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10 LAURENCE VINOUCUR

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO
13 UNLIMITED CIVIL JURISDICTION

14 LAURENCE VINOUCUR,

15 Plaintiff,

16 v.

17 BED BATH & BEYOND INC., *et al.*,

18 Defendants.

Case No. CGC-16-550192

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 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 Bed Bath & Beyond Inc. (“BB&B”), with Vinocur and BB&B each individually
5 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 exposures
8 to toxic chemicals and to improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Vinocur alleges that BB&B imports, sells, or distributes for sale in California children’s play
16 tents supplied by The Monster Factory that contain the flame retardant chemical, tris(1,3-dichloro-2-
17 propyl) phosphate (“TDCPP”), and that it does so without first providing the exposure warning
18 required by Proposition 65. TDCPP is listed pursuant to Proposition 65 as a chemical known to
19 cause cancer.

20 **1.5 Product Description**

21 For purposes of this Consent Judgment, the term “Products” is defined as children’s play tents
22 containing TDCPP that are imported, sold, or distributed for sale in California by BB&B and
23 supplied to BB&B by The Monster Factory, including, but not limited to, *The Monster Factory VW*
24 *Campervan Children’s Pop Up g` Play Tent, VWPT01, UPC #5 060016 406703.*

25 **1.6 Notice of Violation**

26 On November 10, 2015, Vinocur served BB&B, and the requisite public enforcement
27 agencies with a 60-Day Notice of Violation (“Notice”) alleging that BB&B violated Proposition 65
28 by failing to warn its customers and consumers in California of the health hazards associated with

1 exposures to TDCPP from the Products. No public enforcer has commenced and is diligently
2 prosecuting an action to enforce the violations alleged in the Notice.

3 **1.7 Complaint**

4 On February 1, 2016, Vinocur filed the instant action (“Complaint”), naming BB&B as a
5 defendant in an action to enforce the alleged violations of Proposition 65 that are the subject of the
6 Notice.

7 **1.8 No Admission**

8 BB&B denies the material, factual, and legal allegations contained in the Notice and
9 Complaint, and maintains that all of the products it has sold and distributed for sale 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, or
12 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
13 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
14 not, however, diminish or otherwise affect BB&B’s obligations, responsibilities, and duties under this
15 Consent Judgment.

16 **1.9 Jurisdiction**

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

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
23 the Court grants the motion for approval of the Consent Judgment contemplated by Section 5.

24 **2. INJUNCTIVE RELIEF**

25 **2.1 Commitment to Reformulate or Provide Warnings**

26 Commencing on the Effective Date and continuing thereafter, BB&B agrees to: (1) only sell
27 or distribute for sale in California, Reformulated Products, or (2) issue clear and reasonable warnings
28 pursuant to Section 2.3.

1 **2.2 Reformulated Products Defined**

2 For purposes of this Consent Judgment, the term "Reformulated Products" is defined as
3 Products containing no more than 25 parts per million (.0025%) of TDCPP when analyzed pursuant
4 to EPA testing methodologies 3545 and 8270C, or equivalent methodologies utilized by federal or
5 state agencies to determine the presence, and measure the quantity, of TDCPP in a solid substance.

6 **2.3 Clear and Reasonable Warnings Defined**

7 For Products that do not qualify as Reformulated Products, BB&B will, after the Effective
8 Date, only sell or offer for sale in California such Products with warnings in accordance with
9 Sections 2.3.1, 2.3.2 or 2.3.2.

10 **2.3.1 Product Labeling:** Warnings that are affixed to the packaging, labeling or
11 directly on each Product sold in retail outlets in California, shall state:

12 **WARNING:** This product contains TDCPP, a
13 chemical known to the State of
14 California to cause cancer.

15 Or

16 **WARNING:** This product contains a chemical
17 [chemicals] known to the State of
18 California to cause cancer [and birth
19 defects or other reproductive harm].¹

20 Each warning shall be prominently placed with such conspicuousness as compared with other words,
21 statements, designs, or devices as to render it likely to be read and understood by an ordinary
22 individual under customary conditions of purchase or use.

23 **2.3.2 Point of Sale Warnings:** Alternatively, BB&B may have warning signs posted
24 in close proximity to the point of display of the Products that state:

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26
27 ¹ BB&B may only use the bracketed terms or phrases to warn of the risks of harm associated
28 with an exposure where it reasonably believes that, in addition to TDCPP, the Products contain one
or more other Proposition 65-listed chemicals.

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WARNING: PROP 65 Affected Merchandise
Use of the following products will expose
you to chemicals known to the State of
California to cause Cancer, birth defects or
other reproductive harm.

Where more than one Product is sold in close proximity to other like items or to those that do not
require a warning (e.g. Products that qualify as Reformulated Products), the following statement shall
be used:

WARNING: The following products contain a chemical [chemicals] known to the
State of California to cause cancer [and birth defects or other
reproductive harm].²
[List products for which warning is required]

2.3.3 Internet Website Warnings: In the event BB&B sells Products that do not
qualify as Reformulated Products, via an internet website to customers located in California, the
warning shall include the verbiage identified in Section 2.2.1 and shall appear either: (a) on the same
web page on which a Product is displayed and/or described; (b) on the same page as the price for the
Product; (c) on the same page as the order form or (d) on one or more web pages displayed to a
purchaser prior to purchase during the checkout process. Alternatively, a symbol may appear
adjacent to or immediately following the display, description, price, or checkout listing of the
Product, provided that the warning statement also appears elsewhere on the same web page and a
consumer is reasonably likely to understand to which products on the website are associated with the
warning symbol.

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty Payments

Pursuant to Health and Safety Code section 25249.7(b), and in settlement of all the claims
referred to in the Notice, Complaint, and this Consent Judgment, BB&B shall pay civil penalties in
accordance with this Section 3.1 and its subsections. Each civil penalty payment shall be allocated
according to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%)

² BB&B may only use the bracketed terms or phrases to warn of the risks of harm associated
with an exposure where it reasonably believes that, in addition to TDCPP, the Products contain one
or more other Proposition 65-listed chemicals.

1 of the penalty paid to the California Office of Environmental Health Hazard Assessment
2 (“OEHHA”), and the remaining twenty-five percent (25%) of the penalty retained by Vinocur.
3 Vinocur’s counsel shall be responsible for delivering OEHHA’s portion of any penalty payment(s)
4 made under this Consent Judgment.

5 **3.1.1 Initial Civil Penalty**

6 BB&B shall make an initial civil penalty payment of \$4,000. BB&B shall provide its
7 payment in two checks for the following amounts made payable to (a) “OEHHA” in the amount of
8 \$3,000; and (b) “Laurence Vinocur, Client Trust Account” in the amount of \$1,000.

9 **3.1.2 Final Civil Penalty**

10 On December 15, 2016, BB&B shall make a final civil penalty payment of \$12,000. Pursuant
11 to title 11 California Code of Regulations section 3203(c), Vinocur agrees that the final civil penalty
12 payment shall be waived in its entirety if, no later than November 1, 2016, an officer of BB&B
13 provides Vinocur with a signed declaration verifying that, as of the date of the declaration, all of the
14 Products (if any) that BB&B is selling or distributing for sale in California, are Reformulated
15 Products, and that BB&B will only sell or offer for sale in California in the future Products that
16 qualify as Reformulated Products. The option to certify to complete reformulation in lieu of making
17 the final civil penalty payment required by this Section is a material term, and time is of the essence.
18 Unless waived, the final civil penalty payment shall be allocated as set forth in Section 3.1 with the
19 penalty payments being tendered in two checks for the following amounts made payable to (a)
20 “OEHHA” in the amount of \$9,000; and (b) “Laurence Vinocur, Client Trust Account” in the amount
21 of \$3,000.

22 **3.2 Reimbursement of Attorney’s Fees and Costs**

23 The Parties acknowledge that Vinocur and his counsel offered to resolve this dispute without
24 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
25 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
26 other settlement terms had been finalized, the Parties negotiated the compensation due to Vinocur and
27 his counsel under general contract principles and the private attorney general doctrine codified at
28 California Code of Civil Procedure section 1021.5 for all work performed through the mutual

1 execution of this Consent Judgment, and court approval of the same, but exclusive of fees and costs
2 on appeal, if any. Under these legal principles, BB&B shall pay \$28,500 for all fees and costs
3 incurred by Vinocur investigating, bringing this matter to BB&B's attention, litigating and
4 negotiating a settlement in the public interest.

5 **3.3 Payment Timing; Payments Held in Trust**

6 All payments due under this Consent Judgment shall be held in trust until such time as the
7 Court approves the Parties' settlement. Within five (5) days of the date that this Consent Judgment is
8 fully executed by the Parties, with the exception of any final civil penalty payment that may be
9 required by Section 3.1.2, all payments due under this Consent Judgment shall be delivered to
10 BB&B's counsel and held in trust until the Court grants the motion for approval of this Consent
11 Judgment contemplated by Section 5. BB&B's counsel shall provide Vinocur's counsel with written
12 confirmation upon its receipt of the settlement payments. Within five days of the Court's approval
13 of this Consent Judgment, BB&B's counsel shall deliver the initial civil penalty and attorneys' fee
14 reimbursement payments to Vinocur's counsel. In the event that the final civil penalty payment
15 required by subsection 3.1.2 has not been waived and becomes due prior to the Effective Date, the
16 penalty payment shall be tendered to BB&B's counsel when due, held in trust until, and disbursed
17 within five days after, the Effective Date.

18 **3.4 Payment Address**

19 All payments required by this Consent Judgment shall be delivered to:

20 The Chanler Group
21 Attn: Proposition 65 Controller
22 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

23 **4. CLAIMS COVERED AND RELEASED**

24 **4.1 Vinocur's Public Release of Proposition 65 Claims**

25 Vinocur, acting on his own behalf and in the public interest, releases BB&B and its parents,
26 subsidiaries and affiliated entities (including but not limited to Buy Buy Baby, Inc.) under common
27 ownership, directors, officers, employees, and attorneys ("Releasees"), and each person and entity
28 to whom BB&B directly or indirectly distributes or sells the Products including, without limitation,

1 its downstream customers, distributors, wholesalers, and retailers ("Downstream Releasees") for
2 any violation or alleged violation arising under Proposition 65 pertaining to the failure to warn
3 about exposures to TDCPP from Products sold or distributed for sale by BB&B prior to the
4 Effective Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment
5 constitutes compliance with Proposition 65 with respect to exposures to TDCPP from Products sold
6 or distributed for sale by BB&B after the Effective Date.

7 **4.2 Vinocur's Individual Release of Claims**

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

14 **4.3 BB&B's Release of Vinocur**

15 BB&B, on its own behalf, and on behalf of its past and current agents, representatives,
16 attorneys, successors, and assignees, hereby waives any and all claims against Vinocur, and his
17 attorneys and other representatives, for any and all actions taken or statements made by Vinocur,
18 and his attorneys and other representatives, whether in the course of investigating claims, otherwise
19 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

20 **5. COURT APPROVAL**

21 This Consent Judgment is not effective until it is approved and entered by the Court and shall
22 be null and void if it is not approved and entered by the Court within one year after it has been fully
23 executed by the Parties, or by such additional time as the Parties may agree in writing.

24 **6. SEVERABILITY**

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

28

1 **7. GOVERNING LAW**

2 The terms of this Consent Judgment shall be governed by the laws of the state of California
3 and apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise
4 rendered inapplicable by reason of law generally or as to the Products, then BB&B may provide
5 written notice to Vinocur of any asserted change in the law, and shall have no further injunctive
6 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
7 so affected.

8 **8. NOTICE**

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

12 For Bed Bath & Beyond, Inc.:

13 Kenneth Bradley, Esq.
14 Vice President - Litigation
15 Bed Bath & Beyond Inc.
16 650 Liberty Avenue
17 Union, NJ 07083

18 with a copy to:

19 John E. Dittoe, Esq.
20 Law Office of John E. Dittoe
21 70 Hazel Lane
22 Piedmont, CA 94611

23 For Vinocur:

24 Proposition 65 Coordinator
25 The Chanler Group
26 2560 Ninth Street
27 Parker Plaza, Suite 214
28 Berkeley, CA 94710-2565

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

1 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

5 **10. POST EXECUTION ACTIVITIES**

6 Vinocur agrees to comply with the reporting form requirements referenced in Health and
7 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
8 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement,
9 which motion Vinocur shall draft and file. In furtherance of obtaining such approval, the Parties
10 agree to mutually employ their best efforts, and those of their counsel, to support the entry of this
11 agreement as a judgment, and to obtain judicial approval of their settlement in a timely manner. For
12 purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for
13 approval, responding to any objection that any third-party may file or lodge, and appearing at the
14 hearing before the Court if so requested.

15 **11. MODIFICATION**

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

19 **12. AUTHORIZATION**

20 The undersigned are authorized to execute this Consent Judgment and acknowledge that they
21 have read, understand, and agree to all of the terms and conditions contained herein.

22 **AGREED TO:**

22 **AGREED TO:** *KOB*

23
24 Date: 10/13/2016 _____

23
24 Date: *October 7, 2016* _____

25
26 By: *Laurence Vinocur*
LAURENCE VINO CUR _____

25
26 By: *Kenneth O. Bradley*
Kenneth O. Bradley, Vice President-Litigation-
BED BATH & BEYOND INC.
Vice President- Legal and General Counsel