and/or assignees, and in the interest of the general public, and Apex and its attorneys, affiliates,
11 successors, licensors and assigns, including, but not limited to, Carex Health Brands ("Defendant
12 Releasees"), and all entities to whom Apex directly or indirectly distributes or sells Covered
13 Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees,
14 cooperative members, and licensees ("Downstream Defendant Releasees") of any violation of
15 Proposition 65 that has been or could have been asserted against Defendant Releasees and
16 Downstream Defendant Releasees regarding the alleged failure to warn about alleged exposure
17 to TDCPP and DEHP arising in connection with TDCPP Covered Products and DEHP Covered
18 Products manufactured, sourced, distributed, or sold by Defendant Releasees prior to the
19 Effective Date.

20 **6.1.2** Apex's compliance with this Consent To Judgment shall constitute
21 compliance with Proposition 65 with respect to TDCPP in the TDCPP Covered Products and
22 DEHP in the DEHP Covered Products after the Effective Date.

23 **6.1.3** Vinocur on behalf of himself, his past and current agents, representatives,
24 attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives
25 with respect to Covered Products all rights to institute or participate in, directly or indirectly,
26 any form of legal action and releases all claims, including, without limitation, all actions, and
27 causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
28

1 penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and
2 attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent
3 (collectively "claims"), against Defendant Releasees and Downstream Defendant Releasees that
4 arise under Proposition 65 or any other statutory or common law claims that were or could have
5 been asserted in the public interest, as such claims relate to Defendant Releasees' and
6 Downstream Defendant Releasees' alleged failure to warn about exposures to DEHP contained
7 in the DEHP Covered Products and exposures to TDCPP contained in the TDCPP Covered
8 Products.

9 **6.1.4** Vinocur also, in his individual capacity only and *not* in his representative
10 capacity, provides a general release herein which shall be effective as a full and final accord and
11 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
12 damages, losses, claims, liabilities and demands of Vinocur of any nature, character or kind,
13 known or unknown, suspected or unsuspected, arising out of the subject matter of the
14 Complaint as to TDCPP Covered Products and DEHP Covered Products manufactured,
15 distributed or sold by Defendant Releasees. Vinocur acknowledges that he is familiar with
16 Section 1542 of the California Civil Code, which provides as follows:

17 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
18 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR
19 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
20 OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT
21 WITH THE DEBTOR.

22 Vinocur, in his individual capacity only and *not* in his representative capacity, expressly
23 waives and relinquishes any and all rights and benefits which he may have under, or which may
24 be conferred on him by the provisions of Section 1542 of the California Civil Code as well as
25 under any other state or federal statute or common law principle of similar effect, to the fullest
26 extent that he may lawfully waive such rights or benefits pertaining to the released matters. In
27 furtherance of such intention, the release hereby given shall be and remain in effect as a full and
28 complete release notwithstanding the discovery or existence of any such additional or different
claims or facts arising out of the released matters.

1 This Section 6.1 release is expressly limited to those claims that arise under Proposition
2 65, as such claims relate to Defendant's alleged failure to warn about exposures to or
3 identification of TDCPP contained in the TDCPP Covered Products and DEHP contained in the
4 DEHP Covered Products and as such claims are identified in the Proposition 65 60-Day Notice
5 and Supplemental Proposition 65 60-Day Notice to Defendant.

6 This Section 6.1 release is expressly limited to any alleged violations that occur prior to
7 six months after the Effective Date and does not release any person, party or entity from any
8 liability for any violation of Proposition 65 regarding the Covered Products that occur more than
9 six months after the Effective Date.

10 The Parties further understand and agree that this Section 6.1 release shall not extend
11 upstream to any entities, other than Defendant, that manufactured the DEHP Covered Products
12 or TDCPP Covered Products or any component parts thereof, or any distributors or suppliers
13 who sold such Covered Products or any component parts thereof to Defendant.

14 **6.1.5** Upon court approval of the Consent To Judgment, the Parties waive their
15 respective rights to a hearing or trial on the allegations of the Complaint.

16 **6.2 Apex's Release of Vinocur**

17 **6.2.1** Apex waives any and all claims against Vinocur, his attorneys, and other
18 representatives for any and all actions taken or statements made (or those that could have been
19 taken or made) by Vinocur and his attorneys and other representatives, whether in the course of
20 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
21 and/or with respect to the TDCPP Covered Products and DEHP Covered Products.

22 **6.2.2** Apex also provides a general release herein which shall be effective as a
23 full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
24 expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Apex of any nature,
25 character or kind, known or unknown, suspected or unsuspected, arising out of the subject
26 matter of the Action. Apex acknowledges that it is familiar with Section 1542 of the California
27 Civil Code, which provides as follows:

1 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
2 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR
3 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
4 OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT
5 WITH THE DEBTOR.

6 Apex expressly waives and relinquishes any and all rights and benefits that it
7 may have under, or which may be conferred on it by the provisions of Section 1542 of the
8 California Civil Code as well as under any other state or federal statute or common law
9 principle of similar effect, to the fullest extent that it may lawfully waive such rights or
10 benefits pertaining to the released matters. In furtherance of such intention, the release
11 hereby given shall be and remain in effect as a full and complete release notwithstanding
12 the discovery or existence of any such additional or different claims or facts arising out of
13 the released matters.

14 **7. SEVERABILITY**

15 If, subsequent to court approval of this Consent To Judgment, any of the provisions of
16 this Consent To Judgment are held by a court to be unenforceable, the validity of the enforceable
17 provisions remaining shall not be adversely affected, unless the Court finds that any
18 unenforceable provision is not severable from the remainder of the Consent To Judgment.

19 **8. COURT APPROVAL**

20 This Consent To Judgment is effective upon execution but must also be approved by the
21 Court. The Consent to Judgment shall become null and void if, for any reason, it is not approved
22 and entered by the Court within nine months after it has been fully executed by all Parties.

23 **9. GOVERNING LAW**

24 The terms of this Consent To Judgment shall be governed by the laws of the State of
25 California.

26 **10. NOTICES**

27 When any Party is entitled to receive any notice under this Consent To Judgment, the
28 notice shall be sent by certified mail and electronic mail to the following:

For Apex to:
Christopher Amantea, Esq.

1 Squire Patton Boggs (US) LLP
2 555 So. Flower Street, 31st Floor
3 Los Angeles, CA 90071

4 For Vinocur to:

5 Proposition 65 Coordinator
6 The Chanler Group
7 2560 Ninth Street
8 Parker Plaza, Suite 214
9 Berkeley, CA 94710-2565

10 Any Party may modify the person and address to whom the notice is to be sent by sending each
11 other Party notice by certified mail and/or other verifiable form of written communication.

12 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

13 Vinocur agrees to comply with the reporting form requirements referenced, in California
14 Health & Safety Code §25249.7(f) and to file a motion for approval of this Consent Judgment.

15 **12. MODIFICATION**

16 This Consent To Judgment may be modified only: (1) by written agreement of the
17 Parties; or (2) upon a successful motion of any party and entry of a modified Consent To
18 Judgment by the Court.

19 **13. ADDITIONAL POST-EXECUTION ACTIVITIES**

20 The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed
21 motion is required to obtain judicial approval of this Consent To Judgment. In furtherance of
22 obtaining such approval, Vinocur and Apex and their respective counsel agree to mutually
23 employ their best efforts to support the entry of this agreement as a Consent To Judgment and
24 obtain approval of the Consent To Judgment - sufficient to render a formal judgment approving
25 this agreement - by the Court in a timely manner. Any effort by plaintiff or Apex to impede
26 judicial approval of this Consent To Judgment shall subject such impeding party to liability for
27 attorney fees and costs incurred by plaintiff or his counsel in their efforts to meet or oppose
28 Apex's impeding conduct.

1 **14. ENTIRE AGREEMENT**

2 This Consent To Judgment contains the sole and entire agreement and understanding of
3 the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
4 negotiations, commitments, and understandings related hereto. No representations, oral or
5 otherwise, express or implied, other than those contained herein have been made by any Party
6 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
7 deemed to exist or to bind any of the Parties.

8 **15. ATTORNEY'S FEES**

9 15.1 Should Vinocur prevail on any motion, application for order to show cause or
10 other proceeding to enforce this Consent To Judgment, Vinocur shall be entitled to his
11 reasonable attorney fees and costs incurred as a result of such motion, order or application,
12 consistent with C.C.P. §1021.5. Should Defendant prevail on any motion, application for order to
13 show cause or other proceeding to enforce this Consent To Judgment, Defendant may be entitled
14 to its reasonable attorney fees and costs incurred as a result of such motion, order or application
15 upon a finding that Vinocur's prosecution of the motion or application lacked substantial
16 justification. For purposes of this Consent to Judgment, the term substantial justification shall
17 carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure §§
18 2016, et seq.

19 15.2 Except as specifically provided otherwise herein, each Party shall bear its own
20 costs and attorney's fees in connection with this action.

21 15.3 Nothing in this Section 15 shall preclude a Party from seeking an award of
22 sanctions pursuant to law.

23 **16. COUNTERPARTS, FACSIMILE SIGNATURES**

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

27

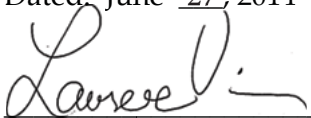
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17. AUTHORIZATION

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

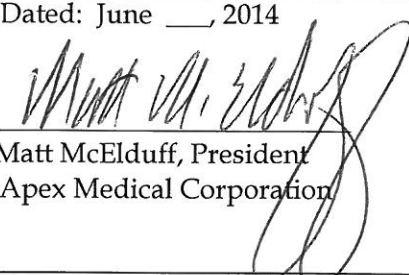
IT IS SO AGREED

<p>Dated: June <u>27</u>, 2014</p> <p></p> <p>_____ Plaintiff Laurence Vinocur</p>	<p>Dated: June __, 2014</p> <p>_____</p> <p>Matt McElduff, President Apex Medical Corporation</p>
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1 **17. AUTHORIZATION**

2 The undersigned parties and their counsel are authorized to execute this Consent To
3 Judgment on behalf of their respective Parties and have read, understood, and agree to all of the
4 terms and conditions of this Consent To Judgment.

5 **IT IS SO AGREED**

<p>6 Dated: June __, 2014</p> <p>7 _____</p> <p>8 Plaintiff Laurence Vinocur</p> <p>9</p>	<p>6 Dated: June __, 2014</p> <p>7 </p> <p>8 Matt McElduff, President</p> <p>9 Apex Medical Corporation</p>
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