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9 LAURENCE VINO CUR

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

12 LAURENCE VINO CUR,
13 Plaintiff,

14 v.

15 EPIC PRODUCTS, INC. GELSON'S
16 MARKETS; and DOES 1 -100, inclusive,
17 Defendants.

Case No. CGC-15-543578

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 1.1 **Parties**

3 The parties to this Consent Judgment (“Consent Judgment”) are Plaintiff Laurence
4 Vinocur (“Vinocur”) on the one hand, and Defendants Epic Products, Inc. (“Epic”) and Gelson’s
5 Markets (“Gelson’s”) (collectively “Defendants”) on the other hand (each a “Party” and
6 collectively “Parties”).

7 1.2 **Plaintiff**

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

11 1.3 **Defendants**

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

16 1.4 **General Allegations**

17 Vinocur alleges that Epic and Gelson’s manufacture, distribute, import, sell and/or offer
18 for sale in California shot glasses with exterior designs containing lead without first providing
19 the clear and reasonable warning required by Proposition 65. Lead is listed pursuant to
20 Proposition 65 as a chemical known to the State of California to cause birth defects or other
21 reproductive harm.

22 1.5 **Product Description**

23 The products that are covered by this Consent Judgment are shot glasses with exterior
24 designs that Plaintiff alleges contain lead that are sold or offered for sale in California by Epic,
25 hereinafter the “Products.”

26 1.6 **Notice of Violation**

27 On October 24, 2014, Vinocur served Defendants and certain public prosecutors with a
28 “60-Day Notice of Violation” (“Notice”) alleging that Defendants were in violation of

1 Proposition 65 for failing to warn its customers and consumers in California that the Products
2 expose users to lead. To the best of the Parties' knowledge, no public enforcer has commenced
3 and is diligently prosecuting the allegations set forth in the Notice.

4 1.7 **Complaint**

5 On January 9, 2015, Vinocur filed the instant action against Defendants for the alleged
6 violations of Health and Safety Code section 25249.6 that are the subject of the Notice.

7 1.8 **No Admission**

8 Defendants deny the material, factual, and legal allegations contained in the Notice and
9 Complaint, and maintain that all of the products that they have sold and distributed in California,
10 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
11 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law,
12 or violation of law, nor shall compliance with this Consent Judgment constitute or be construed
13 as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This
14 Section shall not, however, diminish or otherwise affect Defendants' 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 Defendants 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 **Epic's Financial Condition**

22 The Parties stipulate that the material terms of this Consent Judgment, including the
23 amounts and timing of monetary payments, were agreed upon in reliance on Epic's
24 representations regarding its financial condition.

25 **2. DEFINITIONS**

26 2.1 "Covered Products" means and is limited to Products identified in Section 1.5
27 above that Plaintiff alleges contain lead sold or distributed for sale in California by Defendants.

28 2.2 "Effective Date" means the date this Consent Judgment is entered by the court.

1 2.3 “Reformulation Standard” means the level of lead required under Section 3.1.

2 **3. INJUNCTIVE RELIEF: REFORMULATION**

3 **3.1 Reformulation Standard**

4 Commencing no later than the Effective Date, Defendants shall not manufacture,
5 distribute, purchase or import for sale, sell, and/or offer for sale in California the Covered
6 Products identified in Section 1.5 that contain lead in concentrations exceeding 0.09 percent (90
7 parts per million (“ppm”)) in any exterior decorations when analyzed pursuant to U.S.
8 Environmental Protection Agency testing methodologies 3050B and 6010B, or equivalent
9 methodologies utilized by federal or California state agencies for the purpose of determining lead
10 content in a solid substance.

11 **4. PAYMENTS**

12 **4.1 Payments Pursuant to Health and Safety Code § 25249.7(b)**

13 Pursuant to Health and Safety Code section 25249.7(b)(2), except as provided in Section
14 4.1.2, Epic shall pay \$12,000 in civil penalties. Each penalty payment shall be allocated
15 according to Health and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty
16 amount remitted to the California Office of Environmental Health Hazard Assessment and the
17 remaining 25% of each penalty payment remitted to Vinocur.

18 **4.1.1 Initial Civil Penalty**

19 Epic shall pay an initial civil penalty of \$4,000 within five (5) days of the
20 Effective Date.

21 **4.1.2 Final Civil Penalty; Waiver on Certification of Compliance with**
22 **Section 3.1**

23 No later than 30 days after the Effective Date, Epic shall pay a final civil penalty of
24 \$8,000, except that, the final civil penalty will be waived, in its entirety, if no later than 30 days
25 after the Effective Date, Epic provides Vinocur’s counsel with written certification that as of the
26 date of its certification, all Covered Products manufactured, distributed, purchased or imported
27 for sale in California meet the Reformulation Standard, and that they will continue to only
28

1 manufacture, distribute, purchase or import Covered Products meeting the Reformulation
2 Standard for sale in California in the future.

3 **4.2 Reimbursement of Attorneys' Fees and Costs**

4 The Parties acknowledge that Vinocur and his counsel offered to resolve this dispute
5 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
6 leaving the issue to be resolved after the material terms of the agreement had been settled.
7 Shortly after all other settlement terms had been finalized, Defendants expressed a desire to
8 resolve the fees and costs. The Parties then attempted to (and did) reach an accord on the
9 compensation due Vinocur and his counsel under general contract principles and the private
10 attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work
11 performed in this matter exclusive of fees and costs incurred on appeal, if any. Under these legal
12 principles, Defendants shall pay \$30,000 for the fees and costs incurred investigating, litigating,
13 and enforcing this matter, including the fees and costs incurred (and to be incurred) drafting,
14 negotiating, and obtaining the Court's approval of this Consent Judgment in the public interest.

15 Defendants shall pay the above-described \$30,000 for plaintiff's attorneys' fees and costs
16 as follows:

17 (a) Epic shall pay \$20,000 for plaintiff's attorneys' fees and costs, to be paid
18 in 12 monthly installments, such that the first installment of \$1,666.74 shall be paid
19 within thirty (30) days of the Effective Date, and 11 subsequent installments of \$1,666.66
20 shall be made on the same day of each following month thereafter, until paid in full; and

21 (b) A payment of \$10,000 for plaintiff's attorneys' fees and costs shall be paid
22 by or on behalf of Gelson's within five (5) days of the Effective Date.

23 **4.3 Payment Procedures.**

24 **4.3.1 Payment Timing / Enforcement of Payment Terms**

25 In the event that any payment required by this Consent Judgment is untimely, the Parties
26 agree and acknowledge that (a) Epic shall be liable to Vinocur for 10% simple interest on any
27 unpaid amount(s); (b) Vinocur shall notify Epic in writing of such default, by mailing to Epic
28 (with a copy to Epic's counsel of record), to the address in Section 6 below, and Epic shall have

1 7 days in which to cure such default. In the event of Epic’s failure to cure such default, Vinocur
2 may seek to enforce Epic’s payment obligations under Code of Civil Procedure § 664.6; and (c)
3 in enforcing Epic’s payment obligations as set forth herein, Vinocur shall be entitled to recover
4 the attorneys’ fees incurred to recover any unpaid amounts required by this Consent Judgment
5 pursuant to general contract principles and Code of Civil Procedure § 1021.5.

6 **4.3.2 Payees and Payment Addresses**

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

9 Moscone Emblidge & Otis LLP
10 Attn: Proposition 65 Coordinator
11 220 Montgomery Street, Suite 220
San Francisco, CA 94104

12 Epic shall provide payment of Vinocur’s portion of the civil penalties by check made payable to
13 Laurence Vinocur, with IRS form W-9 to be provided by counsel for Vinocur prior to payment.

14 Defendants shall provide payment of the attorneys’ fees and costs by check made payable to
15 Moscone Emblidge & Otis LLP, which shall also provide an IRS form W-9 prior to payment.

16 (b) **All payments to OEHHA (EIN: 68-0284486) shall be delivered**
17 **directly to OEHHA (Memo line “Prop 65 Penalties”) at the following address:**

18 Mike Gyurics
19 Fiscal Operations Branch Chief
20 Office of Environmental Health Hazard Assessment
21 P.O. Box 4010
Sacramento, CA 95812-4010

22 With a copy of the check(s) payable to OEHHA mailed to Moscone Emblidge & Otis LLP at the
23 payment address provided in section 4.3.2(a), as proof of payment to OEHHA.

24 **5. CLAIMS COVERED AND RELEASED**

25 **5.1 Public Release of Proposition 65 Claims**

26 In consideration of the promises and commitments herein contained, Vinocur, acting on
27 his own behalf and in the public interest, hereby releases Epic and its parents, subsidiaries,
28 affiliated entities under common ownership or control, and each of their directors, officers,

1 employees, and attorneys (“Releasees”); and each entity to whom the Releasees directly or
2 indirectly distributes or sells Covered Products including, but not limited to, any of its
3 downstream distributors (including, but not limited to, Unified Grocers, Inc.), wholesalers,
4 customers, retailers (including, but not limited to, Gelson’s Markets), franchisees, cooperative
5 members, licensors, and licensees (“Downstream Defendant Releasees”), for any violations
6 arising under Proposition 65 for unwarned exposures to lead from Covered Products
7 manufactured, distributed, sold, and offered for sale to consumers in California, as set forth in
8 the Notice, prior to the Effective Date.

9 **5.2 Private Release in Plaintiff’s Individual, Non-representative Capacity**

10 Vinocur, in his individual capacity only and *not* in his representative capacity, also
11 provides a release to Epic, Releasees, and Downstream Defendant Releasees which shall be
12 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
13 obligations, costs, expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of
14 Vinocur of any nature, character or kind, whether known or unknown, suspected or unsuspected,
15 arising out of alleged or actual unwarned exposures to lead from the Covered Products before the
16 Effective Date.

17 Vinocur, also in his individual capacity only and *not* in his representative capacity, and
18 Epic, having the specific intent to release all claims and potential claims arising from the Notice
19 served by Vinocur on Epic on October 24, 2014, hereby acknowledge and expressly waive the
20 provisions of § 1542 of the California Civil Code, which provides:

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

26 Notwithstanding the provisions of § 1542 of the California Civil Code, Vinocur, in his
27 individual capacity only and not in his representative capacity, and Epic, intend to release all
28 claims arising from the Notice served by Vinocur on Epic on October 24, 2014, known or
unknown, and asserted or not asserted as of the date hereof.

1 **5.3 Epic’s Release of Vinocur**

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

7 **6. NOTICES**

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

11 For Vinocur:

12 Moscone Emblidge & Otis LLP
13 Attn: Proposition 65 Coordinator
14 220 Montgomery Street, Suite 220
15 San Francisco, CA 94104

16 For Epic:

17 Ardeen Dubow, President
18 Epic Products, Inc.
19 3100 South Susan Street
20 Santa Ana, CA 92704

21 With a copy to:

22 Aaron Bartz
23 Shanberg, Stafford & Bartz LLP
24 19200 Von Karman Ave., Suite 400
25 Irvine, CA 92612

26 For Gelson’s:

27 Rob McDougall, President
28 Gelson’s Markets
 16400 Ventura Blvd., Suite 240
 Encino, CA 91436

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1 With a copy to:

2 James Neudecker
3 Reed Smith LLP
4 101 Second Street, Suite 1800
5 San Francisco, CA 94105-3659

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

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

9 7.1 Vinocur agrees to comply with the reporting form requirements referenced in
10 Health and Safety Code section 25249.7(f).

11 7.2 The Parties further acknowledge that, pursuant to Health and Safety Code
12 § 25249.7(f)(4), a noticed motion is required to obtain judicial approval of the settlement, which
13 motion Vinocur shall draft and file, and Epic shall join. Vinocur and Defendants agree to
14 mutually employ their best efforts to support the entry of this agreement as a Consent Judgment
15 and obtain approval of the Consent Judgment by the Court in a timely manner. This provision is
16 a material component of the Consent Judgment and shall be treated as such in the event of a
17 breach.

18 7.3 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
19 and any and all prior agreements between the parties as to the Notices or Complaint referenced
20 herein shall terminate and become null and void, and the action shall revert to the status that
21 existed prior to the execution date of this Consent Judgment; (b) no term of this Consent
22 Judgment or any draft thereof, or of the negotiation, documentation, or other part or aspect of the
23 Parties' settlement discussions, shall have any effect, nor shall any such matter be admissible in
24 evidence for any purpose in this action, or in any other proceeding; and (c) the parties agree to
25 meet and confer to determine whether to modify the terms of the Consent Judgment and to
26 resubmit it for approval.

27 **8. ENFORCEMENT**

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

1 **9. SEVERABILITY**

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

5 **10. 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 if any of the
9 provisions of this Consent Judgment are rendered inapplicable or no longer require as a result of
10 any such repeal or preemption or rendered inapplicable by reason of law generally as to the
11 Products, then Epic shall provide written notice to Vinocur of any asserted change in law, and, if
12 Vinocur agrees, Epic shall have no further obligations pursuant to this Consent Judgment with
13 respect to, and to the extent that, the Products are so affected. Nothing in this Consent Judgment
14 shall be interpreted to relieve Epic from any obligation to comply with any pertinent state or
15 federal toxics control law.

16 **11. DRAFTING**

17 The Parties, including their counsel, have participated and cooperated in the drafting and
18 preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts
19 of the Parties. This Consent Judgment was subject to revision and modification by the Parties
20 and has been accepted and approved as to its final form by all Parties and their counsel.
21 Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall not be
22 interpreted against any Party as a result of the manner of the preparation of this Consent
23 Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction
24 providing that ambiguities are to be resolved against the drafting Party should not be employed
25 in the interpretation of this Consent Judgment and, in this regard, the Parties hereby waive
26 California Civil Code Section 1654.

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28 ///

1 **12. MODIFICATION**

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

5 **13. COUNTERPARTS**

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

9 **14. AUTHORIZATION**


10 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the
11 Party he or she represents to agree to the terms and conditions of this Consent Judgment, to enter
12 into and execute the Consent Judgment on behalf of the Party represented, and to legally bind
13 that Party, and that he or she has read, understood, and agree to all of the terms and conditions of
14 this Consent Judgment.

15 AGREED TO:

AGREED TO:

16 Date: 2/29/2016

Date: _____

17 By: 
18 Plaintiff Laurence Vinocur

19 By: _____
Defendant Epic Products, Inc.

20 AGREED TO:

21 Date: _____

22 By: _____
23 Defendant Gelson's Markets

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10 Each signatory to this Consent Judgment certifies that he or she is fully authorized by
11 the Party he or she represents to agree to the terms and conditions of this Consent Judgment, to
12 enter into and execute the Consent Judgment on behalf of the Party represented, and to legally
13 bind that Party, and that he or she has read, understood, and agree to all of the terms and
14 conditions of this Consent Judgment.

15 AGREED TO:

AGREED TO:

16 Date: _____

16 Date: 2/24/2016

17 By: _____
18 Plaintiff Laurence Vinocur

17 By: 
18 Defendant Epic Products, Inc.

19 AGREED TO:

20 Date: _____

21 By: _____
22 Defendant Gelson's Markets

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12 into and execute the Consent Judgment on behalf of the Party represented, and to legally bind
13 that Party, and that he or she has read, understood, and agree to all of the terms and conditions of
14 this Consent Judgment.

15 AGREED TO:

AGREED TO:

16
17 Date: _____

Date: _____

18
19 By: _____
Plaintiff Laurence Vinocur

By: _____
Defendant Epic Products, Inc.

20
21 AGREED TO:

22 Date: 2/24/2016

23
24 By: [Signature]

Defendant Gelson's Markets