

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Parties

This Settlement Agreement is entered into by and between Laurence Vinocur (“Vinocur”) and Bigmouth Inc. (“Bigmouth”), with Vinocur and Bigmouth each individually referred to as a “Party” and collectively as the “Parties.” Vinocur is an individual residing in the State of California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products. Bigmouth employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

### 1.2 General Allegations

Vinocur alleges that Bigmouth sells and/or distributes for sale in California, (a) tools with vinyl/PVC grips containing di(2-ethylhexyl)phthalate (“DEHP”); (b) vinyl/PVC erasers containing DEHP; and (c) mugs with exterior designs containing Lead, and that it did so without providing the warning required by Proposition 65. Lead and DEHP are each listed pursuant to Proposition 65 as chemicals that are known to cause birth defects or other reproductive harm.

### 1.3 Product Description

For purposes of this Settlement Agreement, “Products” are defined as (a) tools with vinyl/PVC grips allegedly containing DEHP; (b) vinyl/PVC erasers containing DEHP; and (c) mugs with exterior decorations allegedly containing lead, which are manufactured, sold or distributed for sale in California by Bigmouth. Such Products include, but are not limited to, the *Over The Hill Back Butt & Crotch Scratcher, Item No. BM1625, UPC #7 18856 15301 5* and *Over The Hill Age Eraser, Item No. BM1619, UPC #7 18856 15291 9*, and the mug offered in connection with the *Over The Hill Starter Kit*,

*Item No. FR-DSSKHILLA, UPC #7 89839 00688 8*, as alleged in the Notice. The parties specifically contemplate and intend for this agreement to cover all Bigmouth beverage mugs offered for sale in California.

#### **1.4 Notice of Violation**

On April 27, 2016, Vinocur served Bigmouth, the California Attorney General and all other requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”). The Notice alleges that Bigmouth violated Proposition 65 when it failed to warn its customers and consumers in California of the health hazards associated with exposures to lead and DEHP from the Products. No public enforcer has commenced and is diligently prosecuting an action to enforce the allegations made in the Notice.

#### **1.5 No Admission**

Bigmouth denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products that it has sold and distributed in California, including the Products, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Bigmouth of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Bigmouth of any fact, finding, conclusion, issue of law, or violation of law, the same being specifically denied by Bigmouth. This Section shall not, however, diminish or otherwise affect Bigmouth’s obligations, responsibilities, and duties under this Settlement Agreement.

#### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean September 15, 2016.

## **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS & WARNINGS**

### **2.1 Commitment to Provide Reformulated Products or Warnings**

Commencing within 30 days after the Effective Date and continuing thereafter, Bigmouth shall only ship, sell, or offer for sale in California: (a) “Reformulated Products” as defined by Section 2.2; or (b) Products sold with a clear and reasonable warning in California in accordance with Section 2.3.

### **2.2 Reformulated Products**

**2.2.1 DEHP Content Limit for Reformulated Products.** For purposes of this Settlement Agreement, “Reformulated Products” are defined as (a) tool Products with vinyl grips, and (b) vinyl eraser Products with no more than 1,000 parts per million (0.1%) DEHP content by weight in any accessible component (i.e. any component that may be touched during a reasonably foreseeable use) analyzed pursuant to U.S. Environmental Protection Agency (“EPA”) testing methodologies 3580A, 8270C or Consumer Product Safety Commission Test Method Standard Operating Procedure for Determination of Phthalates CPSC-CH-C1001-09.3, or any other acceptable methodology used by any state for federal agency for determining DEHP content in a solid substance.

**2.2.2 Lead Content Limit for Reformulated Products.** With respect to lead-containing mug Products, “Reformulated Products” are defined under this Settlement Agreement as mug Products with exterior decorations containing (a) no more than 90 ppm (0.009%) lead content by weight, when analyzed pursuant to EPA test methodology 3050B or which (b) yield a result of no more than 1.0 micrograms of lead when sampled and analyzed according to the NIOSH 9100 testing protocol; and which (c) yield a result of non-detect (i.e. below the detection limit for the method of testing utilized by an accredited laboratory) for the lead content of any decorations located in the upper 20 millimeters of a Product, i.e., the “Lip-and-Rim” area of the vessel, or the decorative materials located on the interior surface of the Product (i.e., the beverage-

containing portion) when analyzed pursuant to EPA testing methodology 3050B and 6010B, or equivalent methodologies used by state and federal agencies to determine lead content in a solid substance.

**2.2.3 Other Methods to Determine Lead and/or DEHP Content.** In addition to the EPA, ASTM, and NIOSH test methods provided in this Section 2.2, the Parties may test Products using equivalent test methodologies utilized by state or federal agencies to determine lead and/or DEHP content in a solid substance.

### **2.3 Clear and Reasonable Warnings**

Commencing the Effective Date and continuing thereafter, for any Products sold or distributed for sale in California by Bigmouth that do not qualify as Reformulated Products under Section 2.2, above, Bigmouth agrees to only offer such Products for sale with a clear and reasonable warning in accordance with this Section. Bigmouth further agrees that any warning will be prominently placed in relation to the Product with such conspicuousness when 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 of purchase or use. For purposes of this Settlement Agreement, a clear and reasonable warning for the Products satisfying these criteria shall consist of a warning affixed directly to a Product or its accompanying labeling or packaging containing one of the following statements:

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

or

**WARNING:** This product contains Lead, a chemical known to the State of California to cause birth defects or other reproductive harm.

or

**WARNING:** This product contains Lead and DEHP, chemicals that are known to the State of California to cause birth defects or other reproductive harm.

### **3. MONETARY SETTLEMENT TERMS**

#### **3.1 Civil Penalty Payments**

Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, Bigmouth agrees to pay a total of \$15,000 in civil penalties, with the possible exception of waiver for early reformulation as outlined in Section 3.1.2 below. Each penalty payment will be allocated in accordance with California Health and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty amount remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount paid to Vinocur. Vinocur’s counsel shall be responsible for delivering OEHHA’s portion of any civil penalty payment(s) made under this Settlement Agreement.

##### **3.1.1 Initial Civil Penalty Payment**

Within five days of the Effective Date, Bigmouth shall make an initial civil penalty payment of \$5,000. It shall deliver its payment in two checks for the following amounts made payable to: (a) “OEHHA” in the amount of \$3,750; and (b) “Laurence Vinocur, Client Trust Account” in the amount of \$1,250.

##### **3.1.2 Final Civil Penalty Payment; Waiver for Early Reformulation**

On June 1, 2017, Bigmouth shall make a final civil penalty payment in the amount of \$10,000. Pursuant to Title 11 California Code of Regulations section 3203(c), Vinocur agrees that the final civil penalty will be waived in its entirety if, no later than May 15, 2017, Bigmouth provides Vinocur’s counsel with a signed declaration certifying that as of the date of the declaration, all of the Products it is shipping for sale or distributing for sale in California are Reformulated Products as defined by Section 2.2, and that Bigmouth will continue to only offer Reformulated Products in California in the

future. Unless waived, the final civil penalty shall be allocated pursuant to California Health and Safety Code section 25249.12(c)(1) and (d) and delivered in two checks as set forth in Section 3.1.1, above.

### **3.2 Attorneys' Fees and Costs**

The Parties acknowledge that Vinocur and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed under this Settlement Agreement, leaving the issue to be resolved after the material terms of the agreement had been settled. Shortly after finalizing the other settlement terms the Parties negotiated Bigmouth's reimbursement of the fees and costs due to Vinocur and his counsel under general contract principles and the private attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work performed in this matter. Under these legal principles, within five days of the Effective Date, Bigmouth agrees to pay \$22,500 in a single check made payable to "The Chanler Group." Bigmouth's payment under this Section shall cover all fees and costs incurred investigating, bringing this matter to the attention of Bigmouth's management, and negotiating a settlement that provides a significant public benefit.

### **3.3 Payment Address**

All payments under this Settlement Agreement shall be delivered to:

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

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

### **4.1 Vinocur's Release of Bigmouth**

This Settlement Agreement is a full, final, and binding resolution between Vinocur and Bigmouth of any violation of Proposition 65 that was or could have been asserted by Vinocur, on his own behalf, or on behalf of his past and current agents,

representatives, attorneys, successors, and assignees, against Bigmouth, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom Bigmouth directly or indirectly distributes or sells Products, including its downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees (“Releasees”), based on the alleged or actual failure to warn about exposures to DEHP and/or lead in Products sold or distributed for sale by Bigmouth in California before the Effective Date, as alleged in the Notice. Compliance with this Agreement constitutes compliance with Proposition 65 with respect to the alleged or actual failure to warn about exposures to lead and/or DEHP in Products sold by Bigmouth after the Effective Date.

In further consideration of the promises and agreements herein, Vinocur also waives any right to institute or participate in, directly or indirectly, any form of legal action and releases all claims that he may have, including, without limitation, all actions and causes of action in law and in equity, all suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, expenses, investigation fees, expert fees, and attorneys’ fees arising under Proposition 65 with respect to the alleged or actual failure to warn about exposures to DEHP and/or lead in Products manufactured, sold, or distributed for sale by Bigmouth before the Effective Date.

The releases provided by Vinocur under this Settlement Agreement are provided solely on Vinocur’s own behalf and not on behalf of the public in California.

#### **4.2 Bigmouth’s Release of Vinocur**

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

**5. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any provision of this Settlement Agreement is held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

**6. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Bigmouth may provide written notice to Vinocur of any asserted change in the law, and shall have no further injunctive obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

**7. NOTICE**

Unless specified herein, all correspondence and notice required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (a) personal delivery; (b) first-class, registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any Party by the other at the following addresses:

For Bigmouth:

Caitlin Blanche, Esq.  
K&L Gates LLP  
1 Park Plaza, Twelfth Floor  
Irvine, CA 92614

For Vinocur:

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

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

**8. COUNTERPARTS; FACSIMILE SIGNATURES**

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



**9. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

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

**10. MODIFICATION**

This Settlement Agreement may be modified only by written agreement of the Parties.

**11. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understand, and agreed to all of the terms and conditions of this Settlement Agreement.

**AGREED TO:**

**AGREED TO:**

Date: 9/27/2016

Date: \_\_\_\_\_

By:   
LAURENCE VINOCUR

By: \_\_\_\_\_  
Steve Wampold, President  
BIGMOUTH INC.

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**AGREED TO:**

**AGREED TO:**

Date: \_\_\_\_\_

Date: SEPT 23, 2016

By: \_\_\_\_\_  
LAURENCE VINO CUR

By:   
Steve Wampold, President  
BIGMOUTH INC.