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LAURENCE VINOCUR

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
10 UNLIMITED CIVIL JURISDICTION

11
12 LAURENCE VINOCUR,
13 Plaintiff,
14 v.
15 TIERRA-DERCO INTERNATIONAL,
16 LLC.; and DOES 1-150, inclusive,
17 Defendants.

Case No. CGC-18-567856
[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 Tierra-Derco International, LLC (“Tierra-Derco”), with Vinocur and
5 Tierra-Derco 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 Tierra-Derco 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, California Health and
13 Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Vinocur alleges that Tierra-Derco manufactures, imports, sells and/or distributes for sale in
16 California, products containing di(2-ethylhexyl)phthalate (“DEHP”), and that it does so without
17 providing the health hazard warning that Vinocur alleges is required by Proposition 65.

18 **1.5 Product Description**

19 The products covered by this Consent Judgment are limited to (a) *The Trake, 900105, MIN*
20 *6 MFG CS 24, UPC #0 17783 90105 9*, with vinyl/PVC tool grips components, and (b) the
21 vinyl/PVC raincoats, *Little Pals Paint Your Own Funky Raincoat, Item Nos. 7-LP472 and 7-LP474,*
22 *UPC #5 013556 124743*, that are manufactured, imported, distributed, sold and/or offered for sale
23 in California by Tierra-Derco (collectively, “Products”).

24 **1.6 Notice of Violation**

25 On March 21, 2018, Vinocur served Tierra-Derco and the requisite public enforcement
26 agencies with a 60-Day Notice of Violation (the “Notice”), alleging that Tierra-Derco violated
27 Proposition 65 when it failed to warn its customers and consumers in California that the Products
28

1 expose users to DEHP. To the best of the Parties' knowledge, no public enforcer has commenced
2 and is diligently prosecuting an action to enforce the allegations set forth in the Notice.

3 **1.7 Complaint**

4 On July 3, 2018, Vinocur commenced the instant action, naming Tierra-Derco as one of the
5 defendants for the alleged violations of Proposition 65 that are the subject of the Notice.

6 **1.8 No Admission**

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

15 **1.9 Jurisdiction**

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

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that
23 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5,
24 including any unopposed tentative ruling.

25 **2. INJUNCTIVE SETTLEMENT TERMS**

26 **2.1 Reformulation Standards**

27 "For the purposes of this Consent Judgment, "Reformulated Products" are defined as
28 Products that contain DEHP in concentrations that do not exceed 1,000 parts per million (0.1%)

1 when analyzed pursuant to U.S. Environmental Protection Agency (“EPA”) testing methodologies
2 3580A and 8270C or equivalent methodologies utilized by state or federal agencies for the purpose
3 of determining DEHP content in a solid substance. For purposes of compliance with this
4 reformulation standard, testing samples shall be prepared and extracted using Consumer Product
5 Safety Commission (CPSC) methodology CPSC-CH-C1001.09.3 and analyzed using U.S.
6 Environmental Protection Agency (EPA) methodology 8270D, or other methodologies utilized by
7 federal or state government agencies to determine phthalate content in a solid substance.

8 **2.2 Reformulation Commitment**

9 Commencing on the Effective Date and continuing thereafter, Tierra-Derco shall only
10 manufacture for sale, purchase for sale, or import for sale, Products in the State of California that
11 are either (a) Reformulated Products pursuant to Section 2.1 above, or (b) offered by Tierra-Derco
12 with appropriate health hazard warnings per section 2.3, below.

13 **2.3 Clear and Reasonable Warnings**

14 Commencing on the Effective Date and continuing thereafter, for any Products sold or
15 distributed for sale in California by Tierra-Derco that are not Reformulated Products, Tierra-Derco
16 agrees to only sell or distribute such Products for sale in California with a clear and reasonable
17 warning in accordance with this Section. Tierra-Derco further agrees that any warning used will be
18 prominently placed in relation to the Products with such conspicuousness when compared with
19 other words, statements, designs, or devices as to render it likely to be read and understood by an
20 ordinary individual under customary conditions of purchase or use. For purposes of this Consent
21 Judgment, a warning satisfying the above criteria that is affixed directly to a Product or its
22 accompanying labeling or packaging containing the following statement shall be deemed clear and
23 reasonable:

24
25 **⚠ WARNING:** This product can expose you to chemicals
26 including DEHP, which is known to the
27 State of California to cause birth defects
28 or other reproductive harm. For more
information go to www.P65Warnings.ca.gov.

1 **3. MONETARY SETTLEMENT TERMS**

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

3 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
4 claims referred to in this Consent Judgment, Tierra-Derco shall pay a total of \$2,000 in civil
5 penalties in accordance with this Section. The penalty payment will be allocated in accordance
6 with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to
7 the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
8 25% of the penalty remitted to Vinocur, as follows: Tierra-Derco shall, within ten (10) business
9 days of the last date that this Consent judgment is executed by both Vinocur and Tierra-Derco,
10 issue a check payable to its counsel’s law firm in the amount of \$2,000, to be held in trust by its
11 counsel. Counsel for Tierra-Derco shall provide The Chanler Group with written confirmation
12 within three days of receipt that the funds have been deposited in a trust account. Within three
13 business days of the Effective Date, counsel shall issue the following checks: (1) to “Laurence
14 Vinocur, Client Trust Account” totaling \$500; and (2) to the “Office of Environmental Health
15 Hazard Assessment” totaling \$1,500. Upon receipt, Vinocur and his counsel will then ensure
16 payment to OEHHA. All penalty payments shall be delivered to the addresses listed in Section 3.3
17 below.

18 **3.2 Reimbursement of Attorneys’ Fees and Costs**

19 The Parties acknowledge that Vinocur and his counsel offered to resolve this dispute
20 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
21 the issue to be resolved after the material terms of the agreement had been settled. Shortly after
22 the other settlement terms had been finalized, Tierra-Derco expressed a desire to resolve Vinocur’s
23 fees and costs. The Parties then negotiated a resolution of the compensation due to Vinocur and
24 his counsel under general contract principles and the private attorney general doctrine codified at
25 California Code of Civil Procedure § 1021.5. For all work performed through the mutual
26 execution of this agreement and the Court’s approval of the same, but exclusive of fees and costs
27 on appeal, if any, Tierra-Derco shall reimburse Vinocur and his counsel \$25,000 in two equal
28 installments. Within ten (10) business days of the last date that this Consent judgment is executed

1 by both Vinocur and Tierra-Derco, Tierra-Derco shall issue a check for the first installment
2 payable to its counsel's law firm in the amount of \$12,500, to be held in trust by its counsel.
3 Counsel for Tierra-Derco shall provide The Chanler Group with written confirmation within three
4 (3) days of receipt that the funds have been deposited in a trust account. Within three (3) business
5 days of the Effective Date, counsel for Tierra-Derco shall issue a check for the first installment
6 payable to "The Chanler Group" in the amount of \$12,500 and shall deliver it to the address listed
7 in Section 3.3. Within ten (10) days after the Effective Date, Tierra-Derco shall issue a check for
8 the second installment payable to "The Chanler Group" in the amount of \$12,500 and shall deliver
9 it directly to the address listed in Section 3.3. The reimbursements payable pursuant to this
10 subsection in two installments shall cover all fees and costs incurred by Vinocur investigating,
11 bringing this matter to Tierra-Derco's attention, litigating, and negotiating a settlement of the
12 matter in the public interest.

13 **3.3 Payment Address**

14 All payments required by this Consent Judgment shall be delivered to the following
15 address: 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 Release of Proposition 65 Claims**

22 Vinocur, acting on his own behalf and in the public interest, releases Tierra-Derco and its
23 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
24 and attorneys ("Releasees") and each entity to whom Tierra-Derco directly or indirectly distributes
25 or sells the Products including, but not limited to, its downstream distributors, wholesalers,
26 customers, retailers, franchisers, cooperative members, licensors and licensees ("Downstream
27 Releasees") for any violations arising under Proposition 65 for unwarned exposures to DEHP from
28 the Products manufactured, imported, distributed or sold by Tierra-Derco prior to the Effective
Date, as set forth in the Notice.

1 **4.2 Vinocur’s Individual Release of Claims**

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

9 **4.3 Tierra-Derco’s Release of Vinocur**

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

16 **5. COURT APPROVAL**

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

27
28

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 Tierra-
9 Derco may provide Vinocur with written notice of any asserted change in the law, and shall have no
10 further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the
11 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Tierra-
12 Derco from its obligation to comply with any pertinent state or federal law or regulation.

13 **8. NOTICE**

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

18	To Tierra-Derco:	To Vinocur:
19	Brian Wilson	Attn: Proposition 65 Coordinator
20	Accounting/HR Manager	The Chanler Group
21	TDI Brands	2560 Ninth Street
22	1000 South Saint Charles Street	Parker Plaza, Suite 214
	Jasper, IN 47546	Berkeley, CA 94710-2565

23 with a copy to Tierra-Derco’s counsel:

24 Jack Henning, Esq.
25 Dillingham & Murphy, LLP
26 601 Montgomery Street, Suite 1900
San Francisco, California 94111

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

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).

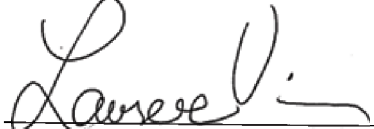
8 **11. MODIFICATION**

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 agreed to all of the terms and conditions of this
15 Consent Judgment.

16
17 **AGREED TO:**

18 

19 LAURENCE VINOCUR

20
21 Dated: 12/13/2018

17 **AGREED TO:**

18 

19 By: CHRIS STERUBERG
20 (Print Name)

21 Its: CFO
22 (Title)

23 Dated: 12/10/18