

1 Christopher C. Moscone, State Bar No. 170250
2 Laurence D. Haveson, State Bar No. 152631
3 MOSCONE EMBLIDGE & OTIS LLP
4 220 Montgomery Street, Suite 2100
5 San Francisco, CA 94104
6 Telephone: (415) 362-3599
7 Facsimile: (415) 362-2006

8 Attorneys for Plaintiff
9 MARK MOORBERG

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

12 MARK MOORBERG,

13 Plaintiff,

14 v.

15 ELMER'S PRODUCTS, INC., and DOES
16 1 -100, inclusive,

17 Defendants.

Case No. CGC-14-541134

[PROPOSED] CONSENT JUDGMENT

18 **1. INTRODUCTION**

19 **1.1 Parties**

20 The parties to this Consent Judgment ("Consent Judgment") are Plaintiff Mark Moorberg
21 ("Moorberg") on the one hand, and Defendant Elmer's Products, Inc. ("Elmer's") on the other
22 hand (each a "Party" and collectively "Parties").

23 **1.2 Plaintiff**

24 Moorberg is an individual residing in the State of California who seeks to promote
25 awareness of exposures to toxic chemicals and to improve human health by reducing or
26 eliminating hazardous substances contained in consumer products.

27 **1.3 Defendant**

28 Elmer's employs ten or more persons, and each is a person in the course of doing
business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health
and Safety Code sections 25249.6 *et seq.* ("Proposition 65").

1 **1.4 General Allegations**

2 Moorberg alleges that Elmer’s manufactures, distributes, imports, sells and/or offer for
3 sale in California cutting tools with vinyl/PVC grips containing di(2-ethylhexyl)phthalate
4 (“DEHP”) without first providing the clear and reasonable warning required by Proposition 65.
5 DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to
6 cause birth defects and other reproductive harm.

7 **1.5 Product Description**

8 The products that are covered by this Consent Judgment are cutting tools with
9 vinyl/PVC grips containing DEHP that are manufactured, sold, or distributed for sale in
10 California by Elmer’s or any of Elmer’s customers, including, but not limited to, the X-Acto
11 Precision Instruments X2000 Knife (X3724, UPC #0 79946 37240 3) (collectively “Products”).

12 **1.6 Notice of Violation**

13 On May 21, 2014, Moorberg served Elmer’s and certain public prosecutors with a “60-
14 Day Notice of Violation” (“Notice”) alleging that Elmer’s was in violation of Proposition 65 for
15 failing to warn its customers and consumers in California that the Products expose users to
16 DEHP. To the best of the Parties’ knowledge, no public enforcer has commenced and is
17 diligently prosecuting the allegations set forth in the Notice.

18 **1.7 Complaint**

19 On August 14, 2014, Moorberg filed the instant action against Elmer’s for the alleged
20 violations of Health & Safety Code § 25249.6 that are the subject of the Notice.

21 **1.8 No Admission**

22 Elmer’s denies the material, factual, and legal allegations contained in the Notice and
23 Complaint, and maintains that all of the products that it has sold and distributed in California,
24 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
25 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law,
26 or violation of law, nor shall compliance with this Consent Judgment constitute or be construed
27 as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This
28

1 Section shall not, however, diminish or otherwise affect Elmer's's obligations, responsibilities,
2 and duties under this Consent Judgment.

3 **1.9 Consent to Jurisdiction**

4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
5 jurisdiction over Defendants as to the allegations in the Complaint, that venue is proper in San
6 Francisco County and that this Court has jurisdiction to enter and enforce the provisions of this
7 Consent Judgment pursuant to California Code of Civil Procedure section 664.6.

8 **2. DEFINITIONS**

9 2.1 "Effective Date" means the date this Consent Judgment is approved by the
10 court.

11 2.2 "Reformulated Products" is defined as Products that contain less than 1,000
12 ppm (0.1%) DEHP content when analyzed pursuant to USEPA testing methodologies 3580A
13 and 8270C, or equivalent methodologies used by state or federal agencies for purposes of
14 determining DEHP content in a solid substance.

15 **3. INJUNCTIVE RELIEF: REFORMULATION**

16 **3.1 Commitment to Reformulate**

17 Commencing no later than the Effective Date, and continuing thereafter, Elmer's shall
18 not manufacture, distribute, purchase or import for sale, sell, and/or offer for sale in California
19 any Products that are not Reformulated Products.

20 **3.2 Right to Cure for Alleged Violations of the Reformulation Standard**

21 If Moorberg provides notice and appropriate supporting information (such as product
22 purchase receipts and test results from a laboratory using a methodology specified for the
23 Reformulation Standard) to Elmer's that show the presence of DEHP at levels in excess of the
24 Reformulation Standard have been detected in one or more Products, sold without warning, that
25 were manufactured or imported after the deadline for meeting the Reformulation Standard, then,
26 in order to cure the alleged violation(s), Elmer's shall provide written certification stating: (i)
27 Elmer's or its supplier established a written specification that DEHP will not be present in the
28 Products in an amount of 1,000 ppm or greater, and (ii) Elmer's or its supplier tested two X2000

1 knives and two X3000 knives per calendar year (representing two X2000 lots and two X3000
2 lots if more than one lot is produced in a given year) and the amount of DEHP detected was less
3 than 1,000 ppm for each test, conducted by a laboratory using a methodology specified for the
4 Reformulation Standard. Elmer's must provide appropriate supporting information, including
5 laboratory test results and a written statement from a company representative attesting to the
6 information provided, to Moorberg within 30 calendar days of receiving test results from
7 Moorberg. Upon receipt of such certification and satisfactory supporting information, no further
8 action will be taken by Moorberg.

9 **4. PAYMENTS**

10 **4.1 Payments Pursuant to Health and Safety Code § 25249.7(b)**

11 Pursuant to Health and Safety Code section 25249.7(b)(2), except as provided in Section
12 4.1.2, Elmer's shall pay \$14,000 in civil penalties. Each penalty payment shall be allocated
13 according to Health and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty
14 amount remitted to the California Office of Environmental Health Hazard Assessment and the
15 remaining 25% of each penalty payment remitted to Moorberg.

16 **4.1.1 Initial Civil Penalty**

17 Elmer's shall pay an initial civil penalty of \$4,000 within five (5) days of the
18 Effective Date.

19 **4.1.2 Final Civil Penalty; Waiver on Certification of Compliance with**
20 **Section 3.1**

21 Within 30 days of the Effective Date, Elmer's shall pay a final civil penalty of \$10,000,
22 except that, the final civil penalty will be waived, in its entirety, if no later than 30 days after the
23 Effective Date, Elmer's provides Moorberg's counsel with written certification, signed by a C-
24 level officer or an employee with authority to bind Elmer's, that as of the date of its certification,
25 all Products manufactured, distributed, purchased or imported for sale in California are
26 Reformulated Products, and that Elmer's will continue to only manufacture, distribute, purchase
27 or import Products that are Reformulated Products for sale in California in the future.
28

1 4.2 Reimbursement of Attorneys' Fees and Costs

2 The Parties acknowledge that Moorberg and his counsel offered to resolve this dispute
3 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
4 leaving the issue to be resolved after the material terms of the agreement had been settled.
5 Shortly after all other settlement terms had been finalized, Elmer's expressed a desire to resolve
6 the fees and costs. The Parties then attempted to (and did) reach an accord on the compensation
7 due Moorberg and his counsel under general contract principles and the private attorney general
8 doctrine codified at Code of Civil Procedure section 1021.5 for all work performed in this matter
9 exclusive of fees and costs incurred on appeal, if any. Under these legal principles, within 30
10 days of the Effective Date, Elmer's shall pay \$36,000 for the fees and costs incurred
11 investigating, litigating, and enforcing this matter, including the fees and costs incurred (and to
12 be incurred) drafting, negotiating, and obtaining the Court's approval of this Consent Judgment
13 in the public interest.

14 4.3 Payment Procedures.

15 4.3.1 **Payment Addresses**

16 (a) **All payments to Moorberg and Moscone Emblidge & Otis LLP**
17 **shall be delivered to the following address:**

18 Moscone Emblidge & Otis LLP
19 Attn: Proposition 65 Coordinator
20 220 Montgomery Street, Suite 220
21 San Francisco, CA 94104

22 (b) **All payments to OEHHA (EIN: 68-0284486) shall be delivered**
23 **directly to OEHHA (Memo line "Prop 65 Penalties") at the following address:**

24 Mike Gyurics
25 Fiscal Operations Branch Chief
26 Office of Environmental Health Hazard Assessment
27 P.O. Box 4010
28 Sacramento, CA 95812-4010

27 With a copy of the check(s) payable to OEHHA mailed to Moscone Emblidge & Otis LLP at the
28 payment address provided in Section 4.3.1(a), as proof of payment to OEHHA.

1 **5. CLAIMS COVERED AND RELEASED**

2 **5.1 Public Release of Proposition 65 Claims**

3 In consideration of the promises and commitments herein contained, Moorberg, on his
4 own behalf and on behalf of his past and current agents, representatives, attorneys, successors,
5 and/or assignees, and in the public interest, hereby waives and releases Elmer’s, its parents,
6 subsidiaries, affiliated entities under common ownership or control, directors, officers,
7 employees, and attorneys (“Releasees”); and each entity to whom it directly or indirectly
8 distributes or sells Products, and any distributors, wholesalers, customers, retailers, franchisees,
9 cooperative members, licensors, and licensees (“Downstream Defendant Releasees”), from all
10 claims for violations of Proposition 65 based on exposures to DEHP from the Products through
11 the Effective Date. This waiver and release is limited to those claims arising under Proposition
12 65 for unwarned exposures to DEHP from Products sold by Defendants before the Effective
13 Date. Defendants’ and Releasees’ compliance with this Consent Judgment constitutes
14 compliance with Proposition 65.

15 **5.2 Private Release in Plaintiff’s Individual, Non-representative Capacity**

16 Moorberg, in his individual capacity only and not in his representative capacity, also
17 provides a release to Elmer’s, Releasees, and Downstream Defendant Releasees which shall be
18 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
19 obligations, costs, expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of
20 Moorberg of any nature, character or kind, whether known or unknown, suspected or
21 unsuspected, arising out of alleged or actual unwarned exposures to DEHP from the Products.

22 **5.3 Elmer’s’s Release of Moorberg**

23 Elmer’s waives any and all claims against Moorberg and his attorneys and other
24 representatives, for any and all actions taken or statements made (or those that could have been
25 taken or made) by Moorberg and his attorneys and other representatives, whether in the course of
26 investigating claims, otherwise seeking enforcement of Proposition 65 against it in this matter, or
27 with respect to the Products.

1 **6. NOTICES**

2 When any Party is entitled to receive any notice under this Consent Judgment, the notice
3 shall be sent by: (a) first class, registered or certified mail; (b) personal delivery; or (c) a
4 recognized overnight courier on any one Party by the other Party at the following addresses:

5 For Moorberg:

6 Moscone Emblidge & Otis LLP
7 Attn: Proposition 65 Coordinator
8 220 Montgomery Street, Suite 220
9 San Francisco, CA 94104

9 For Elmer's:

10 Roger Posacki, President
11 Elmer's Products, Inc.
12 460 Polaris Parkway, Suite 500
13 Westerville, OH 43082

13 With a copy to:

14 Sarah Choi
15 Dentons US LLP
16 525 Market Street, 26th Floor
17 San Francisco, CA 94105-2708

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

19 **7. POST SETTLEMENT ACTIVITIES AND COURT APPROVAL**

20 7.1 Moorberg agrees to comply with the reporting form requirements referenced in
21 Health and Safety Code section 25249.7(f).

22 7.2 The Parties further acknowledge that, pursuant to Health and Safety Code
23 § 25249.7(f)(4), a noticed motion is required to obtain judicial approval of the settlement,
24 which motion Moorberg shall draft and file, and Elmer's shall join. Moorberg and Elmer's
25 agree to mutually employ their best efforts to support the entry of this agreement as a Consent
26 Judgment and obtain approval of the Consent Judgment by the Court in a timely manner. If
27 any third party objection to the noticed motion is filed, Moorberg and Elmer's shall work
28 together to file a joint reply and appear at any hearing before the Court. This provision is a

1 material component of the Consent Judgment and shall be treated as such in the event of a
2 breach.

3 7.3 If this Consent Judgment is not approved by the Court, (a) this Consent
4 Judgment and any and all prior agreements between the Parties as to the Notices or Complaint
5 referenced herein shall terminate and become null and void, and the action shall revert to the
6 status that existed prior to the execution date of this Consent Judgment; (b) no term of this
7 Consent Judgment or any draft thereof, or of the negotiation, documentation, or other part or
8 aspect of the Parties' settlement discussions, shall have any effect, nor shall any such matter be
9 admissible in evidence for any purpose in this action, or in any other proceeding; and (c) the
10 Parties agree to meet and confer to determine whether to modify the terms of the Consent
11 Judgment and to resubmit it for approval.

12 **8. ENFORCEMENT**

13 Any Party may, by motion or application for an order to show cause before this Court,
14 enforce the terms and conditions contained in this Consent Judgment.

15 **9. SEVERABILITY**

16 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
17 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
18 provisions remaining shall not be adversely affected.

19 **10. GOVERNING LAW**

20 The terms of this Consent Judgment shall be governed by the laws of the State of
21 California and apply within the State of California. In the event that Proposition 65 is repealed,
22 preempted or is otherwise rendered inapplicable by reason of law generally, or if any of the
23 provisions of this Consent Judgment are rendered inapplicable or no longer require as a result of
24 any such repeal or preemption or rendered inapplicable by reason of law generally as to the
25 Products, then Elmer's shall provide written notice to Moorberg of any asserted change in law,
26 and, if Moorberg agrees, Elmer's shall have no further obligations pursuant to this Consent
27 Judgment with respect to, and to the extent that, the Products are so affected. Nothing in this
28

1 Consent Judgment shall be interpreted to relieve Elmer's from any obligation to comply with any
2 pertinent state or federal toxics control law.

3 **11. DRAFTING**

4 The Parties, including their counsel, have participated and cooperated in the drafting and
5 preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts
6 of the Parties. This Consent Judgment was subject to revision and modification by the Parties
7 and has been accepted and approved as to its final form by all Parties and their counsel.

8 Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall not be
9 interpreted against any Party as a result of the manner of the preparation of this Consent

10 Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction
11 providing that ambiguities are to be resolved against the drafting Party should not be employed
12 in the interpretation of this Consent Judgment and, in this regard, the Parties hereby waive
13 California Civil Code section 1654.

14 **12. MODIFICATION**

15 This Consent Judgment may be modified only: (1) by written agreement of the Parties
16 and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful
17 motion of any Party and entry of a modified Consent Judgment by the Court.

18 **13. COUNTERPARTS**

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

22 **14. AUTHORIZATION**

23 Each signatory to this Consent Judgment certifies that he or she is fully authorized by
24 the Party he or she represents to agree to the terms and conditions of this Consent Judgment, to
25 enter into and execute the Consent Judgment on behalf of the Party represented, and to legally
26 bind that Party, and that he or she has read, understood, and agree to all of the terms and
27 conditions of this Consent Judgment.

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

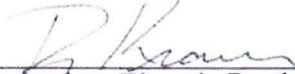
AGREED TO:

AGREED TO:

Date: 1.15.16

Date: 1-13-2016

By: 
Plaintiff Mark Moorberg

By: 
Defendant Elmer's Products, Inc.

85599686V-4