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11 LAURENCE VINOUCUR

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF MARIN
10 UNLIMITED CIVIL JURISDICTION

12 LAURENCE VINOUCUR
13 Plaintiff,
14
15 v.
16 FACTORIES CONNECTION, INC.; and
17 DOES 1-150, inclusive,
18 Defendants.

Case No. CIV1500889
[PROPOSED] CONSENT JUDGMENT
(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

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

6 **1.2 Plaintiff**

7 Vinocur is a resident of the State of California who seeks to promote awareness of
8 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful
9 substances contained in consumer and commercial products.

10 **1.3 Defendant**

11 Factories Connection employs ten or more persons and is a person in the course of doing
12 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California
13 Health and Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Vinocur alleges that Factories Connection manufactures, imports, sells and/or distributes for
16 sale in California, back scratchers with vinyl/PVC grips or other components containing di(2-
17 ethylhexyl)phthalate (“DEHP”), and that it does so without providing the health hazard warning
18 that Vinocur alleges is required by Proposition 65.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are back scratchers with vinyl/PVC grips or
21 other components containing DEHP, including, but not limited to, the *Extendable Back Scratcher*,
22 *UPC #0 94088 29004 0* manufactured, sold or distributed in California by Factories Connection
23 (collectively, “Products”).

24 **1.6 Notice of Violation**

25 On July 11, 2014, Vinocur served Factories Connection and the requisite public
26 enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that Factories
27 Connection violated Proposition 65 when it failed to warn its customers and consumers in
28 California that the Products expose users to DEHP. To the best of the Parties’ knowledge, no

1 public enforcer has commenced and is diligently prosecuting an action to enforce the allegations set
2 forth in the Notice.

3 **1.7 Complaint**

4 On March 10, 2015, Vinocur commenced the instant action, naming Factories Connection
5 as a defendant, for the alleged violations of Proposition 65 that are the subject of the Notice.

6 **1.8 No Admission**

7 Factories Connection denies the material, factual, and legal allegations contained in the
8 Notice and Complaint, and maintains that all of the products that it has sold or distributed for sale in
9 California, including the Products, have been, and are, in compliance with all laws. Nothing in this
10 Consent Judgment shall be construed as an admission by Factories Connection 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 Factories Connection of any fact, finding,
13 conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or
14 otherwise affect Factories Connection’s obligations, responsibilities, and duties under this Consent
15 Judgment.

16 **1.9 Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over Factories Connection as to the allegations contained in the Complaint, that venue
19 is proper in the County of Marin, and that the Court has jurisdiction to enter and enforce the
20 provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure
21 section 664.6.

22 **1.10 Effective Date**

23 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date that
24 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5,
25 including any unopposed Tentative Ruling.
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1 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

2 **2.1 Reformulation Standards**

3 Reformulated Products are defined as those Products containing DEHP in concentrations
4 less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental
5 Protection Agency testing methodologies 3580A and 8270C or any other methodology utilized by
6 federal or state agencies for the purpose of determining the DEHP content in a solid substance.

7 **2.2 Reformulation Commitment**

8 As of the Effective Date, Factories Connection shall not manufacture, import, distribute, sell
9 or offer the Products for sale in the State of California unless they are Reformulated Products
10 pursuant to Section 2.1 above, or carry the Proposition 65 warnings specified in Section 2.3 below.

11 **2.3 Product Warnings**

12 Commencing on the Effective Date, Factories Connection shall provide clear and reasonable
13 warnings for all Products as set forth in subsections 2.3(a) and (b) for all products that do not
14 qualify as Reformulated Products. Each warning shall be prominently placed with such
15 conspicuousness as compared with other words, statements, designs, or devices as to render it likely
16 to be read and understood by an ordinary individual under customary conditions before purchase or
17 use. Each warning shall be provided in a manner such that the consumer or user understands to
18 which *specific* Product the warning applies, so as to minimize the risk of consumer confusion.

19 **(a) Retail Store Sales.**

20 **(i) Product Labeling.** Factories Connection shall affix a warning to the
21 packaging, labeling, or directly on each Product provided for sale in retail outlets in California that
22 states:

23 WARNING: This product contains chemicals, including DEHP, known to the State
24 of California to cause cancer and birth defects and other reproductive
harm.

25 Or

26 WARNING: This product contains chemicals known to the state of California to
27 cause cancer and birth defects and other reproductive harm.

28 **(b) Mail Order Catalog and Internet Sales.** Factories Connections represents that it is
not currently selling the Products via mail order catalog nor via the internet, however, in the event

1 that Factories Connection sells Products via mail order catalog and/or the internet in the future, to
2 customers located in California, after the Effective Date, that are not Reformulated Products,
3 Factories Connection shall provide warnings for such Products sold via mail order catalog or the
4 internet to California residents. Warnings given in the mail order catalog or on the internet shall
5 identify the *specific* Product to which the warning applies as further specified in Sections 2.3(b)(i)
6 and (ii).

7 (i) **Mail Order Catalog Warning.** Any warning provided in a mail order
8 catalog shall be in the same type size or larger than the Product description text within the catalog.
9 The following warning shall be provided on the same page and in the same location as the display
10 and/or description of the Product:

11 WARNING: This product contains chemicals, including DEHP, known to the State
12 of California to cause cancer and birth defects and other reproductive
13 harm.

14 Or

15 WARNING: This product contains chemicals known to the state of California to
16 cause cancer and birth defects and other reproductive harm.

17 Where it is impracticable to provide the warning on the same page and in the same location
18 as the display and/or description of the Product, Factories Connection may utilize a designated
19 symbol to cross reference the applicable warning and shall define the term “designated symbol”
20 with the following language on the inside of the front cover of the catalog or on the same page as
21 any order form for the Product(s):

22 WARNING: Certain products identified with this symbol ▼
23 and offered for sale in this catalog contain chemicals, including
24 DEHP, known to the State of California to cause cancer and birth
25 defects and other reproductive harm.

26 Or

27 WARNING: This product contains chemicals known to the state of California to
28 cause cancer and birth defects and other reproductive harm.

The designated symbol must appear on the same page and in close proximity to the display
and/or description of the Product. On each page where the designated symbol appears, Factories

1 Connection must provide a header or footer directing the consumer to the warning language and
2 definition of the designated symbol.

3 **(ii) Internet Website Warning.** A warning shall be given in conjunction with
4 the sale of the Products via the internet, which warning shall appear either: (a) on the same web
5 page on which a Product is displayed; (b) on the same web page as the order form for a Product; (c)
6 on the same page as the price for any Product; or (d) on one or more web pages displayed to a
7 purchaser during the checkout process. The following warning statement shall be used and shall
8 appear in any of the above instances adjacent to or immediately following the display, description,
9 or price of the Product for which it is given in the same type size or larger than the Product
10 description text:

11 WARNING: This product contains chemicals, including DEHP, known to the State
12 of California to cause cancer and birth defects and other reproductive
13 harm.

13 Or

14 WARNING: This product contains chemicals known to the state of California to
15 cause cancer and birth defects and other reproductive harm.

16 Alternatively, the designated symbol may appear adjacent to or immediately following the
17 display, description, or price of the Product for which a warning is being given, provided that the
18 following warning statement also appears elsewhere on the same web page, as follows:

19 WARNING: This product contains chemicals, including DEHP, known to the State
20 of California to cause cancer and birth defects and other reproductive
21 harm.

21 Or

22 WARNING: This product contains chemicals known to the state of California to
23 cause cancer and birth defects and other reproductive harm.

23 **3. MONETARY SETTLEMENT TERMS**

24 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

25 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
26 claims referred to in this Consent Judgment, Factories Connection has been assessed \$34,000 in
27 civil penalties in accordance with this Section. Each penalty payment will be allocated in
28 accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds

1 remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the
2 remaining 25% of the penalty remitted to Vinocur. Vinocur’s counsel shall be responsible for
3 remitting Factories Connection’s penalty payment(s) under this Consent Judgment to OEHHA.

4 **3.1.1 Initial Civil Penalty.** Factories Connection shall make an initial civil
5 penalty payment of \$14,000. Factories Connection shall provide its payment in a single check
6 made payable to “Laurence Vinocur, Client Trust Account” to be delivered to the address provided
7 in Section 3.3, below within two business days of the Effective Date.

8 **3.1.2 Final Civil Penalty.** On August 15, 2015, Factories Connection shall make
9 a final civil penalty payment of \$20,000. Pursuant to title 11 California Code of Regulations,
10 section 3203(c), Vinocur agrees that the final civil penalty payment shall be waived in its entirety if,
11 no later than August 1, 2015, an officer of Factories Connection provides Vinocur with a signed
12 declaration certifying that all of the Products it ships for sale or distributes for sale in California as
13 of the date if its declaration are Reformulated Products, and that Factories Connection will continue
14 to offer only Reformulated Products in California in the future. The option to certify reformulation
15 in lieu of making the final civil penalty payment otherwise required by this Section is a material
16 term, and time is of the essence. To obtain a waiver of the final civil penalty, Factories Connection
17 must deliver its declaration certifying reformulation to Vinocur’s counsel at the address provided in
18 Section 3.3, below. In the event that Factories Connection does not timely certify its compliance or
19 make the final civil penalty payment required by this Section, the Parties agree that Vinocur may
20 file a motion or application seeking an order compelling Factories Connection’s compliance with
21 this Section. If successful, the Parties further agree that Vinocur shall be entitled to his reasonable
22 attorneys’ fees and costs pursuant to general contract principles and Code of Civil Procedure
23 section 1021.5.

24 **3.2 Reimbursement of Attorneys’ Fees and Costs**

25 The Parties acknowledge that Vinocur and his counsel offered to resolve this dispute
26 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
27 the issue to be resolved after the material terms of the agreement had been settled. Shortly after
28 the other settlement terms had been finalized, Factories Connection expressed a desire to resolve

1 Vinocur’s fees and costs. The Parties then negotiated a resolution of the compensation due to
2 Vinocur and his counsel under general contract principles and the private attorney general doctrine
3 codified at California Code of Civil Procedure § 1021.5. For all work performed through the
4 mutual execution of this agreement and the Court’s approval of the same, but exclusive of fees and
5 costs on appeal, if any, Factories Connection shall reimburse Vinocur and his counsel \$28,500.
6 Factories Connection’s payment shall be delivered to the address in Section 3.3 in the form of a
7 check payable to “The Chanler Group” no later than two business days after the Effective Date.
8 The reimbursement shall cover all fees and costs incurred by Vinocur investigating, bringing this
9 matter to Factories Connection’s attention, litigating, and negotiating a settlement of the matter in
10 the public interest.

11 **3.3 Payment Address**

12 All payments required by this Consent Judgment shall be delivered to the following
13 address:

14 The Chanler Group
15 Attn: Proposition 65 Controller
16 2560 Ninth Street
17 Parker Plaza, Suite 214
18 Berkeley, CA 94710

17 **4. CLAIMS COVERED AND RELEASED**

18 **4.1 Vinocur’s Release of Proposition 65 Claims**

19 Vinocur, acting on his own behalf and in the public interest, releases Factories Connection
20 and its parents, subsidiaries, affiliated entities under common ownership, directors, officers,
21 employees, and attorneys (“Releasees”) and each entity to whom Factories Connection directly or
22 indirectly distributes or sells the Products including, but not limited to, its downstream distributors,
23 wholesalers, customers, retailers, franchisers, cooperative members, licensors and licensees
24 (“Downstream Releasees”) for any violations arising under Proposition 65 for unwarned exposures
25 to DEHP from the Products manufactured, imported, distributed or sold by Factories Connection
26 prior to the Effective Date, as set forth in the Notice. Compliance with the terms of this Consent
27 Judgment constitutes compliance with Proposition 65 by Factories Connection with respect to the
28

1 alleged or actual failure to warn about exposures to DEHP from Products manufactured, sold or
2 distributed for sale by Factories Connection after the Effective Date.

3 **4.2 Vinocur’s Individual Release of Claims**

4 Vinocur, in his individual capacity only and *not* in his representative capacity, also provides
5 a release to Defendants, Releasees, and Downstream Releasees which shall be effective as a full and
6 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
7 attorneys’ fees, damages, losses, claims, liabilities and demands of Vinocur of any nature, character
8 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
9 exposures to DEHP in Products manufactured, imported, distributed or sold by Factories
10 Connection before the Effective Date.

11 **4.3 Factories Connection’s Release of Vinocur**

12 Factories Connection, on its own behalf and on behalf of its past and current agents,
13 representatives, attorneys, successors and/or assignees, hereby waives any and all claims against
14 Vinocur and his attorneys and other representatives, for any and all actions taken or statements
15 made (or those that could have been taken or made) by Vinocur and his attorneys and other
16 representatives in the course of investigating claims, seeking to enforce Proposition 65 against it in
17 this matter, or with respect to the Products.

18 **5. COURT APPROVAL**

19 This Consent Judgment is not effective until it is approved and entered by the Court and
20 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
21 after it has been fully executed by all Parties. Vinocur and Factories Connection agree to support
22 the entry of this agreement as a judgment, and to obtain the Court’s approval of their settlement in a
23 timely manner. The Parties acknowledge that, pursuant to California Health and Safety Code
24 section 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment,
25 which motion Vinocur shall draft and file and Factories Connection shall support, appearing at the
26 hearing if so requested. If any third-party objection to the motion is filed, Vinocur and Factories
27 Connection agree to work together to file a reply and appear at any hearing. This provision is a
28 material component of the Consent Judgment and shall be treated as such in the event of a breach.

1 **6. SEVERABILITY**

2 If, subsequent to the Court’s approval and entry of this Consent Judgment as a judgment,
3 any provision of this Consent Judgment is held by a court to be unenforceable, the validity of the
4 remaining provisions shall 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 California
7 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
8 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Factories
9 Connection may provide Vinocur with written notice 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 relieve
12 Factories Connection from its obligation to comply with any pertinent state or federal law or
13 regulation.

14 **8. NOTICE**

15 Unless specified herein, all correspondence and notice 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 any Party by the other at the
18 following addresses:

19 To Factories Connection:

20 Elizabeth McNulty, Esq.
21 Archer Norris, PLC
22 4695 MacArthur Court, Suite 350
Newport Beach, CA 92660

To Vinocur:

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

23
24 Any Party may, from time to time, specify in writing to the other Party a change of address to
25 which all notices and other communications shall be sent.
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1 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

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

5 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

6 Vinocur and his counsel agree to comply with the reporting form requirements referenced in
7 California Health and Safety Code section 25249.7(f).

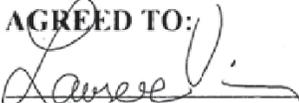
8 **11. MODIFICATION**

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

12 **12. AUTHORIZATION**

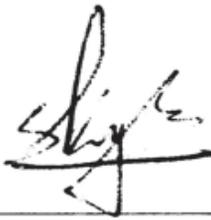
13 The undersigned are authorized to execute this Consent Judgment on behalf of their
14 respective Parties and have read, understood, and agree to all of the terms and conditions of this
15 Consent Judgment.

16
17 **AGREED TO:**

18 
19 LAURENCE VINO CUR

20 Dated: April 30, 2015

21 **AGREED TO:**

22 
23 FACTORIES CONNECTION, INC.

24 By: SCOTT LBB
(Print Name)

25 Its: PRBSIDENT
(Title)

26 Dated: 4-22-2015

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