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

13 LAURENCE VINOUCUR,
14 Plaintiff,
15 v.
16 DIONO, LLC; et al.
17 Defendants.

Case No. RG 13-684497

**[PROPOSED] CONSENT JUDGMENT AS
TO DIONO, LLC**

(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 (“Plaintiff”) and the defendant Diono, LLC (“Settling Defendant”), with Plaintiff and the Settling
5 Defendant collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Settling Defendant**

11 The Settling Defendant employs ten or more persons and is a person in the course of doing
12 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California
13 Health & Safety Code section 25249.6, *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Plaintiff alleges that the Settling Defendant manufactured, imported, sold and/or distributed
16 for sale in California, products with foam cushioned components containing tris(1,3-dichloro-2-
17 propyl) phosphate (“TDCPP”) without the requisite Proposition 65 health hazard warnings.

18 Pursuant to Proposition 65, on October 28, 2011, California identified and listed TDCPP as
19 a chemical known to cause cancer. TDCPP became subject to the “clear and reasonable warning”
20 requirements of Proposition 65 one year later on October 28, 2012. Cal. Code Regs., tit. 27, §
21 27001(b); Health & Safety Code §§ 25249.8 and 25249.10(b).

22 Plaintiff alleges that TDCPP escapes from foam padding, leading to human exposures.

23 Pursuant to Proposition 65, on October 24, 2003, California identified and listed di(2-
24 ethylhexyl)phthalate (“DEHP”) as a chemical known to cause birth defects and other reproductive
25 harm. DEHP became subject to the “clear and reasonable warning” requirements of Proposition 65
26 one year later on October 24, 2004. Cal. Code Regs., tit. 27, § 27001(c); Health & Safety Code §§
27 25249.8 and 25249.10(b).

28 Plaintiff alleges that DEHP escapes from vinyl/plastic, leading to human exposures.

1 Complaint shall be deemed amended *nunc pro tunc* to include the violations of Proposition 65
2 alleged by Plaintiff in the Supplemental Notice.

3 **1.8 No Admission**

4 The Settling Defendant denies the material factual and legal allegations contained in
5 Plaintiff's Notice and Complaint and maintains that all products that it has manufactured, imported,
6 distributed, and/or sold in California, including the Products, have been and are in compliance with
7 all laws. Nothing in this Consent Judgment shall be construed as an admission by the Settling
8 Defendant of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance
9 with this Consent Judgment constitute or be construed as an admission by the Settling Defendant of
10 any fact, finding, conclusion, issue of law, or violation of law. However, this section shall not
11 diminish or otherwise affect the Settling Defendant's obligations, responsibilities, and duties under
12 this Consent Judgment.

13 **1.9 Consent to Jurisdiction**

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

19 **2. DEFINITIONS**

20 **2.1 California Customers**

21 "California Customer" shall mean any customer that the Settling Defendant reasonably
22 understands is located in California, has a California warehouse or distribution center, maintains a
23 retail outlet in California, or has made internet sales into California on or after January 1, 2011.

24 **2.2 Detectable**

25 "Detectable" shall mean containing more than 25 parts per million ("ppm") (the equivalent
26 of .0025%) each of TDCPP, tris(2-chloroethyl) phosphate ("TCEP"), and/or tris(2,3-
27 dibromopropyl)phosphate ("TDBPP") in any material, component, or constituent of a subject
28 product, when analyzed by a NVLAP-accredited laboratory pursuant to EPA testing methodologies

1 3545 and 8270C, or equivalent methodologies utilized by federal or state agencies to determine the
2 presence, and measure the quantity, of TDCPP, TCEP, and/or TDBPP in a solid substance.

3 **2.3 Effective Date**

4 “Effective Date” shall mean September 30, 2013.

5 **2.4 Private Label Covered Products**

6 “Private Label Covered Products” means Products that bear a brand or trademark owned or
7 licensed by a Retailer or affiliated entity that are sold or offered for sale by a Retailer in the State of
8 California.

9 **2.5 Reformulated Products**

10 “Reformulated Products” shall mean Products that contain no Detectable amount of TDCPP,
11 TCEP, or TDBPP, and no more than 1,000 ppm each of DEHP, BBP, and DBP when analyzed
12 pursuant to EPA sample preparation and test methodologies 3580A and 8270C.

13 **2.6 Reformulation Standard**

14 The “Reformulation Standard” shall mean containing no Detectable amount of TDCPP,
15 TCEP, and TDBPP and no more than 1,000 ppm each of DEHP, BBP, and DBP when analyzed
16 pursuant to EPA sample preparation and test methodologies 3580A and 8270C.

17 **2.7 Retailer**

18 “Retailer” means an individual or entity that offers a Product for retail sale to consumers in
19 the State of California.

20 **3. INJUNCTIVE RELIEF: REFORMULATION**

21 **3.1 Reformulation Commitment**

22 Commencing on March 31, 2014, Settling Defendant shall not manufacture or import for
23 distribution or sale to California Customers, or cause to be manufactured or imported for
24 distribution or sale to California Customers, any Products that are not Reformulated Products.

25 **3.2 Vendor Notification/Certification**

26 On or before the Effective Date, each Settling Defendant shall provide written notice to all
27 of its then-current vendors of the Products that will be sold or offered for sale in California, or to
28 California Customers, instructing each such vendor to use reasonable efforts to provide only

1 Reformulated Products for potential sale in California. In addressing the obligation set forth in the
2 preceding sentence, a Settling Defendant shall not employ statements that will encourage a vendor
3 to delay compliance with the Reformulation Standard. The Settling Defendant shall subsequently
4 obtain written certifications, no later than April 1, 2014, from such vendors, and any newly engaged
5 vendors, that the Products manufactured by such vendors are in compliance with the Reformulation
6 Standard. Certifications shall be held by the Settling Defendant for at least two years after their
7 receipt and shall be made available to Plaintiff upon request.

8 **3.3 Products No Longer in a Settling Defendant's Control**

9 No later than thirty days after the Effective Date, the Settling Defendant shall send a letter,
10 electronic or otherwise ("Notification Letter") to: (1) each California Customer and/or Retailer to
11 which it, after October 28, 2011, supplied any item for resale in California described as an exemplar
12 in the Notice and the Supplemental Notice ("Exemplar Product"); and (2) any California Customer
13 and/or Retailer that the Settling Defendant reasonably understands or believes had any inventory for
14 resale in California of any Exemplar Product(s) as of April 3, 2013. The Notification Letter shall
15 advise the recipient that the Exemplar Product(s) contains TDCPP, a chemical known to the State of
16 California to cause cancer, and/or DEHP, a chemical known to the State of California to cause birth
17 defects and other reproductive harm, as appropriate depending on the allegations in the Notice and
18 Supplemental Notice, and request that the recipient either: (a) label the Exemplar Products
19 remaining in inventory for sale in California, or to California Customers, pursuant to Section 3.5; or
20 (b) return, at the Settling Defendant's sole expense, all units of the Exemplar Product(s) held for
21 sale in California, or to California Customers, to the Settling Defendant or a party the Settling
22 Defendant has designated. The Notification Letter shall require a response from the recipient
23 within twenty days confirming whether the Exemplar Product(s) will be labeled or returned. The
24 Settling Defendant shall maintain records of all correspondence or other communications generated
25 pursuant to this Section for two years after the Effective Date and shall promptly produce copies of
26 such records upon Plaintiff's written request.

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3.4 Current Inventory

Any Products in, or manufactured and en route to, the Settling Defendant’s inventory as of or after December 31, 2013, that do not qualify as Reformulated Products and that the Settling Defendant has reason to believe may be sold or distributed for sale in California, shall contain a clear and reasonable warning as set forth in Section 3.5 below unless Section 3.6 applies.

3.5 Product Warnings

3.5.1 Product Labeling

Any warning provided under Section 3.3 or 3.4 above shall be affixed to the packaging, labeling, or directly on each Product. Each warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase. Each warning shall be provided in a manner such that the consumer or user understands to which specific Product the warning applies, so as to minimize the risk of consumer confusion.

A warning provided pursuant to this Consent Judgment shall state, as appropriate:

WARNING: This product contains TDCPP, a flame retardant chemical known to the State of California to cause cancer.

or

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

or

WARNING: This product contains DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm, and TDCPP, a flame retardant chemical known to the State of California to cause cancer.¹

¹ Alternative warning language that meets the requirements of California Code of Regulations, title 27, section 25601 et seq. (“Article 6”) may also be used if the Settling Defendant had begun to use it prior to the Effective Date. A copy of the alternative warning shall be provided to Plaintiff upon request. If Plaintiff reasonably contends that the alternative warning does not comply with Article 6, then the language must be modified thereafter by the Settling Defendant to the Plaintiff’s reasonable satisfaction relative to Article 6’s requirements. Also, the warning language required by this Section may be modified into a hybrid warning statement, subject to Plaintiff’s approval, which shall not be unreasonably withheld, to the extent the Settling Defendant

1 Warnings with the following characteristics will be deemed to be clear and reasonable for
2 purposes of this Consent Judgment: (a) a yellow hang tag measuring 3" x 5", with no less than 12
3 point font, with the warning language printed on each side of the hang tag, which shall be affixed
4 directly to the Product; (b) a yellow warning sign measuring 8.5" x. 11", with no less that 32 point
5 font, with the warning language printed on each side, which shall be affixed directly to the Product;
6 and (c) for Products sold at retail in a box or packaging, a yellow warning sticker measuring 3" x
7 3", with no less than 12 point font, which shall be affixed directly to the Product packaging.
8 However, provided that the other requirements set forth in this Section are addressed, including
9 obtaining Plaintiff's approval where required, the Settling Defendant may provide a warning in any
10 other manner meeting the requirements of California Code of Regulations, title 27, section 25601 *et*
11 *seq.*

12 3.5.2 Internet Website Warning

13 A warning shall be given in conjunction with the sale of the Products to California, or
14 California Customers, via the internet, which warning shall appear on one or more web pages
15 displayed to a purchaser during the checkout process. The following warning statement shall be
16 used and shall: (a) appear adjacent to or immediately following the display, description, or price of
17 the Product; (b) be accessible via a hyperlink that appears adjacent to or immediately following the
18 display, description, or price of the Product; or (c) appear as a pop-up box. The warning, hyperlink
19 and/or pop-up box text shall be the same type size or larger than the Product description text, and
20 consist of the following language, as appropriate:

21 **WARNING:** This product contains TDCPP, a flame
22 retardant chemical known to the State
of California to cause cancer.

23 or

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

26
27 elects to warn for chemicals listed under Proposition 65 in addition to TDCPP and DEHP. The
28 Parties agree that the following hybrid warning language shall not be deemed to meet the
requirements of Article 6 and shall not be used pursuant to this Consent Judgment: (a) "cancer or
birth defects or other reproductive harm"; and (b) "cancer, birth defects or other reproductive
harm."

or

WARNING: This product contains DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm, and TDCPP, a flame retardant chemical known to the State of California to cause cancer²

3.6 Alternatives to Interim Warnings

The obligations of a Settling Defendant under Section 3.3 shall be relieved provided the Settling Defendant certifies on or before December 15, 2013, that only Exemplar Products meeting the Reformulation Standard will be offered for sale in California, or to California Customers for sale in California, after December 31, 2013.

The obligations of a Settling Defendant under Section 3.4 shall be relieved provided the Settling Defendant certifies on or before December 15, 2013, that, after June 30, 2014, it will only distribute or cause to be distributed for sale in, or sell in, California, or to California Customers for sale in California, Products (i.e., Products beyond the Exemplar Product) meeting the Reformulation Standard. The certifications provided by this Section are material terms and time is of the essence.

4. MONETARY PAYMENTS

4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)

In settlement of all the claims referred to in this Consent Judgment, the Settling Defendant shall pay the civil penalties shown for it on Exhibit A in accordance with this Section. Each penalty payment will be allocated in accordance with California Health & Safety Code section 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”), and the remaining 25% of the penalty remitted to “The Chanler Group in Trust for Vinocur.” Each penalty payment shall be made within two business days of the date it is due and be delivered to the addresses listed in Section 4.5 below. The Settling Defendant shall be liable for payment of interest, at a rate of 10% simple interest, for all amounts due and owing under this Section that are not received within two business days of the due date.

² The preceding footnote applies in this context as well.

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4.1.1 Initial Civil Penalty

On or before the Effective Date, the Settling Defendant shall make an initial civil penalty payment in the amount identified on Exhibit A.

4.1.2 Second Civil Penalty

On or before January 15, 2014, the Settling Defendant shall make a second civil penalty payment in the amount identified on Exhibit A. The amount of the second penalty may be reduced according to any penalty waiver the Settling Defendant is eligible for under Sections 4.1.4(i) and 4.1.4(iii), below.

4.1.3 Third Civil Penalty

On or before November 30, 2014, the Settling Defendant shall make a third civil penalty payment in the amount identified on Exhibit A. The amount of the third penalty may be reduced according to any penalty waiver the Settling Defendant is eligible for under Sections 4.1.4(ii) and 4.1.4(iv), below.

4.1.4 Reductions to Civil Penalty Payment Amounts

The Settling Defendant may reduce the amount of the second and/or third civil penalty payments identified on Exhibit A by providing Plaintiff with certification of certain efforts undertaken to reformulate its Products or limit the ongoing sale of non-reformulated Products in California. The options to provide a written certification in lieu of making a portion of the Settling Defendant's civil penalty payment constitute material terms of this Consent Judgment, and with regard to such terms, time is of the essence.

4.1.4(i) Partial Penalty Waiver for Accelerated Reformulation of Products Sold or Offered for Sale in California

As shown on Exhibit A, a portion of the second civil penalty shall be waived, to the extent that the Settling Defendant has agreed that, as of November 1, 2013, and continuing into the future, it shall only manufacture or import for distribution or sale to California Customers or cause to be manufactured or imported for distribution or sale to California Customers, Reformulated Products. An officer or other authorized representative of the Settling Defendant, upon exercise of this election, shall provide Plaintiff with a written certification confirming compliance with such

1 conditions, which certification must be received by Plaintiff's counsel on or before December 15,
2 2013.

3 **4.1.4(ii) Partial Penalty Waiver for Accelerated Nationwide**
4 **Reformulation**

5 As shown on Exhibit A, a portion of the third civil penalty shall be waived, to the extent that
6 the Settling Defendant has agreed that, as of March 15, 2014, and continuing into the future, it shall
7 only manufacture or import for distribution or sale in the United States or cause to be manufactured
8 or imported for distribution or sale in the United States, Reformulated Products. An officer or other
9 authorized representative of the Settling Defendant, upon its exercise of this election, shall provide
10 Plaintiff with a written certification confirming compliance with such conditions, which
11 certification must be received by Plaintiff's counsel on or before November 15, 2014.

12 **4.1.4(iii) Partial Penalty Waiver for Withdrawal of Unreformulated**
13 **Exemplar Products from the California Market**

14 As shown on Exhibit A, a portion of the second civil penalty shall be waived, if an officer or
15 other authorized representative of the Settling Defendant provides Plaintiff with written
16 certification, by December 15, 2013, confirming that each individual or establishment in California
17 to which it supplied the Exemplar Product(s) after October 28, 2011, has elected, pursuant to
18 Section 3.3, to return all Exemplar Product(s) held for sale in California.

19 **4.1.4(iv) Partial Penalty Waiver for Termination of Distribution to**
20 **California of Unreformulated Inventory**

21 As shown on Settling Defendant's Exhibit A, a portion of the third civil penalty shall be
22 waived, if an officer or other authorized representative of the Settling Defendant provides Plaintiff
23 with written certification, on or before November 15, 2014, confirming that, as of July 1, 2014, it
24 has and will continue to distribute, offer for sale, or sell in California, or to California Customers,
25 only Reformulated Products.

26 **4.2 Representation**

27 The Settling Defendant represents that the sales data and other information concerning its
28 size, knowledge of Listed Chemicals, and prior reformulation and/or warning efforts, it provided to
Plaintiff was truthful to its knowledge and a material factor upon which Plaintiff has relied to

1 determine the amount of civil penalties assessed pursuant to Health & Safety Code section 25249.7
2 in this Consent Judgment. If, within nine months of the Effective Date, Plaintiff discovers and
3 presents to Settling Defendant, evidence demonstrating that the preceding representation and
4 warranty was materially inaccurate, then the Settling Defendant shall have thirty days to meet and
5 confer regarding the Plaintiff's contention. Should this thirty day period pass without any such
6 resolution between the Plaintiff and the Settling Defendant, Plaintiff shall be entitled to file a formal
7 legal claim including, but not limited to, a claim for damages for breach of contract.

8 **4.3 Stipulated Penalties for Certain Violations of the Reformulation Standard**

9 If Plaintiff provides notice and appropriate supporting information to the Settling Defendant
10 that levels of TDCPP, TDBPP, TCEP, or DEHP in excess of the Reformulation Standard have been
11 detected in one or more Products labeled or otherwise marked in an identifiable manner as
12 manufactured or imported after a deadline for meeting the Reformulation Standard has arisen under
13 Sections 3.1 or 3.6 above, the Settling Defendant may elect to pay a stipulated penalty to relieve
14 any further potential liability under Proposition 65 or sanction under this Consent Judgment as to
15 Products sourced from the vendor in question.³ The stipulated penalty shall be \$1,500 if the
16 violation level is below 100 ppm and \$3,000 if the violation level is between 100 ppm and 249
17 ppm, this being applicable for any amount in excess of the Reformulation Standards but under 250
18 ppm.⁴ Plaintiff shall further be entitled to reimbursement of his associated expense in an amount
19 not to exceed \$5,000 regardless of the stipulated penalty level. The Settling Defendant must
20 provide notice and appropriate supporting information relating to the purchase (e.g. vendor name
21 and contact information including representative, purchase order, certification (if any) received
22 from vendor for the exemplar or subcategory of products), test results, and a letter from a company
23 representative or counsel attesting to the information provided, to Plaintiff within thirty calendar
24

25 ³ This Section shall not be applicable where the vendor in question had previously been
26 found by the Settling Defendant to have provided unreliable certifications as to meeting the
27 Reformulation Standard in its Products on more than one occasion. Notwithstanding the foregoing,
a stipulated penalty for a second exceedance by the Settling Defendant's vendor at a level between
100 and 249 ppm shall not be available after July 1, 2015.

28 ⁴ Any stipulated penalty payments made pursuant to this Section should be allocated and
remitted in the same manner as set forth in Sections 4.1 and 4.5, respectively.

1 days of receiving test results from Plaintiff's counsel. Any violation levels at or above 250 ppm
2 shall be subject to the full remedies provided pursuant to this Consent Judgment and at law.

3 **4.4 Reimbursement of Fees and Costs**

4 The Parties acknowledge that Plaintiff and his counsel offered to resolve this dispute
5 without reaching terms on the amount of fees and costs to be reimbursed to him, thereby leaving
6 this fee reimbursement issue to be resolved after the material terms of the agreement had been
7 settled. Shortly after the other settlement terms had been finalized, the Settling Defendant
8 expressed a desire to resolve the fee and cost issue. The Settling Defendant then agreed to pay
9 Plaintiff and his counsel under general contract principles and the private attorney general doctrine
10 codified at California Code of Civil Procedure section 1021.5 for all work performed through the
11 mutual execution of this agreement, including the fees and costs incurred as a result of
12 investigating, bringing this matter to the Settling Defendant's attention, negotiating a settlement in
13 the public interest, and seeking court approval of the same. Each Settling Defendant more
14 specifically agreed, upon the Court's approval and entry of this Consent Judgment, to pay
15 Plaintiff's counsel the amount of fees and costs indicated on Exhibit A. The Settling Defendant
16 further agreed to tender and shall tender its full required payment under this Section to a trust
17 account at The Chanler Group (made payable "In Trust for The Chanler Group") within two
18 business days of the Effective Date. Such funds shall be released from the trust account upon the
19 Court's approval and entry of this Consent Judgment.

20 **4.5 Payment Procedures**

21 **4.5.1 Issuance of Payments**

22 (a) All payments owed to Plaintiff and his counsel, pursuant to Sections
23 4.1 and 4.2 shall be delivered to the following payment address:

24 The Chanler Group
25 Attn: Proposition 65 Controller
26 2560 Ninth Street
27 Parker Plaza, Suite 214
28 Berkeley, CA 94710

1 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to
2 Section 4.1, shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at one
3 of the following addresses, as appropriate:

4 For United States Postal Service Delivery:

5 Mike Gyurics
6 Fiscal Operations Branch Chief
7 Office of Environmental Health Hazard Assessment
8 P.O. Box 4010
9 Sacramento, CA 95812-4010

8 For Non-United States Postal Service Delivery:

9 Mike Gyurics
10 Fiscal Operations Branch Chief
11 Office of Environmental Health Hazard Assessment
12 1001 I Street
13 Sacramento, CA 95814

12 **4.5.2 Proof of Payment to OEHHA**

13 A copy of each check payable to OEHHA shall be mailed, simultaneous with payment, to
14 The Chanler Group at the address set forth in Section 4.5.1(a) above, as proof of payment to
15 OEHHA.

16 **4.5.3 Tax Documentation**

17 The Settling Defendant shall issue a separate 1099 form for each payment required by this
18 Section to: (a) Laurence Vinocur, whose address and tax identification number shall be furnished
19 upon request after this Consent Judgment has been fully executed by the Parties; (b) OEHHA, who
20 shall be identified as "California Office of Environmental Health Hazard Assessment" (EIN: 68-
21 0284486) in the 1099 form, to be delivered directly to OEHHA, P.O. Box 4010, Sacramento, CA
22 95814, and (c) "The Chanler Group" (EIN: 94-3171522) to the address set forth in Section 4.5.1(a)
23 above.

24 **5. CLAIMS COVERED AND RELEASED**

25 **5.1 Plaintiff's Release of Proposition 65 Claims**

26 Plaintiff, acting on his own behalf and in the public interest, releases the Settling Defendant,
27 its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents
28 employees, attorneys, and each entity to whom the Settling Defendant directly or indirectly

1 distributes or sells Products, including, but not limited, to downstream distributors, wholesalers,
2 customers, retailers, franchisees, cooperative members, and licensees (collectively, "Releasees"),
3 from all claims for violations of Proposition 65 through the Effective Date based on unwarned
4 exposures to the TDCPP and DEHP in the Products, as set forth in the Notice, Supplemental
5 Notice, and Complaint. Compliance with the terms of this Consent Judgment constitutes
6 compliance with Proposition 65 with respect to exposures to TDCPP and DEHP from the Products,
7 as set forth in the Notice, Supplemental Notice, and Complaint. The Parties further understand and
8 agree that this Section 5.1 release shall not extend upstream to any entities.

9 **5.2 Plaintiff's Individual Releases of Claims**

10 Plaintiff, in his individual capacity only and *not* in his representative capacity, provide a
11 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
12 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
13 liabilities, and demands of Plaintiff of any nature, character, or kind, whether known or unknown,
14 suspected or unsuspected, limited to and arising out of alleged or actual exposures to TDCPP,
15 TCEP, TDBPP, DEHP, DBP, and BBP in the Products or Additional Products (as defined in
16 Section 11.1 and delineated on Exhibit A) manufactured, imported, distributed, or sold by the
17 Settling Defendant prior to the Effective Date.⁵ The Parties further understand and agree that this
18 Section 5.2 release shall not extend upstream to any entities that manufactured the Products or
19 Additional Products, or any component parts thereof, or any distributors or suppliers who sold the
20 Products or Additional Products, or any component parts thereof to Settling Defendant.

21 Nothing in this Section affects Plaintiff's right to commence or prosecute an action under
22 Proposition 65 against a Releasee that does not involve the Settling Defendant's Products or
23 Additional Products.

24 **5.3 Settling Defendant's Release of Plaintiff**

25 The Settling Defendant, on behalf of itself, its past and current agents, representatives,
26 attorneys, successors, and assignees, hereby waives any and all claims against Plaintiff and his

27 _____
28 ⁵ The injunctive relief requirements of Section 3 shall apply to Additional Products as
otherwise specified.

1 attorneys and other representatives, for any and all actions taken or statements made (or those that
2 could have been taken or made) by Plaintiff and his attorneys and other representatives, whether in
3 the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this
4 matter with respect to the Products or Additional Products.

5 **6. COURT APPROVAL**

6 This Consent Judgment is not effective until it is approved and entered by the Court and
7 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
8 after it has been fully executed by the Parties. If the Court does not approve the Consent Judgment,
9 the Parties shall meet and confer as to whether to modify the language or appeal the ruling. If the
10 Parties do not jointly agree on a course of action to take, then the case shall proceed in its normal
11 course on the Court's trial calendar. If the Court's approval is ultimately overturned by an appellate
12 court, the Parties shall meet and confer as to whether to modify the terms of this Consent Judgment.
13 If the Parties do not jointly agree on a course of action to take, then the case shall proceed in its
14 normal course on the Court's trial calendar. In the event that this Consent Judgment is entered by
15 the Court and subsequently overturned by any appellate court, any monies that have been provided
16 to OEHHA, Plaintiff or his counsel pursuant to Section 4, above, shall be refunded within fifteen
17 days of the appellate decision becoming final. If the Court does not approve and enter the Consent
18 Judgment within one year of the Effective Date, any monies that have been provided to OEHHA or
19 held in trust for Plaintiff or his counsel pursuant to Section 4, above, shall be refunded to the
20 Settling Defendant within fifteen days.

21 **7. GOVERNING LAW**

22 The terms of this Consent Judgment shall be governed by the laws of the State of California.
23 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by
24 reason of law generally, or if any of the provisions of this Consent Judgment are rendered
25 inapplicable or are no longer required as a result of any such repeal or preemption, or rendered
26 inapplicable by reason of law generally as to the Products, then the Settling Defendant may provide
27 written notice to Plaintiff of any asserted change in the law, and shall have no further obligations
28 pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so

1 affected. Nothing in this Consent Judgment shall be interpreted to relieve the Settling Defendant
2 from any obligation to comply with any pertinent state or federal law or regulation.

3 **8. NOTICES**

4 Unless specified herein, all correspondence and notices required to be provided pursuant to
5 this Consent Judgment shall be in writing and sent by: (i) personal delivery, (ii) first-class
6 registered or certified mail, return receipt requested; or (iii) overnight courier to any party by the
7 other party at the following addresses:

8 To Settling Defendant:

9 At the address shown on Exhibit A

To Plaintiff:

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

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

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

16 This Consent Judgment may be executed in counterparts and by facsimile or pdf signature,
17 each of which shall be deemed an original, and all of which, when taken together, shall constitute
18 one and the same document. A facsimile or pdf signature shall be as valid as the original.

19 **10. COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(f)**

20 Plaintiff and his attorneys agree to comply with the reporting form requirements referenced
21 in California Health & Safety Code section 25249.7(f).

22 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

23 **11.1 Additional Products**

24 In addition to the Products, where the Settling Defendant has identified on Exhibit A
25 additional products that contain TDCPP or DEHP and that are sold or offered for sale by it in
26 California, or to California Customers, (“Additional Products”), then, no later than October 15,
27 2013, the Settling Defendant may provide Plaintiff with additional information or representations
28 necessary to enable him to issue a 60-Day Notice of Violation and valid Certificate of Merit

1 therefor, pursuant to Health & Safety Code section 25249.7, that includes the Additional Products.
2 After receipt of the required information, Plaintiff agrees to issue a supplemental 60-day notice in
3 compliance with all statutory and regulatory requirements for the Additional Products. By no later
4 than October 1, 2014, Plaintiff will prepare and file an amendment to this Consent Judgment to
5 incorporate the Additional Products within the defined term "Products" and, upon the Court's
6 approval thereof, the Additional Products shall become subject to Sections 5.1 and 5.3 in addition to
7 Section 5.2.

8 The Settling Defendant shall, at the time it elects to utilize this Section and tenders the
9 additional information or representations regarding the Additional Products to Plaintiff, tender to
10 The Chanler Group's trust account an amount not to exceed \$8,750 as stipulated penalties and
11 attorneys' fees and costs incurred by Plaintiff in issuing the new notice and engaging in other
12 reasonably related activities, which may be released from the trust as awarded by the Court upon
13 Plaintiff's application. Any tendered funds remaining in the trust thereafter shall be refunded to the
14 Settling Defendant within fifteen days. Such payment shall be made and delivered as per Section
15 4.5 above.

16 Polyurethane foam that is supplied, shaped, or manufactured for use as a component of a
17 product, such as upholstered furniture, is specifically excluded from the definition of Additional
18 Products and shall not be identified by the Settling Defendant on Exhibit A as an Additional
19 Product. Except as agreed upon by Plaintiff, the Settling Defendant shall not include as an
20 Additional Product any product that is the subject of an existing 60-day notice issued by Plaintiff or
21 any other private enforcer at the time of execution of this Consent Judgment.

22 **11.2 Approval**

23 Plaintiff and Settling Defendant agree to support the entry of this agreement as a Consent
24 Judgment and obtain approval of the Consent Judgment by the Court in a timely manner. The
25 Parties acknowledge that, pursuant to California Health & Safety Code section 25249.7, a noticed
26 motion is required to obtain judicial approval of this Consent Judgment, which Plaintiff shall draft
27 and file. If any third party objection to the noticed motion is filed, Plaintiff and the Settling
28 Defendant shall work together to file a reply and appear at any hearing before the Court. This

1 provision is a material component of the Consent Judgment and shall be treated as such in the event
2 of a breach.

3 **12. MODIFICATION**

4 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
5 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
6 of any party and entry of a modified Consent Judgment by the Court.


7 **13. AUTHORIZATION**


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

11

12 AGREED TO:

AGREED TO:

13 
14 _____
15 Plaintiff Laurence Vinocur



Settling Defendant: Diono, LLC
President, Brad Keller

16 Date: September 11, 2013

Date: September 9, 2013

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EXHIBIT A

I. Name of Settling Defendant (Mandatory) Diono, LLC

II. Names of Releasees (Optional; May be Partial):

III. Types of Covered Products Applicable to Settling Defendant (Check All That Match 60-Day Notice or Supplemental Notice Received)

- Foam-cushioned pads for children and infants to lie on, such as rest mats
- Upholstered furniture
- Foam-filled mattresses, mattress toppers, pillows, cushions, travel beds
- Car seats, strollers
- Other (specify): Rain Covers

IV. Types of Additional Products the Settling Defendant Elects to Address (if any):

V. Settling Defendant's Required Settlement Payments

Civil Penalties of \$74,500, as follows:

- \$24,500 initial payment due on or before the Effective Date;
- \$30,000 second payment due on or before January 15, 2014, of which \$20,000 may be waived pursuant to Section 4.1.4(i) and \$10,000 may be waived pursuant to Section 4.1.4(iii); and
- \$20,000 third payment due on or before November 30, 2014, of which \$12,000 may be waived pursuant to Section 4.1.4(ii) and \$8,000 may be waived pursuant to Section 4.1.4(iv).

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VI. Payment to The Chanler Group for reimbursement of attorneys' fees and costs:
Fees and Costs for Settling Defendant: \$40,500.

VII. Person(s) to receive Notices pursuant to Section 8
Person(s) to receive Notices pursuant to Section 8:

Brad Keller
President
Diono, LLC
418 Valley Avenue NW, Suite 100
Puyallup, WA 98371

Melissa A. Jones
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Sacramento, CA 95814
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Attorneys for Diono, LLC