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10 LAURENCE VINO CUR

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

15 LAURENCE VINO CUR,

16 Plaintiff,

17 v.

18 ROSS ACQUISITION CO.; and DOES 1-150,
19 inclusive,

20 Defendants.

Case No. CIV1501550

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Laurence Vinocur and Ross Acquisition Co.**

3 This Consent Judgment is entered into by and between Laurence Vinocur, (“Vinocur”)
4 and Ross Acquisition Co. (“Ross”), with Vinocur and Ross collectively referred to as the
5 “Parties” and each individually referred to as a “Party.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Vinocur alleges that Ross manufactures, distributes, sells, and/or offers for sale in
16 California mugs with exterior designs containing lead without the requisite Proposition 65 health
17 hazard warning. Lead is listed pursuant to Proposition 65 as a chemical known to California to
18 cause birth defects and other reproductive harm if human exposure exceeds certain thresholds.

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are defined as mugs with exterior
21 designs containing lead including, but not limited to, the *Galerie Sock Monkey Holiday Cocoa*
22 *Set, #871345170, UPC #7 68395 46639 8*, which were manufactured, distributed, sold and/or
23 offered for sale in California by Ross, hereinafter referred to as the “Products.”

24 **1.6 Notice of Violation**

25 On or about July 11, 2014, Vinocur served Ross and various public enforcement agencies
26 with a document entitled “60-Day Notice of Violation” (“Notice”), alleging that Ross was in
27 violation of Proposition 65 for failing to warn its customers and consumers in California that the
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1 Products exposed users to lead. To the best of the Parties’ knowledge, no public enforcer has
2 commenced and is diligently prosecuting the allegations set forth in the Notice.

3 **1.7 Complaint**

4 On or about April 28, 2015, Vinocur, filed a complaint (“Complaint” or “Action”) in the
5 Superior Court in and for the County of Marin against Ross and Does 1 through 150, alleging,
6 *inter alia*, violations of Proposition 65 based on the alleged exposures to lead contained in the
7 Products sold by Ross in the State of California.

8 **1.8 No Admission**

9 Ross denies the material, factual, and legal allegations contained in the Notice and
10 Complaint and maintains that all of the products it has manufactured, distributed, sold and/or
11 offered for sale in California, including the Products, have been, and are, in compliance with all
12 laws. Nothing in this Consent Judgment shall be construed as an admission by Ross of any fact,
13 finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this
14 Consent Judgment constitute or be construed as an admission by Ross of any fact, finding,
15 conclusion of law, issue of law, or violation of law, such being specifically denied by Ross. This
16 Section shall not, however, diminish or otherwise affect Ross’s obligations, responsibilities, and
17 duties under this Consent Judgment.

18 **1.9 Consent to Jurisdiction**

19 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
20 jurisdiction over Ross as to the allegations contained in the Complaint, that venue is proper in the
21 County of Marin and that this Court has jurisdiction to enter and enforce the provisions of this
22 Consent Judgment.

23 **1.10 Effective Date**

24 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date this
25 Consent Judgment is approved by the Court.
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1 **2. INJUNCTIVE RELIEF: REFORMULATION**

2 **2.1 Reformulation Standards and Commitment**

3 Commencing on the Effective Date and continuing thereafter, Ross shall only
4 manufacture, distribute, ship, sell, or offer to ship for sale in California Products that are
5 “Reformulated Products.” For purposes of this Consent Judgment, Reformulated Products are
6 Products that comply with the Lead Reformulation Standards set forth in Section 2.2.

7 **2.2 Lead Reformulation Standards**

8 Reformulated Products shall meet or exceed the standards outlined in Sections 2.2.1,
9 2.2.2 or 2.2.3, subject to the following qualifications:

10 If the Product contains exterior decorations in the Lip and Rim Area (as used throughout
11 this Consent Judgment, the Lip and Rim Area shall include the exterior upper 20 millimeters of
12 a Product) or on any interior surface, it must also satisfy Section 2.2.4 to be considered a
13 Reformulated Product.

14 **2.2.1 Wipe Test-Based Standard**

15 Reformulated Products shall yield a maximum result of 1.0 microgram (“ug”) residual
16 lead content by weight on any surface, exclusive of the Lip and Rim Area or interior surface,
17 with exterior decorations sampled pursuant to the NIOSH 9100 sampling protocol and analyzed
18 pursuant to EPA Analytical Methods 3050B and/or 6020A(ICP/MS).

19 **2.2.2 Content-Based Standard**

20 Exterior decorations, exclusive of the Lip and Rim Area, must only utilize materials that
21 contain a maximum of 100 parts per million (“ppm”) (0.01%) lead by weight as measured either
22 before or after the material is fired onto (or otherwise affixed to) the Product, using EPA Test
23 Method 3050B.¹

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27 ¹ If the exterior decoration is tested after it is affixed to a Product, the percentage of lead by weight must relate only
28 to the decorating material and must not include any quantity attributable to any non-decorating material (e.g. the ceramicware substrate).

1 **2.2.3 Total Acetic-Acid Immersion Test-Based Standard**

2 The Reformulated Product achieves a result of 0.99 ppm (.0099%) or less lead after
3 correcting for internal volume, when tested pursuant to American Society of Testing and
4 Materials (“ASTM”) Standard Test C927-99 test method, modified for total immersion with
5 results corrected for internal volume.

6 **2.2.4 Lip and Rim Area and Interior Surface Exterior Decoration**

7 If a Product contains exterior decorations in the Lip and Rim Area:

8 (a) any such exterior decorations must only utilize decorating
9 materials that yield a result of no detectable lead when analyzed according to any test
10 methodology authorized under Proposition 65; or

11 (b) the Product must yield a maximum lead concentration of one-half
12 microgram per milliliter (0.5 µg/ml.) when tested according to ASTM Test Method C927-80
13 (2009).

14 **2.3 Vendor Notification/Certification**

15 On or before April 1, 2015, Ross shall provide written notice to all of its then-current
16 vendors of the Products instructing each such vendor to provide only Reformulated Products for
17 sale or use in California and that all Products must be tested by a third-party lab confirming that
18 the Products are Reformulated Products prior to acceptance by Ross.

19 Ross shall subsequently obtain written certification, no later than the Effective Date,
20 from such vendors, and any newly engaged vendors, that the Products manufactured and/or
21 distributed by such vendors are Reformulated Products and will be tested by a third-party lab
22 confirming that the Products are Reformulated Products. Certifications shall be held by Ross
23 for at least two years after their receipt and shall be made available to Vinocur upon reasonable
24 request in writing.

1 **3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

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

3 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
4 claims referred to in this Consent Judgment, Ross shall pay \$100,000 in civil penalties in
5 accordance with this Section. Each penalty payment will be allocated in accordance with
6 California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the
7 California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
8 25% of the penalty remitted to Vinocur. Vinocur’s counsel shall be responsible for remitting
9 Ross’s penalty payment(s) under this Consent Judgment to OEHHA.

10 **3.1.1 Initial Civil Penalty.** Ross shall make an initial civil penalty payment of
11 \$20,000. Ross shall provide its payment in a single check made payable to “Laurence Vinocur,
12 Client Trust Account” to be delivered to the address provided in Section 3.3, below.

13 **3.1.2 Final Civil Penalty; Waiver for Accelerated Reformulation.** On August
14 1, 2015, Ross shall make a final civil penalty payment of \$80,000. Pursuant to title 11 California
15 Code of Regulations, section 3203(c), Vinocur agrees that the final civil penalty payment shall be
16 waived in its entirety if, no later than July 15, 2015, an officer of Ross provides Vinocur with a
17 signed declaration certifying that all of the Products it ships for sale or distributes for sale in
18 California as of the date of its declaration are Reformulated Products, and that Ross will continue
19 to offer only Reformulated Products in California in the future. The option to certify early
20 compliance with Section 2.2 in lieu of making the final civil penalty payment otherwise required
21 by this Section is a material term, and time is of the essence. To obtain a waiver of the final civil
22 penalty, Ross must deliver its declaration certifying compliance with Section 2.2 to Vinocur’s
23 counsel at the address provided in Section 3.3, below. In the event that Ross does not either
24 timely certify its compliance or make the final civil penalty payment required by this Section, the
25 Parties agree that Vinocur may file a motion or application seeking an order compelling Ross’s
26 compliance with this Section. If successful, the Parties further agree that Vinocur shall be entitled

1 to his achieving reasonable attorneys' fees and costs pursuant to general contract principles and
2 Code of Civil Procedure section 1021.5.

3 **3.2 Payment Timing; Payments Held In Trust**

4 With the exception of the final civil penalty payment required by Section 3.1.2, Ross
5 shall deliver all payments required by this Consent Judgment to its counsel within 10 days of the
6 date that this agreement is fully executed by the Parties. Ross's counsel shall confirm receipt of
7 settlement funds in writing to Vinocur's counsel and, thereafter, hold the amounts paid in trust
8 until such time as the Court grants the motion for approval of the Parties' settlement
9 contemplated by Section 6. Within 10 days of the Effective Date, Ross's counsel shall deliver all
10 settlement payments it has held in trust to Vinocur's counsel at the address provided in Section
11 3.3. In the event the final civil penalty payment required by Section 3.1.2 becomes due prior to
12 the Effective Date, then Ross shall deliver the final civil penalty payment to its attorney to be
13 held in trust until, and disbursed within 10 days after, the Effective Date.

14 **3.3 Payment Address**

15 All payments required by this Consent Judgment shall be delivered to the following
16 address:

17 The Chanler Group
18 Attn: Proposition 65 Controller
19 2560 Ninth Street
20 Parker Plaza, Suite 214
21 Berkeley, CA 94710

22 **4. REIMBURSEMENT OF FEES AND COSTS**

23 The Parties acknowledge that Vinocur and his counsel offered to resolve this dispute
24 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
25 leaving the issue to be resolved after the material terms of the agreement had been settled.
26 Shortly after the other settlement terms had been finalized, Ross expressed a desire to resolve
27 Vinocur's fees and costs. The Parties then negotiated a resolution of the compensation due to
28 Vinocur and his counsel under general contract principles and the private attorney general
doctrine codified at California Code of Civil Procedure § 1021.5. For all work performed

1 through the mutual execution of this agreement and the Court’s approval of the same, Ross shall
2 reimburse Vinocur and his counsel \$45,000. Ross’s payment shall be delivered to the address in
3 Section 3.3 in the form of a check payable to “The Chanler Group.” This reimbursement covers
4 all fees and costs incurred by Vinocur investigating, bringing this matter to Ross’s attention,
5 litigating, and negotiating a settlement of the matter in the public interest.

6 **5. CLAIMS COVERED AND RELEASED**

7 **5.1 Vinocur’s Public Release of Proposition 65 Claims**

8 Vinocur, acting on his own behalf and in the public interest, releases Ross, its parents,
9 subsidiaries, affiliated entities that are under common ownership, directors, officers, employees,
10 attorneys, and each entity to whom Ross directly or indirectly distributes or sells Products,
11 including but not limited to downstream distributors, wholesalers, customers, retailers,
12 franchisees, cooperative members, licensors, and licensees (collectively, “Releasees”) from all
13 claims for violations of Proposition 65 up through the Effective Date based on exposure to lead
14 from the Products. Compliance with the terms of this Consent Judgment constitutes compliance
15 with Proposition 65 with respect to exposures to lead from the Products.

16 **5.2 Vinocur’s Individual Release of Claims**

17 Vinocur also, in his individual capacity only and *not* in his representative capacity,
18 provides a release herein which shall be effective as a full and final accord and satisfaction, as a
19 bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses,
20 claims, liabilities and demands of Vinocur of any nature, character or kind, whether known or
21 unknown, suspected or unsuspected, limited to and arising out of any violation of Proposition 65
22 regarding the failure to warn about exposure to lead in the Products manufactured, distributed,
23 sold and/or offered for sale by Releasees.

24 **5.3 Ross’s Release of Vinocur**

25 Ross on behalf of itself, its past and current agents, representatives, attorneys, successors,
26 and/or assignees, hereby waives any and all claims against Vinocur, his attorneys and other
27 representatives, for any and all actions taken or statements made (or those that could have been
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1 taken or made) by Vinocur and his attorneys and other representatives, whether in the course of
2 investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with
3 respect to the Products.

4 **6. COURT APPROVAL**

5 This Consent Judgment is not effective until it is approved and entered by the Court and
6 shall be null and void if, for any reason, it is not approved and entered by the Court within one
7 year after it has been fully executed by all Parties, in which event any monies that have been
8 provided to Vinocur or his counsel pursuant to Section 3 and 4 above, shall be refunded within
9 fifteen (15) days after receiving written notice from Ross that the one-year period has expired.

10 **7. SEVERABILITY**

11 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
12 Judgment is found by a court to be unenforceable, the validity of the enforceable provisions
13 remaining shall not be adversely affected.

14 **8. GOVERNING LAW**

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

20 **9. NOTICES**

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

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1 To Ross:

2 Richard Ross, President
3 Ross Acquisition Co.
4 3380 Langley Drive
5 Hebron, KY 41048

To Vinocur:

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

6 With a copy to:

7 Sandra Edwards, Esq.
8 Farella Braun + Martell LLP
9 Russ Building
10 235 Montgomery Street, 18th Floor
11 San Francisco, CA 94104

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

14 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

22 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

23 The Parties agree to mutually employ their, and their counsel’s, reasonable best efforts to
24 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent
25 Judgment by the Court in a timely manner. The Parties acknowledge that, pursuant to California
26 Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this
27 Consent Judgment, which Vinocur shall file, and which Ross shall not oppose. If any third party
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1 objection to the noticed motion is filed, Vinocur and Ross shall work together to file a joint reply
2 and appear at any hearing before the Court. If the Court does not approve the motion to approve
3 this Consent Judgment, and the Parties choose not to pursue a modified Consent Judgment
4 within 30 days of said denial, or in the event that the Court approves this Consent Judgment and
5 any person successfully appeals that approval, all payments made pursuant to this Consent
6 Judgment will be returned to Ross within fifteen (15) days of an order reversing or vacating the
7 approval.

8 **13. MODIFICATION**

9 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
10 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
11 of any Party and entry of a modified Consent Judgment by the Court.

12 **14. ENTIRE AGREEMENT**

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

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1 **15. AUTHORIZATION**

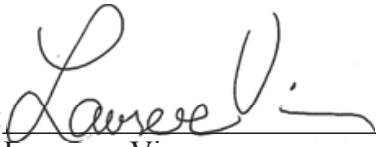
2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective parties and have read, understood, and agree to all of the terms and conditions of this
4 Consent Judgment.

5 **AGREED TO:**

AGREED TO:

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7 Date: May 15, 2015

Date: _____

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9 By:  _____
Laurence Vinocur

By: _____
Richard Ross, President
Ross Acquisition Co.

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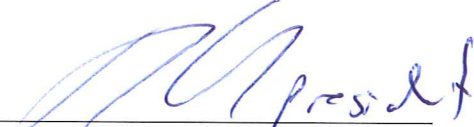
5 **AGREED TO:**

AGREED TO:

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7 Date: _____

Date: 5-15-15

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9 By: _____
10 Laurence Vinocur

By:  _____
Richard Ross, President
Ross Acquisition Co.

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