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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE CITY AND COUNTY OF SAN FRANCISCO
14
15 UNLIMITED CIVIL JURISDICTION
16

17 LAURENCE VINOCUR,

18 Plaintiff,

19 v.

20 CELEBRATION CREATIONS, INC.;
21 WALGREEN CO.; and DOES 1-150,
22 inclusive,

23 Defendants.

Case No. CGC-13-531451

**[PROPOSED] CONSENT JUDGMENT
AND PROPOSITION 65 SETTLEMENT**

1 **1. INTRODUCTION**

2 **1.1 Parties**

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

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

14 **1.4 General Allegations**

15 Vinocur alleges that Walgreen sold children’s sports themed baskets containing lead in
16 California without first providing the exposure warning required by Proposition 65. Lead is listed
17 pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects or
18 other reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are children’s sports themed
21 baskets containing lead that are imported, manufactured, sold, or distributed for sale by Walgreen
22 in California including, but not limited to, the *Football Basket* (UPC# 704456303127) supplied to
23 Walgreen by Celebration Creations, Inc. (“Celebration Creations”) (“Products”).

24 **1.6 Notice of Violation**

25 On or about March 4, 2013, Vinocur served Walgreen and certain requisite public
26 enforcement agencies with a “60-Day Notice of Violation” (“Notice”) alleging that Walgreen was
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1 in violation of Proposition 65 for failing to warn its customers and consumers in California that
2 the Products expose users to lead.

3 **1.7 Complaint**

4 On May 15, 2013, Vinocur filed the instant action against Walgreen ("Complaint") for the
5 alleged violations of Health and Safety Code section 25249.6 that are the subject of the Notice.

6 **1.8 No Admission**

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

16 **1.9 Consent to Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over Walgreen as to the allegations in the Complaint, that venue is proper in San
19 Francisco County, and that this Court has jurisdiction to enter and enforce the provisions of this
20 Consent Judgment.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date this
23 Consent Judgment is entered by the Court.

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

25 **2.1 Reformulated Products**

26 Commencing on the Effective Date and continuing thereafter, Walgreen shall not
27 knowingly and intentionally sell Celebration Creations Products in California unless the
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1 supplier certifies that the Products do not contain lead in excess of 100 parts per million ("ppm")
2 when analyzed pursuant to Environmental Protection Agency ("EPA") testing methodologies
3 3050B and/or 6010B, or another method of detection and analysis for lead authorized under Title
4 27 California Code of Regulations ("CCR") § 25900.

5 **2.2 Warnings for Existing Inventory**

6 Commencing on the Effective Date and continuing thereafter, for all Celebration
7 Creations Products that are not Reformulated Products, and that remain in inventory with
8 Walgreen, Walgreen agrees to only sell or distribute for sale those Celebration Creations Products
9 with a clear and reasonable warning. Each warning shall be prominently placed with such
10 conspicuousness as compared with other words, statements, designs, or devices as to render it
11 likely to be read and understood by an ordinary individual under customary conditions before
12 purchase or use. Each warning shall be provided in a manner such that the consumer or user
13 understands to which *specific* Product the warning applies, so as to minimize the risk of consumer
14 confusion.

15 Walgreen agrees that it will affix the warning to the Product packaging or labeling, if any,
16 or directly on each Product with the following language:

17 **WARNING:** This product contains lead, a chemical known
18 to the State of California to cause birth defects
19 or other reproductive harm.

20 **3. MONETARY SETTLEMENT TERMS**

21 **3.1 Payments pursuant to Health and Safety Code § 25249.7(b)**

22 In settlement of all the claims referred to in this Consent Judgment, Walgreen shall pay
23 \$18,000.00 in civil penalties. Each civil penalty payment shall be allocated according to Health
24 and Safety Code section 25249.12(c)(1) and (d) with seventy-five percent (75%) of the funds paid
25 to the California Office of Environmental Health Hazard Assessment and twenty-five percent
26 (25%) of the funds remitted to Vinocur. All civil penalty payments shall be delivered to the
27 payment addresses provided in section 3.3.1.
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1 **3.1.1 Initial Civil Penalty**

2 Within five days of the Effective Date, Walgreen shall make an initial civil penalty
3 payment of \$3,000. Walgreen shall provide its payment in two checks for the following amounts
4 made payable to: (a) "OEHHA" in the amount of \$2,250; and (b) "The Chanler Group in Trust for
5 Laurence Vinocur" in the amount of \$750.

6 **3.1.2 Final Civil Penalty**

7 On or before September 1, 2014, Walgreen shall make a final civil penalty
8 payment of \$15,000. Pursuant to title 11 California Code of Regulations, section 3203(c), the
9 final civil penalty payment shall be waived in its entirety if, no later than April 30, 2014, an
10 officer of Walgreen provides Vinocur with written certification that it has not knowingly and
11 intentionally sold Celebration Creations Products in California since execution of this Consent
12 Judgment unless the supplier certified that the Celebration Creations Products do not contain lead
13 in excess of 100 ppm, and that Walgreen shall not knowingly and intentionally sell Celebration
14 Creations Products in California at any time in the future unless the supplier certified that the
15 Products do not contain lead in excess of 100 ppm. The aforementioned written certification and
16 compliance with the terms of this Consent Judgment in lieu of the final civil penalty payment
17 required by this section is a material term, and time is of the essence. Unless waived, Walgreen
18 shall issue two checks for the following amounts payable to: (a) "OEHHA" in the amount of
19 \$11,250; and (b) "The Chanler Group in Trust for Laurence Vinocur" in the amount of \$3,750.

20 **3.2 Reimbursement of Fees and Costs**

21 The parties acknowledge that Vinocur and his counsel offered to resolve this dispute
22 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
23 the issue to be resolved after the material terms of this Consent Judgment had been settled.
24 Shortly after the other settlement terms had been finalized, Walgreen expressed a desire to resolve
25 the fee and cost issue. The Parties then attempted to (and did) reach an accord on the
26 compensation due to Vinocur and his counsel under general contract principles and the private
27 attorney general doctrine codified at California Code of Civil Procedure section 1021.5 for all
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work performed through the mutual execution of this Consent Judgment. Walgreen shall pay \$20,750 for fees and costs incurred as a result of investigating, bringing this matter to Walgreen's attention, and negotiating a settlement in the public interest. Walgreen payment of fees and costs shall be delivered within five days of the Effective Date to the payment address provided in section 3.3.1.

3.3 Payment Procedures

3.3.1. Payment Address

(a) All payments to Vinocur and The Chanler Group shall be delivered to the following address:

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

(b) All payments to OEHHA (EIN: 68-0284486) made pursuant to section 3.1, shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at the following address:

Mike Gyrics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

With a copy of the checks payable to OEHHA mailed to The Chanler Group at the address payment address provided in section 3.3.1(a), as proof of payment to OEHHA.

3.3.2 Required Tax Documentation

(a) Walgreen agrees to provide appropriate 1099 form documentation for the civil penalties paid to OEHHA. The form shall be transmitted to the "Office of Environmental Health Hazard Assessment," 1001 I Street, Sacramento, CA 95814 (EIN: 68-0284486);

(b) For the civil penalties paid to Vinocur, Walgreen agrees to issue a 1099 form to "Laurence Vinocur," whose address and tax identification number shall be furnished after this Consent Judgment is fully executed by the Parties.

(b) For the reimbursement of fees and costs pursuant to section 3.2, Walgreen shall issue a separate 1099 form to "The Chanler Group" (EIN: 94-3171522).

4. CLAIMS COVERED AND RELEASED

4.1 Vinocur's Public Release of Proposition 65 Claims

Vinocur, acting on his own behalf and in the public interest, releases Walgreen and its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, and attorneys ("Releasees") for any violations arising under Proposition 65 for unwarned exposures to lead from the Celebration Creations Products sold by Walgreen prior to the Effective Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to lead from the Celebration Creations Products.

4.2 Vinocur's Individual Release of Claims

Vinocur, in his individual capacity only and *not* in his representative capacity, also provides a release to Walgreen and its Releasees which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Vinocur of any nature, character or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to lead in the Products sold or distributed for sale by Walgreen before the Effective Date.

Vinocur acknowledges that he is familiar with Section 1542 of Civil Code, which provides as follows:

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

Vinocur, his past and current agents, representatives, attorneys, successors, and/or assignees expressly waives and relinquishes any and all rights and benefits which he may

1 have under, or which may be conferred on him by the provisions of Civil Code § 1542 as
2 well as under any other state or federal statute or common law principle of similar effect, to
3 the fullest extent that he may lawfully waive such rights or benefits pertaining to the released
4 matters.

5 **4.3 Walgreen's Release of Vinocur**

6 Walgreen, on its own behalf, and on behalf of its past and current agents, representatives,
7 attorneys, successors, and assignees, hereby waives any and all claims against Vinocur and his
8 attorneys and other representatives, for any and all actions taken or statements made by Vinocur
9 and his attorneys and other representatives, whether in the course of investigating claims,
10 otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the
11 Products.

12 Walgreen acknowledges that it is familiar with Section 1542 of Civil Code, which
13 provides as follows:

14 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
15 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT
16 TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
17 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
OR HER MUST HAVE MATERIALLY AFFECTED HIS OR
HER SETTLEMENT WITH THE DEBTOR.

18 Walgreen, its past and current agents, representatives, attorneys, successors, and/or
19 assignees expressly waives and relinquishes any and all rights and benefits which it may have
20 under, or which may be conferred on it by the provisions of Civil Code § 1542 as well as under
21 any other state or federal statute or common law principle of similar effect, to the fullest extent
22 that it may lawfully waive such rights or benefits pertaining to the released matters.

23 **5. COURT APPROVAL**

24 This Consent Judgment is not effective until it is approved and entered by the Court and
25 shall be null and void if, for any reason, it is not approved and entered by the Court within one
26 year after it has been fully executed by the Parties.
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1 **6. SEVERABILITY**

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

5 **7. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the state of
7 California and apply within the state of California. In the event that Proposition 65 is repealed,
8 preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Products,
9 then Walgreen may provide written notice to Vinocur of any asserted change in the law, and shall
10 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent
11 that, the Products are so affected. Nothing in this Consent Judgment shall be interpreted to
12 relieve Walgreen from any obligation to comply with any pertinent state or federal toxics control
13 laws.

14 **8. NOTICES**

15 Unless specified herein, all correspondence and notices required by this Consent Judgment
16 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
17 return receipt requested; or (iii) a recognized overnight courier to the following addresses:

18 For Walgreen:

19 Andrew J. Marks, Esq.
20 Senior Attorney
21 Walgreen Co.
22 200 Wilmot Road
23 Deerfield, IL 60015

24 with a copy to:

25 Renee D. Wasserman, Esq.
26 Rogers Joseph O'Donnell
27 311 California Street, 10th Floor
28 San Francisco, CA 94104

For Vinocur:

1 The Chanler Group
2 Attn: Proposition 65 Coordinator
3 2560 Ninth Street
4 Parker Plaza, Suite 214
5 Berkeley, CA 94710

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

8 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

12 **10. POST EXECUTION ACTIVITIES**

13 Vinocur agrees to comply with the reporting form requirements referenced in Health and
14 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and
15 Safety Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the
16 settlement. In furtherance of obtaining such approval, Vinocur and Walgreen agree to mutually
17 employ their best efforts, and that of their counsel, to support the entry of this agreement as
18 judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of
19 this Section, "best efforts" shall include, at a minimum, cooperating on the drafting and filing of
20 the necessary moving papers, and supporting the motion for judicial approval.

21 **12. MODIFICATION**

22 This Consent Judgment may be modified only by: (i) a written agreement of the Parties
23 and upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful
24 motion or application of any Party and the entry of a modified consent judgment by the Court.

25 **13. AUTHORIZATION**

26 The undersigned are authorized to execute this Consent Judgment and have read,
27 understood, and agree to all of the terms and conditions contained herein.
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1 **AGREED TO:**

2 Date: February 12, 2014

3
4 By: Laurence V.
5 LAURENCE VINOCUR

AGREED TO:

Date: 2-19-14

By: Robert J. Gas, Insurance
WALGREEN CO. Mgr.