

14

FILED
San Francisco County Superior Court

NOV 16 2015

CLERK OF THE COURT
BY: [Signature]
Deputy Clerk

1 Christopher C. Moscone, State Bar No. 170250
2 Laurence D. Haveson, State Bar No. 152631
3 MOSCONE EMBLIDGE & OTIS LLP
4 220 Montgomery Street, Suite 2100
5 San Francisco, CA 94104
6 Tel. (415) 362-3599
7 Fax: (415) 362-2006

8 Attorneys for Plaintiff
9 LAURENCE VINO CUR

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO

12 LAURENCE VINO CUR,
13 Plaintiff,

14 v.

15 SHEDRAIN CORPORATION, and DOES
16 I -100, inclusive,
17 Defendants.

Case No. CGC-15-543700

~~PROPOSED~~ JUDGMENT PURSUANT
TO TERMS OF PROPOSITION 65
SETTLEMENT AND CONSENT
JUDGMENT

(Health & Safety Code § 25249.5 *et seq.*)

Date: November 16, 2015
Time: 9:30 a.m.
Dept: 302
Judge: Hon. Ernest H. Goldsmith

Reservation No.: 09211116-07

@

1 In the above-entitled action, plaintiff Laurence Vinocur and defendants ShedRain
2 Corporation, having agreed through their respective counsel that Judgment be entered pursuant
3 to the terms of their settlement agreement in the form of a [Proposed] Consent Judgment
4 (“Consent Judgment”), and following this Court’s issuance of an Order approving this
5 Proposition 65 settlement and Consent Judgment on Nov. 16, 2015,

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to California
7 Health & Safety Code § 25249.7(f)(4) and California Code of Civil Procedure § 664.6, Judgment
8 is entered in accordance with the terms of the Consent Judgment attached hereto as **Exhibit A**.
9 By stipulation of the parties, the Court will retain jurisdiction to enforce the settlement under
10 Code of Civil Procedure § 664.6.

11
12 **IT IS SO ORDERED.**

13
14
15 Dated: NOV 16 2015


16 JUDGE OF THE SUPERIOR COURT
17 ERNEST H. GOLDSMITH
18
19
20
21
22
23
24
25
26
27
28

Exhibit A

1 Christopher C. Moscone, State Bar No. 170250
2 Laurence D. Haveson, State Bar No. 152631
3 MOSCONE EMBLIDGE & OTIS LLP
4 220 Montgomery Street, Suite 2100
5 San Francisco, CA 94104
6 Telephone: (415) 362-3599
7 Facsimile: (415) 362-2006

8 Attorneys for Plaintiff
9 LAURENCE VINOUCUR

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO - UNLIMITED CIVIL JURISDICTION

12 LAURENCE VINOUCUR,

13 Plaintiff,

14 v.

15 SHEDRAIN CORPORATION, and DOES
16 1 -100, inclusive,

17 Defendants.

Case No. CGC-15-543700

[PROPOSED] CONSENT JUDGMENT

18 **1. INTRODUCTION**

19 **1.1 Parties**

20 The parties to this Consent Judgment ("Consent Judgment") are Plaintiff Laurence
21 Vinocur ("Vinocur") on the one hand, and Defendant ShedRain Corporation ("ShedRain") on the
22 other hand (each a "Party" and collectively "Parties").

23 **1.2 Plaintiff**

24 Vinocur is an individual residing in the State of California who seeks to promote
25 awareness of exposures to toxic chemicals and to improve human health by reducing or
26 eliminating hazardous substances contained in consumer products.

27 **1.3 Defendant**

28 ShedRain employs ten or more persons, and each is a person in the course of doing
business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health
and Safety Code section 25249.6, *et seq.* ("Proposition 65").

1 **1.4 General Allegations**

2 Vinocur alleges that ShedRain manufactures, distributes, imports, sells and/or offer for
3 sale in California vinyl/PVC ponchos containing di(2-ethylhexyl)phthalate (“DEHP”) without
4 first providing the clear and reasonable warning required by Proposition 65. DEHP is listed
5 pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects
6 and other reproductive harm.

7 **1.5 Product Description**

8 The products that are covered by this Consent Judgment are vinyl/PVC ponchos
9 containing DEHP that are sold or offered for sale in California by ShedRain, including, but not
10 limited to, RainEssentials by ShedRain Adult Sport Utility Poncho, #8236, UPC #0 91806
11 15251 2, hereinafter the “Products.”

12 **1.6 Notice of Violation**

13 On October 24, 2014, Vinocur served ShedRain and certain public prosecutors with a
14 “60-Day Notice of Violation” (“Notice”) alleging that ShedRain was in violation of Proposition
15 65 for failing to warn its customers and consumers in California that the Products expose users to
16 DEHP. To the best of the Parties’ knowledge, no public enforcer has commenced and is
17 diligently prosecuting the allegations set forth in the Notice.

18 **1.7 Complaint**

19 On January 16, 2015, Vinocur filed the instant action against ShedRain for the alleged
20 violations of Health and Safety Code section 25249.6 that are the subject of the Notice.

21 **1.8 No Admission**

22 ShedRain denies the material, factual, and legal allegations contained in the Notice and
23 Complaint, and maintains that all of the products that it has sold and distributed in California,
24 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
25 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law,
26 or violation of law, nor shall compliance with this Consent Judgment constitute or be construed
27 as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This
28

1 Section shall not, however, diminish or otherwise affect ShedRain's obligations, responsibilities,
2 and duties under this Consent Judgment.

3 **1.9 Consent to Jurisdiction**

4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
5 jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in San
6 Francisco County and that this Court has jurisdiction to enter and enforce the provisions of this
7 Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 "Covered Products" means and is limited to Products containing DEHP sold or
10 distributed for sale in California by Defendant.

11 2.2 "Effective Date" means the date this Consent Judgment is approved by the
12 court.

13 2.3 "Reformulation Standard" means the level of DEHP required under Section 3.1.

14 **3. INJUNCTIVE RELIEF: REFORMULATION**

15 **3.1 Reformulation Standard**

16 Commencing no later than the Effective Date, ShedRain shall not manufacture, distribute,
17 purchase or import for sale, sell, and/or offer for sale in California any Covered Product that
18 contains DEHP in concentrations exceeding 0.1 percent (1,000 parts per million ("ppm")) when
19 analyzed pursuant to any methodology utilized by federal or California state agencies for the
20 purpose of determining DEHP content in a solid substance.

21 **4. PAYMENTS**

22 **4.1 Payments Pursuant to Health and Safety Code § 25249.7(b)**

23 Pursuant to Health and Safety Code section 25249.7(b)(2), except as provided in Section
24 4.1.2, ShedRain shall pay \$7,500 in civil penalties. Each penalty payment shall be allocated
25 according to Health and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty
26 amount remitted to the California Office of Environmental Health Hazard Assessment and the
27 remaining 25% of each penalty payment remitted to Vinocur.

1 4.1.1 **Initial Civil Penalty**

2 ShedRain shall pay an initial civil penalty of \$3,500 within five (5) days of the
3 Effective Date.

4 4.1.2 **Final Civil Penalty; Waiver on Certification of Compliance with**

5 **Section 3.1**

December 15, 2015

6 On or before ~~October 30, 2015~~, ShedRain shall pay a final civil penalty of \$4,000, except
7 that, the final civil penalty will be waived, in its entirety, if no later than October 30, 2015,
8 ShedRain provides Vinocur's counsel with written certification that as of the date of its
9 certification, all Covered Products manufactured, distributed, purchased or imported for sale in
10 California meet the Reformulation Standard, and that they will continue to only manufacture,
11 distribute, purchase or import Covered Products meeting the Reformulation Standard for sale in
12 California in the future.

13 4.2 **Reimbursement of Attorneys' Fees and Costs**

14 The Parties acknowledge that Vinocur and his counsel offered to resolve this dispute
15 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
16 leaving the issue to be resolved after the material terms of the agreement had been settled.
17 Shortly after all other settlement terms had been finalized, ShedRain expressed a desire to
18 resolve the fees and costs. The Parties then attempted to (and did) reach an accord on the
19 compensation due Vinocur and his counsel under general contract principles and the private
20 attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work
21 performed in this matter. Under these legal principles, within 30 days of the Effective Date,
22 Defendants shall pay \$30,000 for the fees and costs incurred investigating, litigating, and
23 enforcing this matter, including the fees and costs incurred (and to be incurred) drafting,
24 negotiating, and obtaining the Court's approval of this Consent Judgment in the public interest.

25 *///*

26 *///*

27 *///*

28 *///*

1 4.3 Payment Procedures.

2 4.3.1 Payment Addresses

3 (a) All payments to Vinocur and Moscone Emblidge & Otis LLP
4 shall be delivered to the following address:

5 Moscone Emblidge & Otis LLP
6 Attn: Proposition 65 Coordinator
7 220 Montgomery Street, Suite 220
8 San Francisco, CA 94104

9 (b) All payments to OEHHA (EIN: 68-0284486) shall be delivered
10 directly to OEHHA (Memo line "Prop 65 Penalties") at the following address:

11 Mike Gyurics
12 Fiscal Operations Branch Chief
13 Office of Environmental Health Hazard Assessment
14 P.O. Box 4010
15 Sacramento, CA 95812-4010

16 With a copy of the check(s) payable to OEHHA mailed to Moscone Emblidge & Otis LLP at the
17 payment address provided in section 4.3.1(a), as proof of payment to OEHHA.

18 5. CLAIMS COVERED AND RELEASED

19 5.1 Public Release of Proposition 65 Claims

20 In consideration of the promises and commitments herein contained, Vinocur, on his own
21 behalf and on behalf of his past and current agents, representatives, attorneys, successors, and/or
22 assignees, and in the public interest, hereby waives and releases ShedRain, its parents,
23 subsidiaries, affiliated entities under common ownership or control, directors, officers,
24 employees, and attorneys ("Releasees"); and each entity to whom it directly or indirectly
25 distributes or sells Covered Products, and any distributors, wholesalers, customers, retailers,
26 franchisees, cooperative members, licensors, and licensees ("Downstream Defendant
27 Releasees"), from all claims for violations of Proposition 65 based on exposures to DEHP from
28 the Covered Products through the Effective Date. This waiver and release is limited to those
claims arising under Proposition 65 for unwarned exposures to DEHP from Covered Products

1 sold by Defendants before the Effective Date. Defendants' and Releasees' compliance with this
2 Consent Judgment constitute compliance with Proposition 65.

3 **5.2 Private Release in Plaintiff's Individual, Non-representative Capacity**

4 Vinocur, in his individual capacity only and not in his representative capacity, also
5 provides a release to ShedRain, Releasees, and Downstream Defendant Releasees which shall be
6 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
7 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of
8 Vinocur of any nature, character or kind, whether known or unknown, suspected or unsuspected,
9 arising out of alleged or actual unwarned exposures to DEHP from the Covered Products.

10 **5.3 Mutual Release**

11 ShedRain waives any and all claims against Vinocur and his attorneys and other
12 representatives, for any and all actions taken or statements made (or those that could have been
13 taken or made) by Vinocur and his attorneys and other representatives, whether in the course of
14 investigating claims, otherwise seeking enforcement of Proposition 65 against it in this matter, or
15 with respect to the Covered Products.

16 Vinocur, in his individual capacity only and not in his representative capacity, also
17 waives any and all claims against ShedRain and its attorneys and other representatives, for any
18 and all actions taken or statements made (or those that could have been taken or made) by
19 ShedRain and its attorneys and other representatives, whether in the course of investigating
20 claims, otherwise seeking to defend against allegations pertaining to Proposition 65 in this
21 matter, or with respect to the Covered Products.

22 **6. NOTICES**

23 When any Party is entitled to receive any notice under this Consent Judgment, the notice
24 shall be sent by: (a) first class, registered or certified mail; (b) personal delivery; or (c) a
25 recognized overnight courier on any one Party by the other Party at the following addresses:

26 ///

27 ///

28 ///

1 For Vinocur:

2 Moscone Emblidge & Otis LLP
3 Attn: Proposition 65 Coordinator
4 220 Montgomery Street, Suite 220
5 San Francisco, CA 94104

6 For ShedRain:

7 Jeffrey Blauer, President
8 ShedRain Corporation
9 8303 NE Killingsworth Street
10 Portland, OR 97238

11 With copies to:

12 Deanne L. Miller
13 Morgan, Lewis & Bockius LLP
14 300 South Grand Avenue, 22nd Floor
15 Los Angeles, CA 90071-3132

16 and

17 Robyn Ridler Aoyagi
18 Tonkon Torp LLP
19 888 S.W. Fifth Avenue, Suite 1600
20 Portland, Oregon 97204

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

23 **7. POST SETTLEMENT ACTIVITIES AND COURT APPROVAL**

24 7.1 Vinocur agrees to comply with the reporting form requirements referenced in
25 Health and Safety Code section 25249.7(f).

26 7.2 The Parties further acknowledge that, pursuant to Health and Safety Code
27 § 25249.7(f)(4), a noticed motion is required to obtain judicial approval of the settlement,
28 which motion Vinocur shall draft and file, and ShedRain shall join. Vinocur and ShedRain
agree to mutually employ their best efforts to support the entry of this agreement as a Consent
Judgment and obtain approval of the Consent Judgment by the Court in a timely manner. If
any third party objection to the noticed motion is filed, Vinocur and ShedRain shall work
together to file a joint reply and appear at any hearing before the Court. This provision is a

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

3 7.3 If this Consent Judgment is not approved by the Court, (a) this Consent
4 Judgment and any and all prior agreements between the parties as to the Notices or Complaint
5 referenced herein shall terminate and become null and void, and the action shall revert to the
6 status that existed prior to the execution date of this Consent Judgment; (b) no term of this
7 Consent Judgment or any draft thereof, or of the negotiation, documentation, or other part or
8 aspect of the Parties' settlement discussions, shall have any effect, nor shall any such matter be
9 admissible in evidence for any purpose in this action, or in any other proceeding; and (c) the
10 parties agree to meet and confer to determine whether to modify the terms of the Consent
11 Judgment and to resubmit it for approval.

12 **8. ENFORCEMENT**

13 Any Party may, by motion or application for an order to show cause before this Court,
14 enforce the terms and conditions contained in this Consent Judgment.

15 **9. SEVERABILITY**

16 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
17 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
18 provisions remaining shall not be adversely affected.

19 **10. GOVERNING LAW**

20 The terms of this Consent Judgment shall be governed by the laws of the State of
21 California and apply within the State of California. In the event that Proposition 65 is repealed,
22 preempted or is otherwise rendered inapplicable by reason of law generally, or if any of the
23 provisions of this Consent Judgment are rendered inapplicable or no longer require as a result of
24 any such repeal or preemption or rendered inapplicable by reason of law generally as to the
25 Products, then ShedRain shall provide written notice to Vinocur of any asserted change in law,
26 and, if Vinocur agrees, ShedRain shall have no further obligations pursuant to this Consent
27 Judgment with respect to, and to the extent that, the Products are so affected. Nothing in this
28

1 Consent Judgment shall be interpreted to relieve ShedRain from any obligation to comply with
2 any pertinent state or federal toxics control law.

3 **11. DRAFTING**

4 The Parties, including their counsel, have participated and cooperated in the drafting and
5 preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts
6 of the Parties. This Consent Judgment was subject to revision and modification by the Parties
7 and has been accepted and approved as to its final form by all Parties and their counsel.
8 Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall not be
9 interpreted against any Party as a result of the manner of the preparation of this Consent
10 Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction
11 providing that ambiguities are to be resolved against the drafting Party should not be employed
12 in the interpretation of this Consent Judgment and, in this regard, the Parties hereby waive
13 California Civil Code Section 1654.

14 **12. MODIFICATION**

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

18 **13. COUNTERPARTS**

19 13.1 This Consent Judgment may be executed in counterparts and by facsimile or
20 portable document format (PDF) signature, each of which shall be deemed an original, and all
21 of which, when taken together, shall constitute one and the same document.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **14. AUTHORIZATION**

2 Each signatory to this Consent Judgment certifies that he or she is fully authorized by
3 the Party he or she represents to agree to the terms and conditions of this Consent Judgment, to
4 enter into and execute the Consent Judgment on behalf of the Party represented, and to legally
5 bind that Party, and that he or she has read, understood, and agree to all of the terms and
6 conditions of this Consent Judgment.

7 AGREED TO:

AGREED TO:

8
9 Date: 7/20/15

Date: 7/20/15

10
11 By: 
Plaintiff Laurence Vinocur

12
13 By: 
Defendant ShedRain Corporation