

SETTLEMENT AGREEMENT

AG Notice No. 2023-02592

1. INTRODUCTION

1.1 Vinocur and Night Galaxy, Inc.

This settlement agreement (Settlement Agreement) is entered into by and between Laurence Vinocur and Night Galaxy, Inc. (Settling Entity) with Vinocur and the Settling Entity referred to as the “Parties.” Vinocur is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Pursuant to California Health & Safety Code §§25249.5, *et seq.* (Proposition 65), the Settling Entity is a responsible party selling the products at issue set forth in subsection 1.3 below to (a) California consumers or (b) downstream entities in the course of doing business which the Settling Entity has reason to believe sell into the California marketplace (customers).

1.2 General Allegations

The Settling Entity enters into this Settlement Agreement on behalf of the noticed violator described in subsection 1.4 below, with whom such Settling Entity has a contract for one or more of the products at issue which contains indemnity and defense clauses. The Settling Entity has accepted a tender from the noticed violator and approached Vinocur to resolve such violator’s alleged liability. Additionally, the Settling Entity is making commitments in furtherance of the public interest as set forth below.

Vinocur alleges that the Settling Entity manufactures, imports, distributes, sells and/or otherwise facilitates for sale in California the lead products defined below, and that it does so without providing the health hazard warning required by Proposition 65 for consumer exposures to lead. Lead is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer, and birth defects or other reproductive harm.

1.3 Product Description

The lead products covered by this Settlement Agreement is limited to following Amazon Identification Number (ASIN) B003CU75TY, with the description, "Danielson Slinky Weight Lead Std 3/8 Oz Fishing Equipment, Multi, one Size," which was offered for sale by the Settling Entity on amazon.com, hereinafter the "Product" or "Products."

1.4 Notices of Violation

On or about August 8, 2020, October 30, 2020, April 29, 2021 and July 21, 2022, Vinocur served Amazon.com, Inc. and certain requisite public enforcement agencies with 60-Day Notices of Violation (notice), alleging that Amazon.com, Inc. violated Proposition 65 when it failed to warn customers or consumers in California that the Products expose users to lead. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the notice. The Settling Entity understands that Vinocur may need to issue a 60-Day Notice of Violation expressly naming the Settling Entity. To facilitate the issuance of such sixty-day letter, the Settling Entity agrees to certain conditions set forth below.

1.5 No Admission

The Settling Entity (and on behalf of the noticed violator described in subsection 1.4 above) denies the material, factual and legal allegations contained in the notice and maintains that all Products that were sold and distributed in California have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by the Settling Entity (and/or Amazon) of any fact, finding, issue of law or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by the Settling Entity (and/or Amazon) of any fact, finding, conclusion, issue of law or violation of law. This subsection shall not, however, diminish or otherwise affect the obligations, responsibilities, and duties under this Settlement Agreement including the waivers and acknowledgements contained in Sections 6 and 10 below.

1.6 Effective Date

For purposes of this Settlement Agreement, the term “Effective Date” shall mean July 19, 2023.

2. INJUNCTIVE RELIEF: WARNINGS OR REFORMULATION

2.1 Injunctive Relief

The Settling Entity agrees to provide the requisite health hazard warning as set forth in subsections 2.3 through 2.6 below for each Product unless it is reformulated.


2.2 Reformulation Standards

A “reformulated” product (a) contains lead in concentrations that do not exceed 90 parts per million, equivalent to 0.009%, in any exterior parts analyzed pursuant to U.S. Environmental Protection Agency (EPA) methodologies 3050B and 6010B, or (b) yields a result of no more than 1.0 micrograms of lead when sampled according to NIOSH 9100 protocol and analyzed according to EPA 6010B. In addition to the above tests, the Settling Entity may use equivalent methods utilized by any California or federal agency to determine lead content in a solid substance or the amount of the bioavailability of the toxicant through a wipe test, respectively.


2.3 Clear and Reasonable Warnings

Commencing on or before August 25, 2023 (the compliance date), for any Products that are not reformulated, the Settling Entity shall provide clear and reasonable warnings for all units of the Products offered for sale on amazon.com and other websites and sold to any purchaser with a shipping address in California. Each warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.

(a) **Warning.** The warning shall consist of the following or other substantially similar language that is in compliance with Proposition 65 (Warning):

 **WARNING:** This product can expose you to chemicals including lead, which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

(b) **Short-Form Warning.** The Settling Entity may, but is not required to, use the following short-form warning as set forth in this subsection 2.3(b) (Short-Form Warning) or any substantially similar language so long as it is consistent with the implementing regulations, and subject to the additional requirements in subsections 2.5 and 2.6, as follows:

 **WARNING:** Cancer and Reproductive Harm – www.P65Warnings.ca.gov

(c) **Foreign Language Requirement.** Where a product sign or label used to provide a warning includes consumer information in a language other than English, the warning shall also be provided in such language.


2.4 On-Product Warnings

The Settling Entity shall affix a warning to the label or otherwise directly on each unit of the Product provided through in-store retail outlets in California or sold online to consumers in California either directly or through its customers. For the purpose of this Settlement Agreement, “label” means a display of written, printed or graphic material that is printed on or affixed to a Product or its immediate container. The entire warning shall appear in a type size of at least 6-point type and no smaller than the largest type size used for other consumer information on the product. The warning language shall consist of either the Warning, or the Short-Form Warning described above in subsection 2.3(a) or (b), respectively, and be consistent with 2.3(c) above if it applies.

2.5 Mail Order Catalog Warnings

In the event that, the Settling Entity prints new catalogs and sells units of the Products via mail order through such catalogs to California consumers or through its customers, the Settling Entity shall provide a warning for each unit of such Product both on the label in accordance with subsection 2.4 above, and in the catalog in a manner that clearly associates the warning with the specific Product being purchased. Any warning provided in a mail order catalog shall be in the same type size or larger than other consumer information conveyed for such Product within the catalog and shall be located on the same display page of the item. The catalog warning may use the Short-Form Warning content described in subsection 2.3(b) if the language provided on the Product label also uses the Short-Form Warning.

2.6 Internet Warnings

If the Settling Entity offers for sale any of the Products to California consumers through websites such as amazon.com that are not reformulated as set forth in subsection 2.2 above, it shall ensure that the required warning (with the language set forth in subsection 2.3 above) is prominently displayed to the purchaser prior to completion of the transaction without requiring the potential buyer to use considerable effort to be made aware of the health hazard advisory. The warning (or a clearly marked hyperlink to the warning using the word “**WARNING**”) given in conjunction with the online sale of the Products may appear either: (a) prominently placed on a webpage in which the Product’s photograph, price, or “add to cart” section are displayed; (b) on the same webpage as the order form for the Product; or (c) on any webpage displayed to the purchaser during the checkout process and prior to its completion for any purchaser with a California shipping address. The symbol “” may be placed adjacent to the signal word. The internet warning may use the Short-Form Warning content described in subsection 2.3(b). The URL "www.P65Warnings.ca.gov" in the Warning may be substituted with an equivalent reference to the official "Proposition 65 Warnings Website."

3. MONETARY SETTLEMENT TERMS

3.1 Civil Fines

Pursuant to Health & Safety Code §25249.7(b), and in settlement of all claims alleged in the notice, the Settling Entity agrees to pay a total of \$1,000 in civil fines. This payment will be allocated in accordance with Health & Safety Code §25249.12(c)(1) and (d), with 75% of the penalty amount paid to the Office of Environmental Health Hazard Assessment (OEHHA) and the remaining 25% of the penalty amount paid to and retained by Vinocur.

The Settling Entity will deliver its civil penalty payment to the address in subsection 3.3 by overnight courier, with a tracking number, or through an automatic electronic transfer such that payment is received by Vinocur's counsel on or before the Effective Date. For non-electronic payments the Settling Entity shall provide two checks made payable to: (a) "OEHHA" in the amount of \$750; and (b) "Laurence Vinocur" in the amount of \$250. Thereafter, Vinocur's counsel shall send the portions of the penalties paid by the Settling Entity to OEHHA and Vinocur.

3.2 Reimbursement of Attorneys' Fees and Costs

The Parties acknowledge that Vinocur and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to be resolved after the material terms of the agreement had been settled. Shortly after the other settlement terms had been finalized, the Settling Entity expressed a desire to resolve Vinocur's fees and costs. The Parties then negotiated a resolution of the compensation due to Vinocur's counsel under general contract principles, Proposition 65 implementing regulations codified at 11 California Code of Regulations §3201 and/or the private attorney general doctrine codified at California Code of Civil Procedure §1021.5. For all work performed through the mutual execution of this agreement, the Settling Entity shall reimburse Vinocur's counsel \$10,000. The Settling Entity will deliver its payment to the address in subsection 3.3 by overnight courier, with a tracking number, or through an automatic electronic transfer such that payment is received by Vinocur's counsel on or before the Effective Date. The reimbursement

shall cover all fees and costs incurred by Vinocur investigating, bringing this matter to the Settling Entity's attention and negotiating a settlement of the matter in furtherance of the public interest and, if necessary, issuing a sixty-day notice to the Settling Entity and/or seeking judicial approval of this Settlement Agreement.

3.3 Payment Address and Effect of Non-Payment

All non-electronic payments required by this Settlement Agreement shall be delivered to the following address:

Chanler, LLC
Attn: Proposition 65 Controller
72 Huckleberry Hill Road
New Canaan, CT 06840

Should the payments due under Section 3 not clear within two business days from the Effective Date, then this Settlement Agreement shall be null and void.

4. CLAIMS COVERED AND RELEASED

4.1 Vinocur's Release of The Settling Entity

This Settlement Agreement is a full, final and binding resolution between Vinocur, as an individual (and not on behalf of the public yet furthers its health interest, unless it is judicially approved, in which case the release would be in furtherance of the public interest), and the Settling Entity, of any violation of Proposition 65 that was or could have been asserted by Vinocur on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, against the Settling Entity, Amazon and each of their past, current, and future direct and indirect parents, subsidiaries, affiliated entities under common ownership, predecessors, successors, directors, officers, managers, shareholders, members, employees, agents, assignees, and attorneys (releasees), based on their alleged or actual failure to warn about alleged exposures to lead contained in the Products that were sold and/or offered for sale in California by the Settling Entity through amazon.com before the Effective Date, as alleged in the notice.

In further consideration of the promises and agreements herein contained, Vinocur as an individual and not on behalf of the public, on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all of his rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims that he may have, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses including, but not exclusively, investigation fees, expert fees, and attorneys' fees arising under Proposition 65 with respect to lead in the Products, sold and/or offered for sale by the Settling Entity, before the Effective Date, against the Settling Entity and the releasees.

The Parties further understand and agree that this subsection 4.1 release shall not extend upstream to any entities that manufactured the Products or any component parts thereof, or any distributors, importers or suppliers who sold the Products to the Settling Entity. Nothing in this subsection affects Vinocur's right to commence or prosecute an action under Proposition 65 against a releasee that does not involve the Products that were sold and/or offered for sale in California by the Settling Entity.

4.2 The Settling Entity's Release of Vinocur

The Settling Entity, on behalf of itself, its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against Vinocur and his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Vinocur and his attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 in connection with the notice or Products.

5. SEVERABILITY

If, subsequent to its execution, any of the provisions of this Settlement Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

6. GOVERNING LAW & ENFORCEMENT

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. For purposes of this Settlement Agreement only, the Settling Entity stipulates that the Superior Court of California shall have personal jurisdiction over it for the limited and sole purpose of an action to enforce the terms of this Settlement Agreement, brought without joinder of other claims. As an expressed condition of this Settlement Agreement, the Settling Entity waives any exemptions under California Health & Safety Code §25249.6 *et seq.* The Settling Entity also agrees to accept electronic service of a 60-Day Notice of Violation, if one is issued, at the email address noted in Section 7 below. The Settling Entity further acknowledges that it is waiving any argument that the Products do not expose individuals to lead and that any affirmative defense exists under California Health & Safety Code §25249.10(c). Nothing in this Settlement Agreement shall be interpreted to relieve the Settling Entity from any obligation to comply with any pertinent state or federal toxics control law.

The Parties agree that if the Office of Environmental Health Hazard Assessment (OEHHA) changes its warning regulations affecting subsections 2.3 through 2.6 below, then the Settling Entity may either conform with the revised law or continue to conform with the terms provided in this Settlement Agreement if the new implementing regulations so allow. In doing so, the Settling Entity will be in compliance with this Settlement Agreement as long as it continues to fulfill any warning obligations unaffected by such new changes.

In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this Settlement Agreement are rendered inapplicable or no longer required as a result of any such repeal or preemption or rendered inapplicable by reason of law generally as to the Products, then the Settling Entity shall provide written notice to Vinocur of any asserted change in the law and shall have no further injunctive obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

7. **NOTICE**

Unless specified herein, all correspondence notices and service of process required to be provided pursuant to this Settlement Agreement shall be in writing and: (a) personally delivered; (b) sent by first-class (registered or certified mail) return receipt requested; (c) sent by overnight courier; or (d) electronically transmitted to one party by the other party at the following addresses:

For the Settling Entity:

Night Galaxy, Inc.
ATTN: Aleksander Kofman
3434A Georgia St
Louisiana MO 63353
akofman@nightgalaxy.com

With a Copy to:

Yelena Kofman-Delgado, Esq.
Vlasac & Shmaruk LLC
485B Route 1 South, Suite 120
Iselin, NJ 08830
ykofman@vslaws.com

For Vinocur:

Proposition 65 Coordinator
Chanler, LLC
72 Huckleberry Hill Road
New Canaan, CT 06840
clifford@chanlerLLC.com

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

8. **COUNTERPARTS; FACSIMILE AND SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or pdf signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

9. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)

Vinocur agrees to comply with the reporting requirements referenced in Health & Safety Code §25249.7(f).

10. WAIVER OF HEALTH & SAFETY CODE §25249.11(B) AND SERVICE OF 60-DAY NOTICE OF VIOLATION

The Settling Entity represents that it has employed less than 10 employees at all relevant times, does not have sufficient contacts within the State of California and/or otherwise does not fall directly within the purview of Proposition 65. Notwithstanding the prior sentence, the Settling Entity waives any exemption for the purposes of receiving a 60-Day Notice of Violation for the products defined in subsection 1.3. As a direct third-party seller of the Products on amazon.com, the Settling Entity initially contacted Mr. Vinocur voluntarily and freely enters into the terms of this Settlement Agreement.

11. MOTION FOR JUDICIAL APPROVAL

The Parties agree that Vinocur may seek the Court’s approval of this Settlement Agreement as allowed by law. In such event, Vinocur shall file the motion to approve.

12. MODIFICATION


This Settlement Agreement may be modified only by a written agreement of the Parties.

13. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement and have read, understood, and agreed to all of the terms and conditions contained herein.

AGREED TO:


Date: July 12, 2023

By: 

Laurence Vinocur

AGREED TO:

Date: July 14, 2023

By: 

Aleksander Kofman
President
Night Galaxy, Inc.