

1 William Verick (SBN 140972)
2 KLAMATH ENVIRONMENTAL LAW CENTER
Fredric Evenson (SBN 198059)
3 LAW OFFICE OF FREDRIC EVENSON
4 424 First Street
5 Eureka, CA 95501
Telephone: (707) 268-8900
6 Facsimile: (707) 268-8901
wverick@igc.org
ecorights@earthlink.net

7 DAVID WILLIAMS (SBN 144479)
8 BRIAN ACREE (SBN 202505)
9 370 Grand Avenue, Suite 5
Oakland, CA 94610
Telephone: (510) 271-0826
Facsimile: (510) 271-0829
davidhwilliams@earthlink.net
10 brianacree@earthlink.net

11 Attorneys For Plaintiff
12 MATEEL ENVIRONMENTAL JUSTICE
FOUNDATION

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SAN FRANCISCO

15
16 MATEEL ENVIRONMENTAL JUSTICE
17 FOUNDATION,

18 Plaintiff,

19 v.

20 LEHR INCORPORATED, et al.,

21 Defendants.

) Case No. CGC-11-512045
)
)
)
)
)
)
)
)
)

**[PROPOSED] CONSENT
JUDGMENT AS TO LINCOLN
ELECTRIC COMPANY**

1 **1. INTRODUCTION**

2 1.1 On June 28, 2011, the Mateel Environmental Justice Foundation (“Plaintiff
3 MEJF”) acting on behalf of itself and on behalf of public interest, filed a Complaint for civil
4 penalties and injunctive relief (“Complaint”) in San Francisco Superior Court, Case No. CGC-11-
5 512045, against defendant Lincoln Electric Company, (referred to as “Lincoln” or “Defendant”)
6 and other defendants. The Complaint alleges that Defendant violated provisions of the Safe
7 Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code Sections 25249.5,
8 et seq. (Proposition 65) by failing to give clear and reasonable warnings to those residents of
9 California who handle and use products made of, or incorporate parts made of, brass and/or
10 bronze, that handling and use of those products causes exposures to lead and/or lead compounds.
11 Lead is known to the State of California to cause cancer and/or birth defects or other reproductive
12 harm. The Complaint was based upon a 60-Day Notice letter (“Notice of Violation”), dated
13 February 10, 2011, sent by MEJF to Lincoln, the California Attorney General, all District
14 Attorneys, and all City Attorneys for cities with populations exceeding 750,000.

15 1.2 Defendant is a business that employs more than ten persons, and manufactures,
16 distributes, and sells brass tools, including but not limited to compressed gas and welding hoses
17 and related accessories (collectively, “Brass Products”). Mateel alleges that the Brass Products at
18 issue contain components manufactured from leaded brass and cause exposures to lead and/or
19 lead compounds. Pursuant to Health and Safety Code Section 25249.8, lead and lead compounds
20 are chemicals known to the State of California to cause cancer and reproductive toxicity. Plaintiff
21 MEJF alleges that Brass Products with components containing lead-containing brass that are sold
22 by Lincoln for use in California require a warning under Proposition 65, pursuant to Health and
23 Safety Code Section 25249.6. Lincoln denies that a warning is required. For purposes of this
24 Consent Judgment, the parties stipulate that this Court has jurisdiction over the allegations of
25 violations contained in the Complaint and personal jurisdiction over Lincoln as to the acts alleged
26 in the Complaint, that venue is proper in the County of San Francisco and that this Court has
27

28

1 jurisdiction to enter this Consent Judgment as a full settlement and resolution of the allegations
2 contained in the Complaint.

3 1.3 This Consent Judgment resolves claims that are denied and disputed. The parties
4 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims
5 between the parties for the purpose of avoiding prolonged litigation. This Consent Judgment
6 shall not constitute an admission with respect to any material allegation of the Complaint, each
7 and every allegation of which Lincoln denies, nor may this Consent Judgment or compliance with
8 it be used as evidence of any wrongdoing, misconduct, culpability or liability on the part of
9 Lincoln.

10 1.4 For purposes of this Consent Judgment, the term "Covered Products" means Brass
11 Products as described in paragraph 1.2, that contain one or more components manufactured from
12 brass, and that are manufactured, marketed or sold by Lincoln.

13 1.5 The term "Effective Date" means 90 days after entry of this Consent Judgment.

14 **2. SETTLEMENT PAYMENT**

15 2.1 In settlement of all of the claims that are alleged, or could have been alleged, in the
16 Complaint concerning Covered Products, Lincoln shall pay \$15,000 to the Klamath
17 Environmental Law Center ("KELC") to cover Plaintiff's attorneys' fees. Additionally, Lincoln
18 shall pay \$4,000 to the Ecological Rights Foundation, and \$4,000 to Californians for Alternatives
19 to Toxics, for use toward reducing exposures to toxic chemicals and other pollutants, and toward
20 increasing consumer, worker and community awareness of health hazards posed by lead and other
21 toxic chemicals. The parties agree and acknowledge that the charitable contributions made
22 pursuant to this section shall not be construed as a credit against the personal claims of absent
23 third parties for restitution against the defendant.

24 2.2 Lincoln shall also pay \$2,000 in civil penalties. Mateel waives its entitlement to
25 25% of this amount, and thus the entire amount of civil penalties shall be made payable, pursuant
26 to the statute, to the Office of Environmental Health Hazard Assessment (OEHHA).

27
28

1 2.3 The above described payments shall be forwarded by Lincoln to its counsel so that
2 they are received at least 5 days prior to the hearing date scheduled for approval of this Consent
3 Judgment. Defendant's counsel shall notify via email Klamath Environmental Law Center upon
4 receipt of the funds. If the Consent Judgment is not approved within 120 days of the date
5 scheduled for approval, the above described payments shall be returned and the provisions of this
6 Consent judgment shall become null and void. If the Consent Judgment is approved and entered
7 by the Court, Defendant's counsel shall ensure the above described payments are delivered, via
8 UPS or FedEx within two business days, to Klamath Environmental Law Center.

9 **3. ENTRY OF CONSENT JUDGMENT**

10 3.1 The parties hereby request that the Court promptly enter this Consent Judgment.
11 Upon entry of the Consent Judgment, Lincoln and MEJF waive their respective rights to a hearing
12 or trial on the allegations of the Complaint.

13 **4. MATTERS COVERED BY THIS CONSENT JUDGMENT**

14 4.1 As to alleged exposures to lead or lead compounds from Covered Products, this
15 Consent Judgment provides a full release of liability on behalf of the public interest to Lincoln,
16 (as well as its past, present and future parents, subsidiaries affiliates, predecessors, successors,
17 and assigns), as to all claims and matters raised in the Notice of Violation. Notwithstanding any
18 other provision of this Consent Judgment, no claim or matter is released on behalf of the Public
19 Interest unless that claim or matter was raised in the Notice of Violation.

20 4.2 As to alleged exposures to lead or lead compounds from Covered Products, MEJF,
21 by and on behalf of itself and its respective agents, successors and assigns, waives any and all
22 rights to institute any form of legal action, and releases all claims against Lincoln and the
23 Released Entities, and all of their respective parents, subsidiaries or affiliates, and all of their
24 suppliers, customers, distributors, wholesalers, retailers, or any other person in the course of
25 doing business, and the successors and assigns of any of them, who may use, maintain, distribute
26 or sell the Covered Products, whether, under Proposition 65 or otherwise, arising out of or
27 resulting from, or related directly or indirectly to, in whole or in part, the Covered Products,

28

1 including but not limited to any exposure to, or failure to warn with respect to, the Covered
2 Products (referred to collectively in this paragraph as the "Claims"). In furtherance of the
3 foregoing, as to alleged exposures to Covered Products, MEJF hereby waives any and all rights
4 and benefits which it now has, or in the future may have, conferred upon it with respect to the
5 Claims by virtue of the provisions of section 1542 of the California Civil Code, which provides as
6 follows:

7 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
8 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT
9 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM,
MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
DEBTOR.

10 4.3 MEJF understands and acknowledges that the significance and consequence of this
11 waiver of California Civil Code section 1542 is that even if MEJF suffers future damages arising
12 out of or resulting from, or related directly or indirectly to, in whole or in part, the Covered
13 Products, including but not limited to any exposure to, or failure to warn with respect to exposure
14 to, lead or lead compounds from Covered Products, MEJF will not be able to make any claim for
15 those damages against Lincoln or the Released Entities. Furthermore, MEJF acknowledges that it
16 intends these consequences for any such Claims as may exist as of the date of this release but
17 which MEJF does not know exist, and which, if known, would materially affect their decision to
18 enter into this Consent Judgment, regardless of whether their lack of knowledge is the result of
19 ignorance, oversight, error, negligence, or any other cause.

20 **5. ENFORCEMENT OF JUDGMENT**

21 5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
22 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
23 San Francisco County, giving the notice required by law, enforce the terms and conditions
24 contained herein. A Party may enforce any of the terms and conditions of this Consent Judgment
25 only after that Party first provides 30 days notice to the Party allegedly failing to comply with the
26 terms and conditions of this Consent Judgment and attempts to resolve such Party's failure to
27 comply in an open and good faith manner.

1 5.2 In any proceeding brought by either party to enforce this Consent Judgment, such
2 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
3 violation of Proposition 65 or this Consent Judgment.

4 **6. MODIFICATION OF JUDGMENT**

5 6.1 This Consent Judgment may be modified only upon written agreement of the
6 parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
7 any party as provided by law and upon entry of a modified Consent Judgment by the Court.

8 6.2 If, with respect to brass containing lead, the Attorney General of the State of
9 California or Plaintiff permit any other reformulation standard by way of settlement or
10 compromise with any other person in the course of doing business, or any other entity, or if
11 another reformulation standard for brass is incorporated by way of final judgment as to any other
12 person in the course of doing business, or any other entity, then Defendant is entitled to seek a
13 modification to this Consent Judgment on the same terms as provided in those settlements,
14 compromises or judgments.

15 **7. INJUNCTIVE RELIEF**

16 7.1 The requirements of this paragraph 7 shall apply only to Covered Products that are
17 manufactured by Lincoln after the Effective Date.

18 7.2 As to any Covered Product that contains a component made from brass that
19 contains lead as an intentionally added ingredient, where such brass comes into contact with the
20 user, a warning that contains one of the following warning statements shall be provided:

21 (a) “**WARNING:** This product contains chemicals, including lead, known to
22 the State of California to cause birth defects and other reproductive harm. *Wash hands after*
23 *handling*” or

24 (b) “**WARNING:** Handling the brass parts of this product will expose you to
25 lead, a chemical known to the State of California to cause birth defects and other reproductive
26 harm. *Wash hands after handling.*” Or

27
28

1 (c) **"Warning:** This product contains or produces a chemical, including lead,
2 known to the State of California to cause cancer and birth defects (or other reproductive harm).
3 Wash hands after use. (California Health & Safety Code 25249.5 et seq.)"

4 For warning (a) or (b) above, the word "WARNING" shall be in bold text, and the phrase
5 "Wash hands after handling" shall be in bold italic text.

6 (d) The warning statements required in paragraph 7.2 shall be affixed to or
7 printed on the Covered Product itself or to the Covered Product's packaging, labeling, or
8 instruction booklet, if any. The warning shall be prominently affixed to or printed on the Covered
9 Product or packaging, labeling, or instruction booklet, and displayed with such conspicuousness,
10 as compared with other words, statements, designs, or devices on the Covered Product, or its
11 packaging, labeling, or instruction booklet, as to render it likely to be read and understood by an
12 ordinary individual under customary conditions of purchase or use. For purposes of this
13 paragraph, a warning may be contained in the same section of the packaging, labeling, or
14 instruction booklet that contains other safety warnings, if any, concerning the use of the Covered
15 Product, or near its displayed price and/or UPC code. The type size of the warning must be
16 legible, but need not be any larger than any other warning provided for the Covered Product, and
17 its relative size may take into account the nature, immediacy, and acuteness of the risks for which
18 other warnings are provided.

19 **8. TERMINATION AND RETENTION OF JURISDICTION**

20 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the
21 terms this Consent Judgment.

22 **9. AUTHORITY TO STIPULATE**

23 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
24 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
25 the party represented and legally to bind that party.

1 **10. DUTIES LIMITED TO CALIFORNIA**

2 10.1 This Consent Judgment shall have no effect on Covered Products sold by Lincoln
3 outside the State of California.

4 **11. SERVICE ON THE ATTORNEY GENERAL**

5 11.1 KELC shall serve a copy of this Consent Judgment, signed by both parties, on the
6 California Attorney General on behalf of the parties so that the Attorney General may review this
7 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five (45)
8 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
9 and in the absence of any written objection by the Attorney General to the terms of this Consent
10 Judgment, the parties may then submit it to the Court for approval.

11 **12. ENTIRE AGREEMENT**

12 12.1 This Consent Judgment contains the sole and entire agreement and understanding
13 of the parties with respect to the entire subject matter hereof and any and all prior discussions,
14 negotiations, commitments and understandings related hereto. No representations, oral or
15 otherwise, express or implied, other than those contained herein have been made by any party
16 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
17 deemed to exist or to bind any of the parties.

18 **13. GOVERNING LAW**

19 13.1 The validity, construction and performance of this Consent Judgment shall be
20 governed by the laws of the State of California, without reference to any conflicts of law
21 provisions of California law.

22 **14. EXECUTION AND COUNTERPARTS**

23 14.1 This Consent Judgment may be executed in counterparts and by means of
24 facsimile, which taken together shall be deemed to constitute one document.

25 **15. COURT APPROVAL**

26 15.1 If this Consent Judgment, in its entirety, is not approved by the Court, it shall be of
27 no force or effect, and cannot be used in any proceeding for any purpose.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

16. NOTICES

16.1 Any notices under this Consent Judgment shall be by personal delivery of First Class Mail.

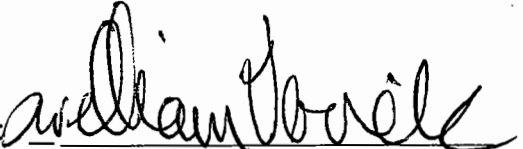
If to MEJF: William Verick, Esq.
Klamath Environmental Law Center
424 First Street
Eureka, CA 95501

If to Lincoln Electric Company: Todd O. Maiden
Reed Smith LLP
101 Second Street
Suite 1800
San Francisco, CA 94105-3659
Direct Phone: 415.659.5918
Email: tmaiden@reedsmith.com

IT IS SO STIPULATED:

DATED: _____

MATEEL ENVIRONMENTAL JUSTICE FOUNDATION

BY: 
WILLIAM VERICK

DATED: _____

LINCOLN ELECTRIC COMPANY

BY: _____

ITS: _____

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: _____

JUDGE OF THE SUPERIOR COURT