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4 San Diego, California 92130
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6 *Attorneys for Plaintiff, Evelyn Wimberley*

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9
10 **COUNTY OF SAN DIEGO**

11 **UNLIMITED CIVIL JURISDICTION**

12
13 **EVELYN WIMBERLEY,**)

14)
15 **Plaintiff**)

16)
17 **and**)

18 **HONIG'S WHISTLE STOP, INC.;**)

19)
20)
21 **and Does 1-25 Inclusive**)
22 **Defendants.**)

CASE NO.:

37-2015-00008107-CU-NP-NC

~~PROPOSED~~

**JUDGMENT APPROVING
PROP 65 STIPULATION AND
CONSENT JUDGMENT**

(Cal. Health & Safety Code § 25249.6 et seq.)

Date: December 18, 2015

Time: 01:30

Dept. N-27

Hon. Jacqueline M. Stern

Action Filed: March 11, 2015

1
2
3 In the above entitled action, Plaintiff, Evelyn Wimberley and Defendant Honig's
4 Whistle Stop, Inc, having agreed through their respective counsel that judgment be entered
5 pursuant to the terms of the Proposition 65 settlement agreement in the form of a [Proposed]
6 Consent Judgment entered into by the parties, and following issuance of an order approving this
7 Proposition 65 settlement agreement and entering this Consent Judgment on Dec 21, 2015. ^{WJ}

8 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that pursuant to
9 Code of Civil Procedure §664.6, judgment is entered in accordance with the Consent Judgment
10 attached hereto as Exhibit 1.

11
12 **IT IS SO ORDERED.**

13
14 Dated: 12/21/15



15 _____
16 **JUDGE OF THE SUPERIOR COURT**
17 **JACQUELINE M. STERN**
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Exhibit NO. 1

1 STEPHEN URE, ESQ.
2 LAW OFFICES OF STEPHEN URE, PC
3 11622 El Camino Real, Suite 100
4 San Diego, CA 92130
5 Telephone: 619-235-5400

6 Attorneys for Plaintiff, Evelyn Wimberley

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO

10 EVELYN WIMBERLEY,
11 Plaintiff,
12 v.
13 HONIG'S WHISTLE STOP, INC
14 And DOES 1-25
15 Defendants.

Case No: 37-2015-00008107-CU-NP-NC

UNLIMITED JURISDICTION

STIPULATION RE ENTRY OF
CONSENT JUDGMENT AS TO
HONIG'S WHISTLE STOP, INC.

Complaint Filed: March 11, 2015

Judge: Honorable Jacqueline M. Stern

Dept. : N-27

19 1. INTRODUCTION

20 1.1 The Parties

21 This Stipulation and [Proposed] Order Re Consent Judgment ("Consent Judgment") is
22 hereby entered into by and between Evelyn Wimberley acting on behalf of the public interest
23 (hereinafter "Wimberley") and Honig's Whistle Stop, Inc., (hereinafter "Honig's"), with
24 Wimberley and Honig's collectively referred to as the "Parties" and each of them as a "Party."
25 Wimberley is an individual residing in California who seeks to promote awareness of exposures
26 to toxic chemicals and improve human health by reducing or eliminating hazardous substances
27 contained in consumer products. Honig's employs ten or more persons and is a person in the
28 course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et

1 seq.

2 **1.2 Allegations and Representations**

3 Wimberley alleges that Honig's has offered for sale in the State of California whistles
4 containing lead, and that such sales have not been accompanied by Proposition 65 warnings.
5 Lead is listed under Proposition 65 as a chemical known to the State of California to cause cancer
6 and birth defects or other reproductive harm. Wimberley has cited A4 - Honig's Metal Finger
7 Whistle as a specific example of the Honig's whistles that are the subject of her allegations. For
8 purposes of this Consent Judgment only, Honig's represents that: A4 - Honig's Metal Finger
9 Whistle is marketed as a metal whistle item manufactured for and distributed by Honig's; and 2)
10 Honig's had no reason to believe that the item contained lead until receiving Wimberley's 60-Day
11 Notice.

12 Wimberley represents that her independent testing confirmed by two independent
13 laboratories that lead was present and accessible in amounts that would expose users to lead in
14 excess of the allowable safe harbor number for lead, 0.5 ug/day for reproductive toxicity and for
15 carcinogens 15 ug/day oral, as established by California Office of Environmental Health Hazard
16 Assessment. See <http://www.oehha.ca.gov/prop65/pdf/2012StatusReportJune.pdf>

17 **1.3 DEFINITIONS**

18 **Complaint.** The term "Complaint" shall have the meaning given in Section 1.5.

19 **Covered Product.** The term "Covered Product" means metal whistles manufactured and sold by
20 Honig's including but not limited to Honig's A-4 Metal Finger Whistles.

21 **Effective Date.** The term "Effective Date" shall mean the date this Consent Judgment is entered
22 as a Judgment of the Court.

23 **Execution Date.** The term "Execution Date" shall mean the date this Consent Judgment is signed
24 by all parties in Clause 12 below.

25 **Listed Chemicals:** The term "Listed Chemicals" shall mean lead and lead compounds.

26 **Notice.** The term "Notice" shall have the meaning given in Section 1.5.

27 **Releasees.** The terms "Defendant Releasees" and "Downstream Defendant Releasees" shall have
28 the meanings given in Section 5.1.

1 **1.4 Product Description**

2 The products that are covered by this Consent Judgment are defined as whistles containing
3 lead which are manufactured for, distributed and sold by Honig's in California whether as
4 standalone items like A-4 Metal Finger Whistles or as parts of sets containing other products in
5 addition to whistles. All such whistles shall be referred to herein as the "Covered Products."

6 **1.5 Notices of Violation/Complaint**

7 On or about June 23, 2014, Wimberley served Honig's, and all public enforcement
8 agencies eligible to initiate Proposition 65 actions on behalf of the People of the State of
9 California with a document entitled "60-Day Notice of Violation" (the "Notice") that provided
10 Honig's, and such public enforcers with notice that alleged that Honig's was in alleged violation
11 of Proposition 65 for failing to warn consumers and customers that the Covered Products exposed
12 users in California to lead. No public enforcer diligently prosecuted the claims threatened in the
13 Notice within sixty days plus service time relative to the provision of the Notice to them by
14 Wimberley, such that Wimberley filed a complaint in the matter as captioned above on March 11,
15 2015, ("Complaint").

16 **1.6 Stipulation as to Jurisdiction/No Admission**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over Honig's as to the allegations contained in the complaint filed in this matter, that
19 venue is proper in the County of San Diego, and that this Court has jurisdiction to approve, enter,
20 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
21 claims which were or could have been raised in the Complaint based on the facts alleged therein
22 and/or in the Notices.

23 Honig's denies the material allegations contained in Wimberley's Notice and Complaint
24 and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be
25 construed as an admission by Honig's of any fact, finding, issue of law, or violation of law; nor
26 shall compliance with this Consent Judgment constitute or be construed as an admission by
27 Honig's of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
28 denied by Honig's. However, this section shall not diminish or otherwise affect the obligations,

1 responsibilities, and duties of Honig's under this Consent Judgment.

2 **2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION**

3 In a case alleging failure to warn, a settlement that provides for the giving of a clear and
4 reasonable warning, where there had been no warning provided prior to the 60-day notice, for an
5 exposure that appears to require a warning, is presumed to confer a significant benefit on the
6 public. If there is no evidence of an exposure for which a warning plausibly is required; there is
7 no public benefit, even if a warning is given. If the relief consists of minor or technical changes in
8 the language, appearance, or location of a warning in a manner that is not likely to significantly
9 increase its visibility or effectiveness in communicating the warning to the exposed persons, there
10 is no significant public benefit. Where a settlement sets forth a standard or formula for when a
11 given product requires a warning, supporting evidence should show that at least some of the
12 products in controversy in the action either are, or at some time were, above the warning level, or
13 the existence of the standard or formula itself may not establish the existence of a public benefit.
14 Cal.Code Regs., Title 11 § 3201(2) (b) (1).

15 **2.1 Reformulation Option.** The Covered Products shall be deemed to comply with
16 Proposition 65 with regard to lead and be exempt from any Proposition 65 warning requirements
17 for lead if components of the Covered Products from which exposures to lead may arise,
18 including solder used in the Covered Products, meet the following criteria: (a) alloys from which
19 the components are made shall have no lead as an intentionally-added constituent; and, regardless
20 of intent, (b) the alloy from which the components are made and solder used in the Covered
21 Products shall have a lead content by weight of no more than 0.01% (100 parts per million, or
22 "100 ppm") which complies with the strictest standard for lead in children's items as established
23 by the US Consumer Product Safety Commission, See 16 CFR Part 1500.90, and significantly
24 reduces the lead content in the Covered Products, which Wimberley contends were in excess of
25 0.1% lead. The whistles are not childrens' products under either Federal or California law.

26 Honig's may comply with the above requirements by relying on information obtained
27 from its suppliers, provided such reliance is in good faith. Obtaining test results showing that the
28 lead content is no more than 0.01%, using a method of sufficient sensitivity to establish a limit of

1 quantification (as distinguished from detection) of less than 100 ppm shall be deemed to establish
2 good faith reliance, provided that Honig's does not receive later test results indicating that lead at,
3 or in excess of, 100 ppm has been detected in a component of or solder used in the Covered
4 Products. Upon request, Honig's shall make such test results available to Wimberley for review
5 should it exercise this reformulation option.

6 **2.2 Warning Option.**

7 Pursuant to California Code of Regulations, title 27, § 25603.2 (a), a Proposition 65
8 warning message must include the following language for consumer products that contain a
9 chemical known to the state to cause reproductive toxicity: "WARNING: This product will
10 expose users to lead a chemical known to the State of California to cause cancer birth defects or
11 other reproductive harm."

12 The Parties hereto agree that Covered Products that do not meet the specifications set
13 forth in Section 2.1 above shall be accompanied by a warning in compliance with § 25603.2, as
14 described above. The warning requirements shall apply only to: (1) Covered Products that
15 Honig's manufactures or causes to be manufactured after the Effective Date; and (2) Covered
16 Products manufactured, distributed, marketed, sold or shipped for sale or use inside the State of
17 California. Warnings required hereunder 2.2 shall be provided on the Covered Products within
18 ten (10) days of Effective Date.

19 Where utilized as an alternative to meeting the criteria set forth in Section 2.1, Honig's
20 shall provide the warning language set forth with the unit package of the Covered Products. Such
21 warning shall be prominently affixed to or printed on each Product's label or package or, if not
22 the label or package of each Product, then displayed on box, bin, or shelf from which the Product
23 is offered for sale in California within ten (10) days of the Effective Date. If printed on the label
24 itself, the warning shall be contained in the same size font and same section that states other
25 safety warnings, if any, concerning the use of the Product. If no other warnings are present then
26 printed in a conspicuous location and in same size font as other printed words such to be noticed
27 by the normal user of the product. Honig's may continue to utilize, on an ongoing basis, unit
28 packaging containing substantively the same Proposition 65 warnings as those set forth in herein,

1 but only to the extent such packaging materials have already been printed within ninety days
2 following the Execution Date. Upon request, Honig's shall provide Wimberley with information
3 sufficient to establish the date labeling was changed to be in compliance with this consent
4 judgment.

5 The Parties also recognize that the requirements set forth in sections 2.2 above are not the
6 exclusive methods of providing a warning under Proposition 65 and its implementing regulations
7 and that they may or may not be appropriate in other circumstances.

8 If Proposition 65 warnings for lead or lead compounds should no longer be required,
9 Honig's shall have no further warning obligations pursuant to this Consent Judgment. Except as
10 provided in Section 2.1 above, in the event that Honig's ceases to implement or modifies the
11 warnings required under this Consent Judgment (because of a change in the law or otherwise),
12 Honig's shall provide written notice to Wimberley (through counsel) of its intent to do so, and of
13 the basis for its intent, no less than thirty (30) days in advance.

14 15 **2.3 Cessation of Sales in California Option**

16 Honig's may comply with this option by ceasing all further sales of the A-4 Metal Whistle
17 within, and to customers residing in, the State of California within twenty-four (24) hours post
18 execution of this agreement. If Honig's exercises this option, Honig's shall notify Wimberley's
19 counsel in writing attesting to the fact that all sales have ceased, that the Covered Goods have
20 been removed from the shelves and either destroyed or shipped out of California.

21 **3. PAYMENTS PURSUANT TO HEALTH & SAFETY CODE §25249.7(b)**

22 With regard to all claims that have been raised or which could be raised with respect to
23 failure to warn pursuant to Proposition 65 with regard to lead in the Covered Products, Honig's
24 shall pay a civil penalty of \$500.00 pursuant to Health and Safety Code section 25249.7(c), to be
25 apportioned in accordance with California Health & Safety Code § 25192, with 75% of these
26 funds remitted to the State of California's Office of Environmental Health Hazard Assessment
27 and the remaining 25% of the penalty remitted to Wimberley, as provided by California Health &
28 Safety Code § 25249.12(d) and the instructions directly below.

1 Honig's shall issue two separate checks or wire transfers for the penalty payment: (a) one
2 check made payable to "OEHHHA" (tax identification number: 68-0284486) in an amount
3 representing 75% of the total penalty (i.e., \$375.00); and (b) one check in an amount representing
4 25% of the total penalty (i.e., \$125.00) made payable directly to Wimberley. Honig's shall
5 overnight these payments within seven days following the Execution Date, to the following
6 address and shall provide copies of transmittals letters to Wimberley's counsel at that time as
7 well:

8 Evelyn Wimberley
9 C/O Law Offices of Stephen Ure, PC
10 11622 El Camino Real, Suite 100 San Diego, CA 92130

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

12 The parties reached an accord on the compensation due to Wimberley and her counsel
13 under the private attorney general doctrine and principles of contract law. Under these legal
14 principles, Honig's shall reimburse Wimberley's counsel for fees and costs, incurred as a result of
15 investigating, bringing this matter to Honig's's attention, and negotiating a settlement in the
16 public interest. Such fees are proper and reasonable under the private attorney general doctrine.
17 Honig's shall pay Wimberley's counsel pursuant to Code of Civil Procedure section 1021.5,
18 \$14,500.00 for all attorneys' fees, expert and investigation fees, and related costs associated with
19 this matter and the Notice.

20 The settlement amount for the attorney's fees and costs shall be made in two separate
21 payments as follows"

22 1) Within seven (7) days of the Execution Date, Honig's shall overnight a check in
23 the amount of \$4,500.00 made payable to the "Law Offices of Stephen Ure, PC, Trust Account"
24 (tax identification number 42-1641673).

25 2) Within thirty (30) days of the Execution Date, Honig's shall overnight a check in
26 the amount of \$10,000.00 made payable to the "Law Offices of Stephen Ure, PC, Trust Account"
27 (tax identification number 42-1641673).

28 The Law Offices of Stephen Ure, PC will provide Honig's with tax identification

1 information. Other than the payment required hereunder, each side is to bear its own attorneys'
2 fees and costs.

3 **5. RELEASE OF ALL CLAIMS**

4 **5.1 Release of Honig's and Downstream Customers**

5 Wimberley, on behalf of herself and in the public interest, releases Honig's and each of its
6 downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers, franchisees,
7 dealers, customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries,
8 and their respective officers, directors, attorneys, representatives, shareholders, agents, and
9 employees, and sister and parent entities (collectively "Releasees") from all claims for violations
10 of Proposition 65 up through the Effective Date based on exposure to lead from the Covered
11 Products as set forth in her Notice of Violation. Compliance with the terms of this Consent
12 Judgment constitutes compliance with Proposition 65 with respect to exposures to lead from the
13 Covered Products.

14 In addition to the foregoing, Wimberley, on behalf of herself, her past and current agents,
15 representatives, attorneys, and successors and/or assignees, and *not* in her representative capacity,
16 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
17 action and releases any other Claims that she could make against Honig's or its Releasees arising
18 up to the Effective Date with respect to violations of Proposition 65 based upon the Covered
19 Products. With respect to the foregoing waivers and releases in this paragraph, Wimberley
20 hereby specifically waives any and all rights and benefits which she now has, or in the future may
21 have, conferred by virtue of the provisions of Section 1542 of the California Civil Code, which
22 provides as follows:

23
24 A GENERAL RELEASE DOES NOT EXTEND TO
25 CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR
26 SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF
27 EXECUTING THE RELEASE, WHICH IF KNOWN BY
28 HIM MUST HAVE MATERIALLY AFFECTED HIS
SETTLEMENT WITH THE DEBTOR.

27 **5.2 Honig's's Release of Wimberley**

1 Honig's waives any and all claims against Wimberley, her attorneys and other
2 representatives, for any and all actions taken or statements made (or those that could have been
3 taken or made) by Wimberley and her attorneys and other representatives, whether in the course
4 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this
5 matter, and/or with respect to the Covered Products.

6 **6. SEVERABILITY AND MERGER**

7 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
8 document are held by a court to be unenforceable, the validity of the enforceable provisions
9 remaining shall not be adversely affected.

10 This Consent Judgment contains the sole and entire agreement of the Parties and any and
11 all prior negotiations and understandings related hereto shall be deemed to have been merged
12 within it. No representations or terms of agreement other than those contained herein exist or
13 have been made by any Party with respect to the other Party or the subject matter hereof.

14 **7. GOVERNING LAW**

15 The terms of this Consent Judgment shall be governed by the laws of the State of
16 California and apply within the State of California. Compliance with the terms of this Consent
17 Judgment resolves any issue, now or in the future, with the requirements of Proposition 65 with
18 respect to alleged exposures to lead arising from the Covered Products. In the event that
19 Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as
20 to the Covered Products, then Honig's shall provide written notice to Wimberley of any asserted
21 change in the law, and shall have no further obligations pursuant to this Consent Judgment with
22 respect to, and to the extent that, the Covered Products are so affected.

23 **8. NOTICES**

24 Unless specified herein, all correspondence and notices required to be provided pursuant
25 to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
26 (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by the
27 other party at the following addresses:

28 For Honig's:

1 Elizabeth V. McNulty
2 ARCHER NORRIS, PC
3 4695 MacArthur Court, Suite 350
4 Newport Beach, CA 92660-8816

5 And For Wimberley:

6 Stephen Ure
7 Law Offices of Stephen Ure, PC.
8 11622 El Camino Real, Suite 100
9 San Diego, California 92130

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

12 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

13 This Consent Judgment may be executed in counterparts and by facsimile, each of which
14 shall be deemed an original, and all of which, when taken together, shall constitute one and the
15 same document.

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

17 Wimberley agrees to comply with the requirements set forth in California Health & Safety
18 Code §25249.7(f) and to promptly bring a motion for approval of this Consent Judgment.
19 Honig's agrees to cooperate with Wimberley and support Wimberley's motion for approval of
20 this Consent Judgment.

21 In the event the Court does not grant Wimberley's motion for approval of or enter this
22 Consent Judgment within eighteen months after it has been fully executed by the parties, the
23 parties shall meet and confer as to (and jointly agree on) whether to modify the language or
24 appeal the ruling. If the parties do not jointly agree on a course of action to take, then the case
25 shall proceed in its normal course on the trial court's calendar and Wimberley's counsel shall
26 refund Honig's the payment provided pursuant paragraph 4 in full within thirty (30) days of
27 Honig's providing written demand thereof.

28 **11. MODIFICATION**

This Consent Judgment may be modified only by further stipulation of the Parties and the

1 shall proceed in its normal course on the trial court's calendar and Wimberley's counsel shall
2 refund Honig's the payment provided pursuant paragraph 4 in full within thirty (30) days of
3 Honig's providing written demand thereof.

4 **11. MODIFICATION**

5 This Consent Judgment may be modified only by further stipulation of the Parties and the
6 approval of the Court or upon the granting of a motion brought to the Court by either Party.

7 **12. RETENTION OF JURISDICTION**

8 This Court shall retain jurisdiction of this matter to implement, modify and enforce this
9 Consent Judgment.

10 **13. AUTHORIZATION**

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

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APPROVED AS TO FORM:

Dated: August 17, 2015

By: Elizabeth V. McNulty
Elizabeth V. McNulty
Attorney for Defendant,
HONIG'S WHISTLE STOP, INC.

Dated: August 17, 2015

LAW OFFICES OF STEPHEN URE, PC

By: Stephen Ure
Stephen Ure, Esq.
Attorneys for Plaintiff,
EVELYN WIMBERLEY

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IT IS HEREBY SO STIPULATED:

AGREED TO:

AGREED TO:

Date: _____

Date: 8/17/2015

By: _____
EVELYN WIMBERLEY

By: *A. L. Brannon, CEO*
HONIG'S WHISTLE STOP, INC

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AGREED TO:

AGREED TO:

Date: 8-17-15

Date: _____

By: 
EVELYN WIMBERLEY

By: _____
HONIG'S WHISTLE STOP, INC