

1 LEXINGTON LAW GROUP, LLP
Eric S. Somers, State Bar No. 139050
2 Mark N. Todzo, State Bar No. 168389
Howard Hirsch, State Bar No. 213209
3 1627 Irving Street
San Francisco, CA 94122
4 Telephone: (415) 759-4111
Facsimile: (415) 759-4112

5 Attorneys for Plaintiff
6 MICHAEL RUGGIE

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

10
11 MICHAEL RUGGIE,
12 Plaintiff,

13 v.

14 DRUGSTORE.COM, INC., and Defendant
DOES 1 through 200, inclusive,
15 Defendants.
16

No. CGC-07-460374

[PROPOSED] CONSENT JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

1 **1. INTRODUCTION**

2 1.1 On February 9, 2007, plaintiff Michael Ruggie (“Plaintiff”) filed a
3 complaint in San Francisco County Superior Court, entitled *Ruggie v. Drugstore.com* (the
4 “Action”), for civil penalties and injunctive relief pursuant to the provisions of Cal. Health &
5 Safety Code § 25249.5 *et seq.* (“Proposition 65”). On February 27, 2007, Plaintiff filed the
6 operative First Amended Complaint (“FAC”). Plaintiff’s original Complaint and FAC named
7 Drugstore.com, Inc. (“Drugstore.com”) and unnamed “Does” as defendants. Plaintiff and
8 Drugstore.com are referred to individually as a “Party” and collectively as the “Parties.”

9 1.2 Drugstore.com is a corporation that employs 10 or more persons and, at
10 the time the Action was filed, sold Greyban (the “Product”) in the State of California through its
11 web site. The Product is a hair coloring product that contains lead acetate as an ingredient.
12 Shortly after the Action was filed, Drugstore.com stopped selling the Product.

13 1.3 On or about July 27, 2006, Plaintiff served Drugstore.com and the
14 appropriate public enforcement agencies with the requisite 60-day notice that Drugstore.com was
15 in violation of Proposition 65. Plaintiff’s notice and the FAC allege that Drugstore.com exposes
16 people who use the Product to lead and lead compounds and lead acetate (collectively referred to
17 herein as “Lead”) contained in the Product, chemicals known to the State of California to cause
18 cancer and birth defects or other reproductive harm, without providing prior clear and reasonable
19 warning to such persons regarding the carcinogenicity and reproductive toxicity of Lead, in
20 violation of Health & Safety Code § 25249.6.

21 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this
22 Court has jurisdiction over the allegations of violations contained in Plaintiff’s FAC and personal
23 jurisdiction over Drugstore.com as to the acts alleged in Plaintiff’s FAC, that venue is proper in
24 the County of San Francisco, and that this Court has jurisdiction to enter this Consent Judgment
25 as a full and final resolution of all claims which were or could have been raised in the FAC based
26 on the facts alleged therein.

1 1.5 The Parties enter into this Consent Judgment pursuant to a settlement of
2 certain disputed claims between the Parties as alleged in the FAC for the purpose of avoiding
3 prolonged and costly litigation between the Parties hereto.

4 1.6 Nothing in this Consent Judgment shall be construed as an admission by
5 any Party of any fact, conclusion of law, issue of law or violation of law, nor shall compliance
6 with the Consent Judgment constitute or be construed as an admission by any Party of any fact,
7 conclusion of laws issue of law, or violation of law.

8 1.7 Except as provided in Section 7, nothing in this Consent Judgment shall
9 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or
10 any other or future legal proceedings.

11 1.8 This Consent Judgment is the product of negotiation and compromise and
12 is accepted by the Parties, for purposes of settling, compromising and resolving issues disputed
13 in this action, including future compliance by Drugstore.com with Section 2 of this Consent
14 Judgment and shall not be used for any other purpose, or in any other matter.

15 **2. COMPLIANCE - WARNING**

16 2.1 Within 10 days of entry of this Consent Judgment by the Court (the
17 “Compliance Date”), Drugstore.com shall not sell the Product or cause the Product to be sold so
18 long as it contains Lead without providing the following warning language:

19 **WARNING: This product contains lead, a chemical known to the State of**
20 **California to cause cancer, birth defects and other reproductive harm. Wash**
21 **hands thoroughly after use.**

22 This warning shall: (a) be displayed on Drugstore.com’s internet web site before a consumer
23 commits to purchasing the Product and without the need for the consumer to follow any
24 additional hyperlinks beyond those required as part of the ordinary purchasing process; (b) be set
25 out in a text, box on a separate line or in a separate paragraph; (c) be displayed in a font size in
26 which the smallest character is no less than the equivalent of the height of the equivalent
27 characters in 9 point arial font; and (d) be displayed with such conspicuousness, as compared
28 with other words, statements, or designs as to render it likely to be read and understood by an

1 ordinary individual. The warning statement shall not be preceded, followed, or surrounded by
2 words, symbols, or other matter that reduces its conspicuousness to an ordinary individual, or
3 that qualifies or interprets the required text, such as "legal notice required by law."

4 **3. SETTLEMENT PAYMENT**

5 3.1 Within 10 days of entry of this Consent Judgment by the Court,
6 Drugstore.com shall pay \$16,500 as a total settlement payment. The payment required under this
7 Section shall be made by check payable to "Lexington Law Group, LLP Attorney Client Trust
8 Account," and shall be delivered to the address for notices to Plaintiff set forth in Paragraph 12
9 below. The funds paid by Drugstore.com shall be distributed as follows:

10 3.1.1 The sum of \$2,000 as a civil penalty pursuant to Health & Safety
11 Code § 25249.7(b), such money to be apportioned by Plaintiff in accordance with Health &
12 Safety Code § 25249.12.

13 3.1.2 The sum of \$1,000 as a payment in lieu of penalty. This payment
14 shall be donated by Plaintiff to the Center for Environmental Health ("CEH") to be used to help
15 fund CEH's lead and chemical exposure reduction programs.

16 3.1.3 The sum of \$13,500 to reimburse Plaintiff and his attorneys for
17 their reasonable investigation fees and costs, attorneys' fees, and any other costs incurred as a
18 result of investigating, bringing this matter to Drugstore.com's attention, litigating and
19 negotiating a settlement in the public interest, and seeking Court approval of this Consent
20 Judgment.

21 **4. MODIFICATION OF CONSENT JUDGMENT**

22 4.1 This written Consent Judgment may be modified by written agreement of
23 the Parties upon stipulation and Order of the Court, or after noticed motion, and upon entry of a
24 consent judgment by the Court thereon, or upon motion of Plaintiff or Drugstore.com as
25 provided by law and upon entry of a modified consent judgment by the Court.

26 **5. ENFORCEMENT OF CONSENT JUDGMENT**

27 5.1 Any Party may, by motion or application for an order to show cause
28 before the Superior Court of the County of San Francisco, enforce the terms and conditions

1 contained in this Consent Judgment. The prevailing Party shall be entitled to reasonable
2 attorneys' fees and costs associated with such motion or application.

3 **6. APPLICATION OF CONSENT JUDGMENT**

4 6.1 This Consent Judgment shall apply to and be binding upon the Parties
5 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of
6 them.

7 **7. CLAIMS COVERED**

8 7.1 In consideration of the promises and agreements herein contained, and for
9 the payments to be made pursuant to Section 3, Plaintiff, on behalf of himself, his successors
10 and/or assignees, and in the interest of the general public, hereby releases all claims of any nature
11 whatsoever (including, but not limited to, any claims for investigation fees, expert fees and
12 attorneys' fees), whether known or unknown, asserted or unasserted, fixed or contingent, against
13 Drugstore.com, Verseo, Inc., Atlantic Horizon International, Inc., Innodis, S.A., and each of their
14 respective downstream distributors, wholesalers, customers, officers, employees, directors,
15 attorneys, representatives, shareholders, agents, parent companies, corporate affiliates,
16 subsidiaries, regarding Drugstore.com's alleged failure to provide warnings concerning
17 exposures to Lead with respect to any Products sold or distributed by Drugstore.com on or before
18 the date of entry of this Consent Judgment. Compliance with the terms of this Consent Judgment
19 shall constitute compliance with Proposition 65 with respect to any exposures to Lead resulting
20 from purchase or use of Products sold by Drugstore.com.

21 7.2 The release in Section 7.1 does not limit or affect the obligations of any
22 Party created under this Consent Judgment or any Party's rights to enforce the Consent Judgment
23 as provided under this Consent Judgment.

24 **8. SEVERABILITY**

25 8.1 In the event that any of the provisions of this Consent Judgment are held
26 by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely
27 affected.

1 **9. SPECIFIC PERFORMANCE**

2 9.1 The Parties expressly recognize that Drugstore.com's obligations under
3 this Consent Judgment are unique. In the event that Drugstore.com is found to be in breach of
4 this Consent Judgment for failure to comply with the provisions of Section 2 hereof, the Parties
5 agree that it would be extremely impracticable to measure the resulting damages and that such
6 breach would cause irreparable damage. Accordingly, Plaintiff, in addition to any other
7 available rights or remedies, may sue in equity for specific performance, and Drugstore.com
8 expressly waives the defense that a remedy in damages will be adequate.

9 **10. GOVERNING LAW**

10 10.1 The terms of this Consent Judgment shall be governed by the laws of the
11 State of California.

12 **11. RETENTION OF JURISDICTION**

13 11.1 This Court shall retain jurisdiction of this matter to implement this
14 Consent Judgment.

15 **12. PROVISION OF NOTICE**

16 12.1 All notices required pursuant to this Consent Judgment and
17 correspondence shall be sent to the following:

18 For Plaintiff:

19 Eric S. Somers
20 Lexington Law Group, LLP
21 1627 Irving Street
22 San Francisco, CA 94122

23 For Drugstore.

24 Trent H. Norris
25 Bingham McCutcheon LLP
26 Three Embarcadero Center
27 San Francisco, CA 94111

28 **13. COURT APPROVAL**

13.1 This Consent Judgment is not effective until it is approved and entered by
the Court and shall be null and void if, for any reason, it is not approved and entered by the Court
within one year after it has been fully executed by all Parties, in which event any monies that

1 have been provided to Plaintiff, or his counsel pursuant to Section 3 above, shall be refunded
2 within fifteen (15) days after receiving written notice from Drugstore.com that the Consent
3 Judgment has been disapproved or that the one year period has expired without the Consent
4 Judgment being approved.

5 **14. EXECUTION AND COUNTERPARTS**

6 14.1 The stipulations to this Consent Judgment may be executed in counterparts
7 and by means of facsimile, which taken together shall be deemed to constitute one document.

8 **15. ADDITIONAL POST-EXECUTION ACTIVITIES**

9 The Parties agree to mutually employ their best efforts to seek approval of the
10 Consent Judgment by the Court in a timely manner. The Parties acknowledge that, pursuant to
11 Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this
12 Consent Judgment. Accordingly, the Plaintiff will file a Motion to Approve the Consent
13 Judgment ("Motion") within 60 (sixty) days of the Parties' executing the Consent Judgment,
14 unless Drugstore.com agrees in writing to a later date for the filing of the Motion.

15 Drugstore.com shall have no additional responsibility to Plaintiff or Plaintiff's counsel pursuant
16 to Code of Civil Procedure § 1021.5 or otherwise with regard to reimbursement of any fees and
17 costs incurred with respect to the preparation and filing of the Motion or with regard to
18 Plaintiff's counsel appearing for a hearing thereon.

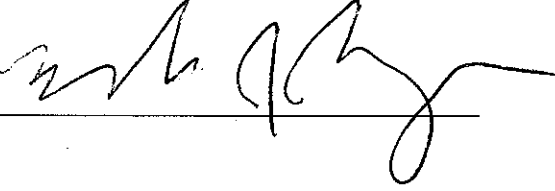
19 **16. AUTHORIZATION**

20 16.1 Each signatory to this Consent Judgment certifies that he or she is fully
21 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter
22 into and execute the Consent Judgment on behalf of the Party represented and legally bind that
23 Party. The undersigned have read, understand and agree to all of the terms and conditions of this
24 Consent Judgment. Except as explicitly provided herein, each Party is to bear its own fees and
25 costs.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AGREED TO:

MICHAEL RUGGIE



Dated: 10/9/07

Michael S Ruggie
Printed Name

DRUGSTORE.COM, INC.

Dated: _____

Printed Name

Title

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

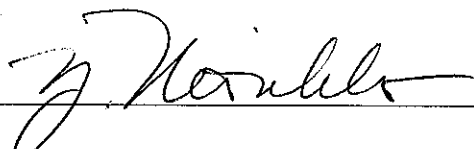
AGREED TO:

MICHAEL RUGGIE

Dated: _____

Printed Name

DRUGSTORE.COM, INC.



Dated: 10/4/07

Yukio Morikubo
Printed Name

Gen. Counsel, VP Strategy
Title

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between Plaintiff and Drugstore.com, the settlement is approved and judgment is hereby entered according to the terms herein.

Dated: _____

Judge, Superior Court of the State of California