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10 LAURENCE VINOUCUR

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF ALAMEDA

14 UNLIMITED CIVIL JURISDICTION

15 LAURENCE VINOUCUR

16 Plaintiff,

17 v.

18 WESTFIELD OUTDOOR, INC., *et al.*,

19 Defendants.

Case No. RG15754189

**[PROPOSED] CONSENT JUDGMENT
BETWEEN PLAINTIFF LAURENCE
VINOUCUR AND DEFENDANT MARMOT
MOUNTAIN, LLC**

(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Laurence Vinocur
4 (“Vinocur”) and defendant Marmot Mountain, LLC (“Marmot”), with Vinocur and Marmot each
5 referred to individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Vinocur is a resident of the State of California who seeks to promote awareness of
8 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful
9 substances contained in consumer and commercial products.

10 **1.3 Defendants**

11 Marmot employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and
13 Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Vinocur alleges that Marmot manufactures, imports, sells and/or distributes for sale in
16 California, tent and/or shelter fabrics that contain tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”)
17 without providing the health hazard warning required by Proposition 65.

18 **1.5 Product Description**

19 The products covered by this Consent Judgment are tent and/or shelter fabrics containing
20 TDCPP, including, but not limited to, the fabric components of the *Marmot Aspen 2P Tent, #93600*,
21 *UPC #7 85562 40560 9* (collectively, “Products”).

22 **1.6 Notice of Violation**

23 On October 24, 2014, Vinocur served Marmot and the requisite public enforcement agencies
24 with a 60-Day Notice of Violation (“Notice”), alleging that Marmot violated Proposition 65 when it
25 failed to warn its customers and consumers in California that the Products expose users to TDCPP.
26 To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently
27 prosecuting an action to enforce the allegations set forth in the Notice.
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1.7 Complaint

On January 9, 2015, Vinocur commenced the instant action. Thereafter, on February 3, 2015, Plaintiff filed a First Amended Complaint (“Complaint”), the operative pleading in this action, adding Marmot as a defendant for the alleged violations of Proposition 65 that are the subject of the Notice.

1.8 No Admission

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

1.9 Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Marmot as to the allegations in the Complaint, that venue is proper in Alameda County, and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

1.10 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” shall mean the date that the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

2. INJUNCTIVE SETTLEMENT TERMS

Commencing June 15, 2016 and continuing thereafter, Marmot shall only manufacture for sale, or purchase for sale in California, Reformulated Products. For purposes of this Consent Judgment, “Reformulated Products” are defined as Products with a maximum TDCPP, tris(2-chloroethyl) phosphate (“TCEP”), and/or tris(2,3-dibromopropyl)phosphate (“TDBPP”) concentration of no more than 25 parts per million each, when analyzed pursuant to U.S.

1 Environmental Protection Agency testing methodologies 8141, 3545 and/or 8270C, or other
2 methodologies utilized by state or federal agencies for the purpose of determining TDCPP content
3 in a solid substance.

4 **3. MONETARY SETTLEMENT TERMS**

5 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

6 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
7 claims referred to in this Consent Judgment, Marmot shall pay \$30,000 in civil penalties in
8 accordance with this Section. Each penalty payment will be allocated in accordance with California
9 Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California
10 Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the
11 penalty remitted to Vinocur. Vinocur’s counsel shall be responsible for remitting Marmot’s penalty
12 payment(s) under this Consent Judgment to OEHHA.

13 **3.1.1 Initial Civil Penalty.** Marmot shall make an initial civil penalty payment of
14 \$9,000.00. Marmot shall provide its payment in a single check made payable to “Laurence
15 Vinocur, Client Trust Account” to be delivered to the address provided in Section 3.4, below.

16 **3.1.2 Final Civil Penalty.** On May 1, 2016, Marmot shall make a final civil
17 penalty payment of \$21,000.00. Pursuant to title 11 California Code of Regulations, section
18 3203(c), Vinocur agrees that the final civil penalty payment shall be waived in its entirety if, no
19 later than April 15, 2016, an officer of Marmot provides Vinocur with a signed declaration
20 certifying that all of the Products it ships for sale or distributes for sale in California as of the date if
21 its certification are Reformulated Products, and that Marmot will continue to offer only
22 Reformulated Products in California in the future. The option to provide a declaration certifying its
23 complete early reformulation of the Products in lieu of making the final civil penalty payment
24 otherwise required by this Section is a material term, and time is of the essence.

25 **3.2 Reimbursement of Attorneys’ Fees and Costs**

26 The Parties acknowledge that Vinocur and his counsel offered to resolve this dispute
27 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
28 the issue to be resolved after the material terms of the agreement had been settled. After finalizing

1 the other settlement terms, the Parties then negotiated a resolution of the compensation due to
2 Vinocur and his counsel under general contract principles and the private attorney general doctrine
3 codified at California Code of Civil Procedure § 1021.5. For all work performed through the
4 mutual execution of this agreement and the Court’s approval of the same, but exclusive of fees and
5 costs on appeal, if any, Marmot shall reimburse Vinocur and his counsel \$34,000.00. Marmot’s
6 payment shall be in the form of a check payable to “The Chanler Group.” The reimbursement
7 covers all fees and costs incurred by Vinocur investigating, bringing this matter to Marmot’s
8 attention, litigating, and negotiating a settlement of the matter in the public interest and obtaining
9 court approval of the same.

10 **3.3 Payment Timing / Enforcement of Payment Terms**

11 With the exception of the final civil penalty payment required by Section 3.1.2, Marmot
12 shall deliver all payments required by this Consent Judgment to Vinocur’s counsel within five days
13 of the Effective Date. In the event that any payment required by this Consent Judgment, including
14 the Section 3.1.2 final civil penalty, is untimely, the Parties agree and acknowledge that (a)
15 Marmot shall be liable to Vinocur for 10% simple interest on any unpaid amount(s); (b) Vinocur
16 may seek to enforce Marmot’s payment obligations under general contract principles and Code of
17 Civil Procedure sections 664.6; and (c) Vinocur shall be entitled to any fees incurred recovering
18 such settlement payments pursuant to general contract principles and Code of Civil Procedure
19 section 1021.5.

20 **3.4 Payment Address**

21 All payments required by this Consent Judgment shall be delivered to:

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

25 **4. CLAIMS COVERED AND RELEASED**

26 **4.1 Vinocur’s Release of Proposition 65 Claims**

27 Vinocur, acting on his own behalf and in the public interest, releases Marmot and its
28 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,

1 and attorneys (“Releasees”) and each entity to whom Marmot directly or indirectly distributes or
2 sells the Products including, but not limited to, its downstream distributors, wholesalers, customers
3 (including, without limitation, Dick’s Sporting Goods, Inc.), retailers, franchisers, cooperative
4 members, licensors and licensees (“Downstream Releasees”) for any violations arising under
5 Proposition 65 for unwarned exposures to TDCPP from the Products manufactured, imported,
6 distributed or sold by Marmot prior to the Effective Date, as set forth in the Notice. Compliance
7 with the terms of this Consent Judgment constitutes compliance with Proposition 65 by Marmot
8 with respect to exposures to TDCPP from Products manufactured, sold or distributed for sale by
9 Marmot after the Effective Date.

10 **4.2 Vinocur’s Individual Release of Claims**

11 Vinocur, in his individual capacity only and *not* in his representative capacity, also provides
12 a release to Defendants, Releasees, and Downstream Releasees which shall be effective as a full and
13 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
14 attorneys’ fees, damages, losses, claims, liabilities and demands of Vinocur of any nature, character
15 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
16 exposures to TDCPP, TCEP, and/or TDBPP in Products manufactured, imported, distributed or
17 sold by Marmot before the Effective Date.

18 **4.3 Marmot’s Release of Vinocur**

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

24 **5. COURT APPROVAL**

25 This Consent Judgment is not effective until it is approved and entered by the Court and
26 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
27 after it has been fully executed by all Parties. Vinocur and Marmot agree to support the entry of
28 this agreement as a judgment, and to obtain the Court’s approval of their settlement in a timely

1 manner. The Parties acknowledge that, pursuant to California Health and Safety Code section
2 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment, which
3 motion Vinocur shall draft and file and Marmot shall support, appearing at the hearing if so
4 requested. If any third-party objection to the motion is filed, Vinocur and Marmot agree to work
5 together to file a reply and appear at any hearing. This provision is a material component of the
6 Consent Judgment and shall be treated as such in the event of a breach.

7 **6. SEVERABILITY**

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

11 **7. GOVERNING LAW**

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

19 **8. NOTICE**

20 Unless specified herein, all correspondence and notice required by this Consent Judgment
21 shall be in writing and sent by: (i) personal delivery, (ii) first-class registered or certified mail,
22 return receipt requested; or (iii) a recognized overnight courier to any Party by the other at the
23 following addresses:

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To Marmot:

To Vinocur:

Mark Martin, President
Marmot Mountain, LLC
5789 State Farm Drive, Suite 100
Rohnert Park, CA 94928

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

with a copy to Marmot’s counsel:

Elizabeth V. McNulty, Esq.
Archer Norris, LLP
4695 MacArthur Court, Suite 350
Newport Beach, CA 92660

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

9. DISMISSAL OF DEFENDANTS

Vinocur shall file a request for dismissal without prejudice as to Jarden Corporation within 10 days of the date of execution of this Consent Judgment. Thereafter, within 10 days of the Effective Date, Vinocur shall file a Request for Dismissal without prejudice as to defendant Dick’s Sporting Goods, Inc.

10. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES

This Consent Judgment 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.

11. COMPLIANCE WITH REPORTING REQUIREMENTS

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

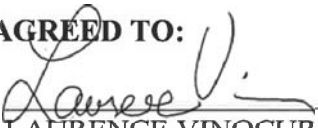
12. MODIFICATION

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

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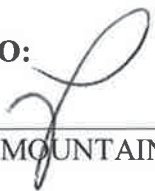
13. AUTHORIZATION

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

AGREED TO:


LAURENCE VINOUCUR

Dated: 2/9/16

AGREED TO:


MARMOT MOUNTAIN, LLC
By: MARK MARTIN
(Print Name)
Its: PRESIDENT
(Title)
Dated: FEB. 9, 2016