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MARK MOORBERG

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
UNLIMITED CIVIL JURISDICTION

MARK MOORBERG,
Plaintiff,
v.
APEX TOOL GROUP, LLC; and DOES 1-
150, inclusive,
Defendants.

Case No. 114CV274390
[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
4 Apex Tool Group, LLC (“Apex”), with Moorberg and Apex each individually referred to as a “Party”
5 and collectively as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Moorberg alleges that Apex manufactures, imports, sells, or distributes for sale in California,
16 vinyl/PVC coated cables and vinyl/PVC tool pouches that contain di(2-ethylhexyl)phthalate
17 (“DEHP”) without first providing the exposure warning required by Proposition 65. DEHP is listed
18 pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects or
19 other reproductive harm.

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are: (i) vinyl/PVC coated cables containing
22 DEHP including, but not limited to, the *1/8” x 100’ Vinyl Coated Galvanized Cable with Swaged Eye*
23 *on One End, #5977610CBL, (UPC No. 0 20418 23957 1)* (“Coated Cables”); and (ii) the *Nicholson*
24 *5-1/2” Hobby File Set, #42030 L (UPC No. 0 37103 18795 6)* vinyl/PVC tool pouch containing
25 DEHP, (“Nicholson Tool Pouches”); manufactured, imported, sold, or distributed for sale in
26 California by Apex, collectively the “Products.”

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1.6 Notice of Violation

On or about August 28, 2014, Moorberg served Apex and certain requisite public enforcement agencies with a “60-Day Notice of Violation” (“Notice”) alleging that Apex violated Proposition 65 by failing to warn its customers and consumers in California that the Products expose users to DEHP. To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

1.7 Complaint

On December 12, 2014, Moorberg filed the instant action (“Complaint”) naming Apex as a defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of the Notice

1.8 No Admission

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

1.9 Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Apex as to the allegations contained in the Complaint, that venue is proper in the County of Santa Clara, and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

1.10 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” means the date on which the Motion for Approval of the Consent Judgment is granted by the Court.

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

2 **2.1 Reformulated Products**

3 **2.1.1 Coated Cables**

4 Commencing on the Effective Date, and continuing thereafter, Apex shall only purchase for
5 sale, or manufacture for sale in California, "Reformulated Coated Cables." Reformulated Coated
6 Cables are products that contain DEHP in vinyl or PVC components in concentrations less than 0.1
7 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental Protection Agency
8 testing methodologies 3580A and 8270C or other methodology utilized by federal or state
9 government agencies for the purpose of determining DEHP content in a solid substance.

10 **2.1.2 Nicholson Tool Pouches**

11 Commencing on the Effective Date, and continuing thereafter, for the Nicholson Tool Pouch,
12 Apex shall only purchase for sale, or manufacture for sale in California, "Reformulated Tool
13 Pouches." Reformulated Tool Pouches are products that contain DEHP in concentrations less than
14 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental Protection
15 Agency testing methodologies 3580A and 8270C or other methodology utilized by federal or state
16 government agencies for the purpose of determining DEHP content in a solid substance.

17 **3. MONETARY SETTLEMENT TERMS**

18 **3.1 Civil Penalty Payments**

19 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
20 this Consent Judgment, Apex shall pay \$5,000 in civil penalties. The civil penalty payment shall be
21 allocated according to Health and Safety Code section 25249.12(c)(1) and (d) with seventy-five
22 percent (75%) of the funds paid to the California Office of Environmental Health Hazard Assessment
23 ("OEHHA") and twenty-five percent (25%) of the funds remitted to Moorberg.

24 Within 10 days of the Effective Date, Apex shall make an initial civil penalty payment of
25 \$5,000 in two checks for the following amounts made payable to: (a) "OEHHA" in the amount of
26 \$3,750; and (b) "Mark Moorberg, Client Trust Account" in the amount of \$1,250, as set forth in
27 Section 3.4.

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1 **3.2 Reimbursement of Attorney’s 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 leaving the
4 issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after
5 the other settlement terms had been finalized, Apex expressed a desire to resolve Moorberg’s fees
6 and costs. The Parties then attempted to (and did) reach an accord on the compensation due to
7 Moorberg and his counsel under general contract principles and the private attorney general doctrine
8 codified at California Code of Civil Procedure section 1021.5 for all work performed through the
9 mutual execution of this Consent Judgment. Within 10 days of the Effective Date, Apex shall pay
10 \$30,000 for the fees and costs incurred by Moorberg investigating, bringing this matter to Apex’s
11 attention, litigating and negotiating a settlement in the public interest.

12 **3.4 Payment Address**

13 All payments required by this Consent Judgment shall be delivered to the following address:

14 The Chanler Group
15 Attn: Proposition 65 Controller
16 2560 Ninth Street
17 Parker Plaza, Suite 214
18 Berkeley, CA 94710

17 **4. CLAIMS COVERED AND RELEASED**

18 **4.1 Moorberg’s Public Release of Proposition 65 Claims**

19 Moorberg, acting on his own behalf and in the public interest, releases Apex and its parents,
20 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
21 attorneys (“Releasees”) and each entity to whom it directly or indirectly distributes or sells the
22 Products including, but not limited to, its downstream distributors, wholesalers, customers, retailers,
23 franchisers, cooperative members, licensors and licensees (“Downstream Releasees”) for any
24 violations arising under Proposition 65 for unwarned exposures to DEHP from Products
25 manufactured, distributed, or sold by Apex prior to the Effective Date, as set forth in the Notice.
26 Compliance with the terms of this Consent Judgment, specifically Section 2.1, constitutes compliance
27 with Proposition 65 with respect to exposures to failures to warn about DEHP from the Products sold
28 by Apex after the Effective Date.

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

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

9 **4.3 Apex’s Release of Moorberg**

10 Apex, on its own behalf, and on behalf of its past and current agents, representatives,
11 attorneys, successors, and assignees, hereby waives any and all claims against Moorberg and his
12 attorneys and other representatives(or those that could have been taken or made), for any and all
13 actions taken or statements made by Moorberg and his attorneys and other representatives, whether in
14 the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this
15 matter, or with 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 shall
18 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
19 has been fully executed by the Parties.

20 **6. SEVERABILITY**

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

24 **7. GOVERNING LAW**

25 The terms of this Consent Judgment shall be governed by the laws of the state of California
26 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
27 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Apex may
28 provide written notice to Moorberg of any asserted change in the law, and shall have no further

1 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
2 so affected. Nothing in this Consent Judgment shall be interpreted to relieve Apex from any
3 obligation to comply with any pertinent state or federal toxics control laws.

4 **8. NOTICE**

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

8 For Apex:

9 Michael Munn, Vice President and General Counsel
10 Apex Tool Group, LLC
11 1000 Lufkin Rd.
12 Apex, NC 27539

13 with a copy to:

14 Jeffrey Margulies, Esq.
15 Norton Rose Fulbright US LLP
16 555 South Flower Street, 41st Floor
17 Los Angeles, California 90071

18 For Moorberg:

19 The Chanler Group
20 Attn: Proposition 65 Coordinator
21 2560 Ninth Street
22 Parker Plaza, Suite 214
23 Berkeley, CA 94710-2565

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

26 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

10. POST EXECUTION ACTIVITIES

Moorberg agrees to comply with the reporting form requirements referenced in Health and
Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement,

1 which Motion Moorberg shall draft and file with the Court. Apex shall support the entry of this
2 Consent Judgment, including appearing at the hearing on the Motion if requested.

3 **11. MODIFICATION**

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

7 **12. OTHER TERMS**

8 **12.1** This Consent Judgment contains the sole and entire agreement and understanding of
9 the Parties with respect to the entire subject matter set forth in this Consent Judgment, and any and all
10 prior discussions, negotiations, commitments, or understandings related thereto, if any, are deemed
11 merged. There are no warranties, representations, or other agreements between the Parties except as
12 expressly set forth in this Consent Judgment. No representations, oral or otherwise, express or
13 implied, other than those specifically referred to in this Consent Judgment have been made by any
14 Party. No other agreements not specifically contained or referenced in this Consent Judgment, oral or
15 otherwise, shall be deemed to exist or to bind any of the Parties. No waiver of any of the provisions
16 of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other provisions
17 whether or not similar, nor shall such waiver constitute a continuing waiver.

18 **12.2** The Parties, including their counsel, have participated in the preparation of this
19 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
20 Consent Judgment was subject to revision and modification by the Parties and has been accepted and
21 approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
22 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of
23 the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment agrees
24 that any statute or rule of construction providing that ambiguities are to be resolved against the
25 drafting Party should not be employed in the interpretation of this Consent Judgment and, in this
26 regard, the Parties hereby waive California Civil Code section 1654.

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13. AUTHORIZATION


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

AGREED TO:

AGREED TO:

Date: 11/10/2015

Date: 11/12/2015

By: 
MARK MOORBERG

By: 
Apex Tool Group, LLC