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

13 LAURENCE VINOUCUR,
14 Plaintiff,
15 v.
16 RUSSELL STOVER CHOCOLATES, LLC,
17 Defendant.
18

Case No. CGC-17-557047
[PROPOSED] CONSENT JUDGMENT
(Health & Safety Code § 25249.6 *et seq.*)

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1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Laurence Vinocur
4 ("Vinocur"), and defendant Russell Stover Chocolates, LLC, whose brands include Whitman's
5 (collectively "Russell Stover"), with Vinocur and Russell Stover each individually referred to as a
6 "Party" and collectively as the "Parties."

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

12 Vinocur alleges that Russell Stover employs ten or more individuals and is a "person in the
13 course of doing business" for purposes of the Safe Drinking Water and Toxic Enforcement Act of
14 1986, Health and Safety Code section 25249.6 *et seq.* ("Proposition 65").

15 **1.4 General Allegations**

16 Vinocur alleges that Russell Stover manufactures, imports, sells, distributes, and/or offers for
17 sale or use in California, vinyl/PVC candy boxes that contain di(2-ethylhexyl) phthalate ("DEHP")
18 without first providing the exposure warning required by Proposition 65. DEHP is listed pursuant to
19 Proposition 65 as a chemical known to the State of California to cause birth defects or other
20 reproductive harm.

21 **1.5 Product Description**

22 The products covered by this Consent Judgment are vinyl/PVC candy boxes containing
23 DEHP that are manufactured, imported, sold, distributed, and/or offered for sale or use in California
24 by Russell Stover including, but not limited to, *Whitman's Happy Valentine's Day Assorted*
25 *Chocolates, UPC #0 76740 07235 5* (collectively "Covered Products").

26 **1.6 Notice of Violation**

27 On or about September 29, 2016, Vinocur served Russell Stover and certain requisite public
28 enforcement agencies with a "60-Day Notice of Violation" ("Notice") alleging that the sale and

1 distribution of Covered Products, including without limitation *Whitman's Happy Valentine's Day*
2 *Assorted Chocolates*, violated Proposition 65 by failing to provide a "clear and reasonable warning"
3 to consumers in California that such Covered Products expose users to DEHP. To the best of the
4 Parties' knowledge, no public enforcer has commenced and is diligently prosecuting the allegations
5 set forth in the Notice.

6 **1.7 Complaint**

7 On February 10, 2017, Vinocur filed the instant action ("Complaint"), for the alleged
8 violations of Proposition 65 that are the subject of the Notice.

9 **1.8 No Admission**

10 Russell Stover denies the material, factual, and legal allegations contained in the Notice and
11 Complaint, and maintains that all of the products that it has manufactured, imported, distributed, sold,
12 and/or offered for sale or use in California, including the Covered Products, have been, and are, in
13 compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission of
14 any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this
15 Consent Judgment constitute or be construed as an admission of any fact, finding, conclusion of law,
16 issue of law, or violation of law. This Section shall not, however, diminish or otherwise affect
17 Russell Stover's obligations, responsibilities, and duties under this Consent Judgment.

18 **1.9 Jurisdiction**

19 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
20 jurisdiction over Russell Stover as to the allegations contained in the Complaint, that venue is proper
21 in the County of San Francisco, and that the Court has jurisdiction to enter and enforce the provisions
22 of this Consent Judgment pursuant to Proposition 65 and California Code of Civil Procedure section
23 664.6.

24 **1.10 Effective Date**

25 For purposes of this Consent Judgment, the term "Effective Date" means the date on which
26 the Court approves and enters this Consent Judgment.

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1 **2. INJUNCTIVE RELIEF: REFORMULATION**

2 Commencing on the Effective Date, and continuing thereafter, any Covered Products
3 manufactured by Russell Stover for sale in or into California shall be “Reformulated Products.” For
4 purposes of this Consent Judgment, Reformulated Products are Covered Products containing DEHP
5 in concentrations of not more than 0.1 percent (1,000 parts per million) when analyzed pursuant to
6 U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, Consumer Product
7 Safety Commission test method: CPSC-CH-C1001-09.3, Determination of Phthalates (April 1, 2010),
8 as amended from time to time, or equivalent methodology utilized by federal or state government
9 agencies for the purpose of determining DEHP content in a solid substance.

10 **3. MONETARY SETTLEMENT TERMS**

11 **3.1 Civil Penalty Payment**

12 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
13 this Consent Judgment, Russell Stover shall pay \$5,000 in civil penalties. The civil penalty payment
14 shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-
15 five percent (75%) of the funds paid to the California Office of Environmental Health Hazard
16 Assessment (“OEHHA”), and twenty-five percent (25%) of the funds remitted to Vinocur. Russell
17 Stover shall provide its payment in two checks for the following amounts made payable to: (a)
18 “OEHHA” in the amount of \$3,750; and (b) “Laurence Vinocur, Client Trust Account” in the amount
19 of \$1,250, delivered as provided under Section 3.3 below. Vinocur’s counsel shall be responsible for
20 delivering the penalty payment made under this Consent Judgment to OEHHA.

21 **3.2 Reimbursement of Attorney’s Fees and Costs**

22 The parties acknowledge that Vinocur and his counsel offered to resolve this dispute without
23 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
24 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
25 other settlement terms had been finalized, Russell Stover expressed a desire to resolve Vinocur’s fees
26 and costs. The Parties then attempted to (and did) reach an accord on the compensation due to
27 Vinocur and his counsel under general contract principles and the private attorney general doctrine,
28 as codified at California Code of Civil Procedure section 1021.5, for all work performed through the

1 mutual execution of this Consent Judgment and seeking court approval as provided in Section 10
2 below. As provided for in Section 3.3. below, Russell Stover shall pay \$28,000 for all of the fees and
3 costs incurred by Vinocur through the Effective Date in investigating, bringing this matter to Russell
4 Stover's attention, litigating and obtaining a settlement in the public interest.

5 **3.3 Payment Timing/Enforcement of Payment Terms**

6 Russell Stover shall deliver all payments required by this Consent Judgment to Vinocur's
7 counsel within ten (10) days of the Effective Date. In the event that any payment is untimely, the
8 Parties agree and acknowledge that (a) Russell Stover shall be liable to Vinocur for ten percent (10%)
9 simple interest on any unpaid amount(s); (b) Vinocur may seek to enforce Russell Stover's payment
10 obligations under general contract principles and Code of Civil Procedure sections 664.6; and (c)
11 Vinocur shall be entitled to any fees incurred recovering such settlement payments pursuant to
12 general contract principles and Code of Civil Procedure section 1021.5.

13 **3.4 Payment Address**

14 All payments owed by Russell Stover under this Consent Judgment shall be delivered to:

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

20 **4. CLAIMS COVERED AND RELEASED**

21 **4.1 Vinocur's Public Release of Proposition 65 Claims**

22 Vinocur, acting on his own behalf and in the public interest, releases Russell Stover and its
23 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
24 owners, shareholders and attorneys ("Releasees"), and each entity to whom it directly or indirectly
25 distributes or sells the Covered Products including, but not limited to, its downstream distributors,
26 wholesalers, customers, retailers (including, without limitation, Walgreen Company), franchisers,
27 cooperative members, licensors and licensees (collectively "Downstream Releasees") for any
28 violations arising under Proposition 65 based on any alleged exposure to DEHP from Covered
Products manufactured, imported, sold, distributed and/or offered for sale or use by Russell Stover
prior to the Effective Date. Compliance with the terms of this Consent Judgment constitutes

1 compliance with Proposition 65 with respect to the alleged or actual failure to warn of exposure to
2 DEHP from Covered Products manufactured, imported, sold, distributed and/or offered for sale or
3 use by Releasees and/or Downstream Releasees.

4 **4.2 Vinocur's Individual Release of Claims**

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

12 **4.3 Russell Stover's Release of Vinocur**

13 Russell Stover, on its own behalf, and on behalf of its past and current agents,
14 representatives, attorneys, successors, and assignees, hereby waives any and all claims against
15 Vinocur and his attorneys and other representatives, for any and all actions taken or statements
16 made by Vinocur and his attorneys and other representatives, whether in the course of investigating
17 claims or otherwise seeking to enforce Proposition 65 against Russell Stover in this matter with
18 respect to the Covered Products, through the Effective Date.

19 **4.4 Mutual Waiver of California Civil Code Section 1542**

20 The Parties each acknowledge that he/it is familiar with Section 1542 of the Civil Code,
21 which provides as follows:

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

27 The Parties, each on his/its own behalf (and Vinocur in his individual capacity only and *not* in
28 any representative capacity), and on behalf of his/its past and current agents, representatives, counsel,
29 successors, and/or assignees, expressly waive and relinquish any and all rights and benefits that they
30 may have under, or that may be conferred upon them by the provisions of Civil Code section 1542 as

1 well as under any other state or federal statute or common law principle of similar effect, to the
2 fullest extent he/it may lawfully waive such rights or benefits pertaining to the released matters, as
3 defined by Sections 4.2 and 4.3, above.

4 **5. COURT APPROVAL**

5 This Consent Judgment is not effective until it is approved and entered by the Court and shall
6 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
7 has been fully executed by the Parties, or within such additional time as the Parties may mutually
8 agree to in writing.

9 **6. SEVERABILITY**

10 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any
11 provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be
12 adversely affected, so long as the deletion of provisions deemed unenforceable does not materially
13 affect, or otherwise result in the effect of the Consent Judgment being contrary to the intent of the
14 Parties.

15 **7. GOVERNING LAW**

16 The terms of this Consent Judgment shall be governed by the laws of the state of California
17 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
18 otherwise rendered inapplicable by reason of law generally, or if any provision of this Consent
19 Judgment is rendered inapplicable or no longer required as a result of any such repeal or preemption,
20 or rendered inapplicable by reason of law generally, or as to the Covered Products, then Russell
21 Stover may provide written notice to Vinocur of any asserted change in the law, and shall have no
22 further injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent
23 that, the Covered Products are so affected.

24 **8. NOTICE**

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

2 David Shapland
3 Chief Financial Officer
4 Russell Stover Chocolates, LLC
5 4900 Oak Street
6 Kansas City, MO 64112

7 Chris Locke, Esq.
8 Farella Braun + Martel LLP
9 235 Montgomery Street, 17th Floor
10 San Francisco, CA 94104

11 For Vinocur:

12 Proposition 65 Coordinator
13 The Chanler Group
14 2560 Ninth Street
15 Parker Plaza, Suite 214
16 Berkeley, CA 94710-2565

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

19 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

23 **10. POST EXECUTION ACTIVITIES**

24 Vinocur agrees to comply with the reporting form requirements referenced in Health and
25 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
26 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of this Consent
27 Judgment, which Vinocur shall take the lead to draft and file and Russell Stover shall support,
28 including appearing at the hearing if so required.

11. MODIFICATION; DUTY TO MEET AND CONFER

11.1. Modification

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

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11.2. Duty to Provide Notice; Meet and Confer

Any Party seeking to modify this Consent Judgment or allege a violation thereof shall first attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

12. ATTORNEYS FEES AND COSTS

Except as provided in Section 3.2 above, each Party shall bear their own attorneys' fees and costs in this matter, except as provided by law in an action for enforcement of this Consent Judgment.

13. AUTHORIZATION

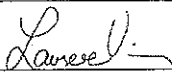
The undersigned warrant and represent that they are authorized to execute this Consent Judgment, and that they have read, understood, and agree to all of the terms and conditions contained herein.


14. FULL SETTLEMENT

The Parties intend for this Consent Judgment to constitute a full and final settlement of this matter, and that it should be approved and entered as a final judgment.

AGREED TO:

AGREED TO:

Date: February 17, 2017
By: 
LAURENCE VINOCUR

Date: 22 Feb 2017
By: 
David Shapland, CFO
RUSSELL STOVER CHOCOLATES, LLC