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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA
11 UNLIMITED CIVIL JURISDICTION
12
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14

15 MARK MOORBERG,

16 Plaintiff,

17 v.

18 LINCOLN ELECTRIC HOLDINGS, INC.; *et*
19 *al.*,

20 Defendants.

Case No. RG15768391

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Mark Moorberg (“Moorberg”) and: (i)
4 The Lincoln Electric Company (“Lincoln”), and (ii) J.W. Harris Company, Inc. (“JW”), with
5 Moorberg, Lincoln, and JW each individually referred to as a “Party” and collectively as the
6 “Parties.” Lincoln, and JW shall hereinafter be referred to as “Settling Defendants.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendants**

12 Settling Defendants each employ ten or more persons and is a “person in the course of doing
13 business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and
14 Safety Code section 25249.6 *et seq.* (“Proposition 65”).

15 **1.4 General Allegations**

16 Moorberg alleges that Settling Defendants manufacture, import, sell, or distribute for sale in
17 California, a) tools with vinyl/PVC grips; b) goggles with vinyl/PVC components holders containing
18 di(2-ethylhexyl)phthalate (“DEHP”), and c) lens pouches containing lead without first providing the
19 exposure warning required by Proposition 65. DEHP and lead are listed pursuant to Proposition 65
20 as chemicals known to the State of California to cause birth defects and other reproductive harm.

21 **1.5 Product Description**

22 The Settling Defendants’ products that are covered by this Consent Judgment are defined as
23 pliers with vinyl/PVC grips containing DEHP including, without limitation, the *Lincoln Electric*
24 *Matador MIG Pliers, KH545, UPC #7 25636 41494 5 and the Welper YS 50 pliers*; individually
25 packaged goggles with vinyl/PVC components containing DEHP including, without limitation, the
26 *Lincoln Electric Welders Goggles, KH625, UPC #7 25636 09571 7*, and lens pouches containing lead
27 including, without limitation, the *Lincoln Electric Weld Lens Pouch, KH-615, KH-616, KH-618, and*
28

1 *KH-619, UPC #7 25636 09551 9*, which are manufactured, imported, distributed, sold and/or offered
2 for sale by Settling Defendants in the State of California, hereinafter the “Products.”

3 **1.6 Notice of Violation**

4 On April 16, 2014, Moorberg served The Lincoln Electric Company, J.W. Harris Company,
5 Inc. and certain requisite public enforcement agencies with a “60-Day Notice of Violation” (“April
6 Notice”) alleging that The Lincoln Electric Company, J.W. Harris Company, Inc. violated
7 Proposition 65 when they failed to warn their customers and consumers in California that tools with
8 vinyl/PVC grips expose users to DEHP.

9 On or about January 30, 2015, Moorberg served The Lincoln Electric Company, J.W. Harris
10 Company, Inc., others, and certain requisite public enforcement agencies with a Supplemental 60-
11 Day Notice of Violation (“January Notice”) alleging that Settling Defendants were in violation of
12 Proposition 65 for failing to warn its customers and consumers in California that the Products expose
13 users to DEHP and lead. The April Notice and the January Notice shall hereinafter be referred to as
14 the “Notices.”

15 **1.7 Complaint**

16 On April 29, 2015 Moorberg filed the instant action (“Complaint”), naming Lincoln and JW
17 as defendants for their alleged violations of Health and Safety Code section 25249.6 that are the
18 subject of the Notices.

19 **1.8 No Admission**

20 Settling Defendants deny the material, factual, and legal allegations contained in the Notices
21 and Complaint, and maintain that all of the products that they have sold and distributed for sale in
22 California, including the Products, have been, and are, in compliance with all laws. Nothing in this
23 Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of
24 law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed
25 as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This
26 Section shall not, however, diminish or otherwise affect Settling Defendants obligations,
27 responsibilities, and duties under this Consent Judgment.
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2 **1.9 Jurisdiction**

3 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
4 jurisdiction over Settling Defendants as to the allegations in the Complaint, that venue is proper in the
5 County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions of this
6 Consent Judgment.

7 **1.10 Effective Date**

8 For purposes of this Consent Judgment, the term “Effective Date” means:

- 9 a) For pliers with vinyl/PVC handles, July 31, 2015,
10 b) For lens pouches containing lead, August 31, 2015,
11 c) For individually packaged (as opposed to in welding kits) goggles with vinyl/PVC
12 components containing DEHP, September 30, 2015.

13 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

14 **2.1 Reformulated Products**

15 Commencing on the respective Effective Dates for each Product, and continuing thereafter,
16 Settling Defendants shall only purchase for sale, manufacture for sale, import, sell, or distribute for
17 sale in California “Reformulated Products,” or Products that are sold with a clear and reasonable
18 warning pursuant to Section 2.2 below. For purposes of this Consent Judgment, “Reformulated
19 Products” are products that contain:

20 (a) DEHP in concentrations of less than 0.1 percent (1,000 parts per million) when analyzed
21 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or any
22 other methodology utilized by federal or state agencies for the purpose of determining the DEHP
23 content in a solid substance, and

24 (b) that contain a maximum of 100 parts per million of lead by weight in any accessible
25 component (i.e., any component that can be touched or handled during reasonably a foreseeable use)
26 when analyzed pursuant to Environmental Protection Agency testing methodologies 3050B and/or
27 6010B, and that yield a result of less than 1.0 micrograms of lead when analyzed pursuant to the
28

1 NIOSH 9100 testing protocol. In addition to the EPA test methods authorized above, the Parties may
2 utilize equivalent methodologies employed by state or federal agencies to determine DEHP or lead
3 content in a solid substance.

4 **2.2 Product Warnings**

5 Commencing on the Effective Date, Settling Defendants shall provide clear and reasonable
6 warnings for all Products as set forth in subsections 2.2(a) and (b) for all Products that do not
7 currently have warnings and that do not qualify as Reformulated Products. Each warning shall be
8 prominently placed with such conspicuousness as compared with other words, statements, designs, or
9 devices as to render it likely to be read and understood by an ordinary individual under customary
10 conditions before purchase or use. Each warning shall be provided in a manner such that the
11 consumer or user understands to which *specific* Product the warning applies, so as to minimize the
12 risk of consumer confusion.

13 **(a) Retail Store Sales.**

14 **(i) Product Labeling.** Settling Defendants shall affix a warning to the
15 packaging, labeling, or directly on each tool with vinyl/PVC grips provided for sale in retail outlets in
16 California that states:

17 WARNING: This product contains a chemical, including [DEHP or lead, as
18 applicable], known to the State of California to cause cancer,
birth defects and other reproductive harm.

19 **(ii) Point-of-Sale Warnings.** Alternatively, Settling Defendants may provide
20 warning signs in the form below to its customers in California with instructions to post the warnings
21 in close proximity to the point of display of the Products. Such instruction sent to Settling
22 Defendants' customers shall be sent by certified mail, return receipt requested.

23
24 WARNING: This product contains a chemical, including [DEHP or lead, as
25 applicable], known to the State of California to cause cancer,
26 birth defects and other reproductive harm.
27
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1 Where more than one Product is sold in proximity to other like items or to those that do not
2 require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement
3 shall be used:¹

4
5 WARNING: The following products contain chemicals, including [DEHP or lead, as
6 applicable], known to the State of California to cause cancer, birth
7 defects and other reproductive harm:

8 [*list products for which warning is required*]

9 **(b) Mail Order Catalog and Internet Sales.** In the event that Settling Defendants sell
10 Products via mail order catalog and/or the internet, to customers located in California, after the
11 Effective Date, that are not Reformulated Products, Settling Defendants shall provide warnings for
12 such Products sold via mail order catalog or the internet to California residents. Warnings given in
13 the mail order catalog or on the internet shall identify the *specific* Product to which the warning
14 applies as further specified in Sections 2.2(b)(i) and (ii).

15 **(i) Mail Order Catalog Warning.** Any warning provided in a mail order catalog
16 shall be in the same type size or larger than the Product description text within the catalog. The
17 following warning shall be provided on the same page and in the same location as the display and/or
18 description of the Product:

19 WARNING: This product contains a chemical, including [DEHP or lead, as
20 applicable], known to the State of California to cause
21 cancer, birth defects and other reproductive harm.

22 Where it is impracticable to provide the warning on the same page and in the same location as
23 the display and/or description of the Product, Settling Defendants may utilize a designated symbol to
24 cross reference the applicable warning and shall define the term “designated symbol” with the
25 following language on the inside of the front cover of the catalog or on the same page as any order
26 form for the Product(s):

27 ¹ For purposes of the Settlement Agreement, “sold in proximity” shall mean that the Product and another similar
28 product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could
not reasonably determine which of the two products is subject to the warning sign.

1
2 WARNING: Certain products identified with this symbol ▼
3 and offered for sale in this catalog contain a chemical, including
4 [DEHP or lead, as applicable], known to the State of California to
5 cause cancer, birth defects and other reproductive harm.

6 The designated symbol must appear on the same page and in close proximity to the display
7 and/or description of the Product. On each page where the designated symbol appears, Settling
8 Defendants must provide a header or footer directing the consumer to the warning language and
9 definition of the designated symbol.

10 (ii) **Internet Website Warning.** A warning shall be given in conjunction with the
11 sale of the Products by Settling Defendants via the internet, which warning shall appear either: (a) on
12 the same web page on which a Product is displayed; (b) on the same web page as the order form for a
13 Product; (c) on the same page as the price for any Product; or (d) on one or more web pages
14 displayed to a purchaser during the checkout process. The following warning statement shall be used
15 and shall appear in any of the above instances adjacent to or immediately following the display,
16 description, or price of the Product for which it is given in the same type size or larger than the
17 Product description text:

18 WARNING: This product contains a chemical, including [DEHP or lead, as
19 applicable], known to the State of California to cause
20 cancer, birth defects and other reproductive harm.

21 Alternatively, the designated symbol may appear adjacent to or immediately following the
22 display, description, or price of the Product for which a warning is being given, provided that the
23 following warning statement also appears elsewhere on the same web page, as follows:

24 WARNING: This product contains a chemical, including [DEHP or lead, as
25 applicable], known to the State of California to cause
26 cancer, birth defects and other reproductive harm.

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2 **2.3 Supplemental Product Warnings**

3 At their discretion, Settling Defendants may supplement the warnings in Section 2.2 above
4 with the additional language that recommends the user wash their hands after use of the Product, or
5 directing the purchaser to sections of Proposition 65 and its regulations.
6

7 **3. MONETARY SETTLEMENT TERMS**

8 **3.1 Civil Penalty Payments**

9 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred
10 to in this Consent Judgment, Settling Defendants shall pay \$28,000 in civil penalties. Each civil
11 penalty payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and
12 (d) with seventy-five percent (75%) of the funds paid to the California Office of Environmental
13 Health Hazard Assessment (“OEHHA”) and twenty-five percent (25%) of the funds allocated to
14 Moorberg.

15 **3.1.1 Initial Civil Penalty**

16 On or before July 31, 2015, Settling Defendants shall issue a check for their initial
17 civil penalty payment in the amount of \$10,000 to “Reed Smith, LLP, c/o Todd Maiden, Esq.” Reed
18 Smith, LLP shall provide The Chanler Group with written confirmation within five days of receipt
19 that the funds have been deposited in a trust account. Within one week of the date that this Consent
20 Judgment is approved (including any unopposed tentative rulings) by the Court, Reed Smith, LLP
21 shall issue a check for the initial civil penalty payment to “Mark Moorberg, Client Trust Account.”
22 Moorberg subsequently will direct 75% of the initial civil penalty to OEHHA.

23 **3.1.2 Final Civil Penalty**

24 On or before January 30, 2016, Settling Defendants shall make a final civil penalty
25 payment of \$18,000. Pursuant to title 11 California Code of Regulations, section 3203(c), Moorberg
26 agrees that the final civil penalty payment shall be waived in its entirety if, no later than January 15,
27 2016, an officer of Settling Defendants provides Moorberg with written certification that all of the
28 Products purchased for sale or manufactured for sale in California as of the date of such certification

1 are Reformulated Products as defined by Section 2.1, and that Settling Defendants will continue to
2 offer only Reformulated Products in California in the future. Moorberg further agrees that \$17,000 of
3 the final civil penalty payment shall be waived if, no later than January 15, 2016, an officer of the
4 Settling Defendants provides Moorberg with written certification that the goggle and lens pouch
5 products at issue in this settlement purchased for sale, or manufactured for sale in California as of the
6 date of such certification are Reformulated Products as defined by Section 2.1, and that Settling
7 Defendants will continue to offer only Reformulated goggle and lens pouch products in California in
8 the future. The option to certify reformulation in lieu of making the final civil penalty payment
9 required by this Section is a material term and time is of the essence.

10 **3.2 Reimbursement of Fees and Costs**

11 The parties acknowledge that Moorberg and his counsel offered to resolve this dispute
12 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the
13 issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after
14 the other settlement terms had been finalized, Settling Defendants expressed a desire to resolve
15 Moorberg's fees and costs. The Parties then attempted to (and did) reach an accord on the
16 compensation due to Moorberg and his counsel under general contract principles and the private
17 attorney general doctrine codified at California Code of Civil Procedure section 1021.5 for all work
18 performed through the mutual execution of this Consent Judgment. Settling Defendants shall, on or
19 before July 31, 2015, issue a check payable to "Reed Smith, LLP" in the amount of fees and costs of
20 \$37,500 to be held in trust by Reed Smith, LLP for The Chanler Group. Reed Smith, LLP shall
21 provide The Chanler Group with written confirmation within one week of receipt that the funds have
22 been deposited in a trust account. Within one week of the date this Consent Judgment is approved by
23 the Court (including any unopposed tentative rulings), Reed Smith, LLP shall issue a check payable
24 to "The Chanler Group" to the address found in Section 3.3.1 below.

25 **3.3 Payment Procedures**

26 Except for the final civil penalty payment required by Section 3.1.2, all payments due under
27 this Consent Judgment are to be delivered on or before July 31, 2015 to Reed Smith, LLP, and
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1 released to The Chanler Group and Moorberg within one week of the Court approving this Consent
2 Judgment according to the following subsections.

3 **3.3.1 Payment Addresses**

4 (a) All payments and tax documentation for OEHHA, Moorberg, and his counsel
5 shall be delivered to:

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7
8 The Chanler Group
9 Attn: Proposition 65 Controller
10 2560 Ninth Street
11 Parker Plaza, Suite 214
12 Berkeley, CA 94710

13 **4. CLAIMS COVERED AND RELEASED**

14 **4.1 Moorberg's Public Release of Proposition 65 Claims**

15 Moorberg, acting on his own behalf and in the public interest, releases Settling Defendants
16 and their parents, subsidiaries, affiliated entities under common ownership (including, but not
17 limited to WCTA, Inc.), directors, officers, employees, and attorneys ("Releasees") and each entity
18 to whom they directly or indirectly distribute or sell the Products, including but not limited to its
19 downstream distributors, wholesalers, customers, retailers, franchisers, cooperative members,
20 licensors, and licensees ("Downstream Releasees") for violations arising under Proposition 65 for
21 unwarned exposures to DEHP and lead from the Products sold by Settling Defendants prior to the
22 Effective Date, as set forth in the Notice.

23 **4.2 Moorberg's Individual Release of Claims**

24 Moorberg, in his individual capacity only and *not* in his representative capacity, also provides
25 a release to Settling Defendants, Releasees, and Downstream Releasees which shall be effective as a
26 full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
27 expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Moorberg of any nature,
28 character or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or

1 actual exposures to DEHP and lead from the Products sold or distributed for sale by Settling
2 Defendants before the Effective Date.

3 **4.3 Settling Defendants' Release of Moorberg**

4 Settling Defendants, on their own behalf, and on behalf of their past and current agents,
5 representatives, attorneys, successors, and assignees, hereby waives any and all claims against
6 Moorberg and his attorneys and other representatives, for any and all actions taken or statements
7 made by Moorberg and his attorneys and other representatives, whether in the course of
8 investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with
9 respect to the Products.

10 **5. COURT APPROVAL**

11 This Consent Judgment is not effective until it is approved and entered by the Court and shall
12 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
13 has been fully executed by the Parties.

14 **6. SEVERABILITY**

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

18 **7. GOVERNING LAW**

19 The terms of this Consent Judgment shall be governed by the laws of the state of California
20 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
21 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Settling
22 Defendants may provide written notice to Moorberg of any asserted change in the law, and shall have
23 no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
24 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Settling
25 Defendants from any obligation to comply with any pertinent state or federal toxics control laws.
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1 **8. NOTICE**

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

5 For Settling Defendants:

6 Todd O. Maiden, Esq.
7 Reed Smith, LLP
8 101 Second Street
9 Suite 1800
10 San Francisco, California 94105

11 For Moorberg:

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

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 Moorberg 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 the settlement. In
27 furtherance of obtaining such approval, Moorberg and Settling Defendants agree to mutually employ
28 their best efforts, and that of their counsel, to support the entry of this agreement as judgment, and to
obtain judicial approval of their settlement in a timely manner. For purposes of this Section, "best
efforts" shall include, at a minimum, cooperating with the drafting and filing of the necessary moving
papers, and supporting the motion for judicial approval.

1 **11. MODIFICATION**

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

5 **12. AUTHORIZATION**

6 The undersigned are authorized to execute this Consent Judgment and have read, understood,
7 and agree to all of the terms and conditions contained herein.

8
9 **AGREED TO:**

AGREED TO:

10 Date: 7.9.15

Date: Jul 9, 2015

11
12 By:  _____

13 MARK MOORBERG

14 By:  _____

15 Frederick G. Stueber, Executive Vice President
16 and General Counsel
17 Lincoln Electric Company, and JW Harris
18 Company, Inc.
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