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Del Mar, CA 92130
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Attorneys for Plaintiff, King Pun Cheng

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

KING PUN CHENG,

Plaintiff,

vs.

THE LINCOLN ELECTRICT COMPANY, *et al.*

Defendants.

Case No.

UNLIMITED JURISDICTION

**STIPULATION AND [PROPOSED]
ORDER RE ENTRY OF CONSENT
JUDGMENT AS TO THE LINCOLN
ELECTRIC COMPANY
COMPANY INC., AND J.W.
HARRIS CO., INC., DBA THE
HARRIS PRODUCTS GROUP**

Complaint Filed: January 27, 2016

1 **1. INTRODUCTION**

2 **1.1 The Parties**

3 This Stipulation and [Proposed] Order Re Consent Judgment (“Consent Judgment”) is
4 hereby entered into by and between King Pun Cheng acting on behalf of the public interest
5 (hereinafter “Cheng”) and The Lincoln Electric Company, Inc. and J.W. Harris Co., Inc. dba The
6 Harris Products Group (hereinafter collectively referred to as “Lincoln” or “Defendants”).
7 Collectively Lincoln and Cheng shall be referred to hereafter as the “Parties” and each of them as
8 a “Party.” Cheng 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. Defendants employ ten or more persons and for
11 purposes of of Proposition 65, Cal. Health & Safety Code §§ 25249.6, *et seq.* each are considered
12 a person in the course of doing business

13 **1.2 Allegations and Representations**

14 Cheng alleges that Defendants have offered for sale in the State of California and have
15 sold in California Propane Torch products made from leaded brass, which contains lead, and that
16 such sales have not been accompanied by Proposition 65 warnings. Lead is listed under
17 Proposition 65 as chemicals known to the State of California to cause cancer and birth defects or
18 other reproductive harm. Cheng has cited The Lincoln “Harris Inferno Propane Torch”, hereafter
19 (“Propane Torch”) as a specific example of products that are the subject of his allegations.

20 **1.3 Covered Products Description**

21 The product that is covered by this Consent Judgment is defined as the Harris Inferno
22 Propane Torch (UPC725636411937) made from leaded brass or for which leaded brass is a
23 component, that is manufactured, sold, or distributed for sale in California by Defendants and/or
24 Releasees (as defined in Section 5.1 below). All such items shall be referred to herein as the
25 “Covered Products.”
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1.4 Notices of Violation/Complaint

A) On or about November 6, 2015, Cheng served Lincoln, J. W. Harris Co., Inc. dba The Harris Products Group, The Harris Products Group , The Home Depot, Inc., The Home Depot USA, Inc. and various public enforcement agencies with a document entitled "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Lincoln, J. W. Harris Co., Inc. dba The Harris Products Group, The Harris Products Group, The Home Depot, Inc. and The Home Depot USA, Inc. were in violation of Proposition 65 for failing to warn consumers and customers that the Covered Products exposed users in California to listed chemicals.. No public enforcer diligently prosecuted the claims threatened in the Notice within sixty days plus service time relative to the provision of the Notice to them by Cheng.

B) On January 27, 2016, Cheng, acting in the interest of the general public in the State of California, filed a complaint in the Superior Court of San Diego County alleging violations of Health & Safety Code §25249.6 (the "Complaint") based on the alleged failure to warn of exposures to lead and/or DEHP contained in Covered Products manufactured, distributed, or sold by Lincoln.

1.5 Stipulation as to Jurisdiction/No Admission

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Defendants as to the allegations contained in the complaint filed in this matter, that venue is proper in the County of San Diego, and that this Court has jurisdiction to approve, enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all claims which were or could have been raised in the Complaint based on the facts alleged therein and/or in the Notices.

Defendants individually and collectively deny the material allegations contained in Cheng's Notice and Complaint and maintains that each has not violated Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by any Defendant of any fact, finding, issue of law, or violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an admission by any Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by each Defendant. However,

1 this section shall not diminish or otherwise affect the obligations, responsibilities, and duties of
2 each Defendant under this Consent Judgment.

3 **1.6 Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date this
5 Consent Judgment is entered as a judgment of the Court. All Covered Products already shipped
6 on or before the “Effective Date” or within 30 days thereafter are deemed to be covered by the
7 waiver and release provisions of Section 5.1 of this Consent Judgment and shall not be subject to
8 any future enforcement action by Cheng hereunder. The warning requirements of Sections 2.1
9 and 2.2 shall apply to any Covered Product shipped later than 30 days after the Effective Date.

10 For purposes of this Consent Judgment, the term “Execution Date” shall mean the date
11 this Consent Judgment is signed by all parties in Section 14 below.

12
13 **2. INJUNCTIVE RELIEF: PROPOSITION 65 WARNINGS**

14 **2.1 Commitment to Warn**

15 Commencing thirty (30) days after the Effective Date, Defendants shall not ship, sell, or
16 offer to sell in California a Covered Product(s) that is/are manufactured, distributed or sold by
17 Defendants containing more than 100 parts per million lead or without a warning as set forth in
18 Section 2.2. Thirty (30) days after the Effective Date in California, Covered Products
19 manufactured, distributed or sold by Defendants shall include a warning as provided in Section
20 2.2.
21

22
23 **2.2 Health Hazard Warning**

24 Where required under Section 2.1 above, Defendants shall provide a Proposition 65
25 warning as follows:

26 **WARNING: This product contains or produces a chemical, including lead, known to**
27 **the State of California to cause cancer and birth defects (or other reproductive**
28 **harm). Wash hands after use. (California Health and Safety Code 25249.5, et seq.)**

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2.3 Placement of Health Hazard Warning

Defendants shall provide the warning language set forth in Section 2.2 either:

(a) With the unit package of the Covered Products or affixed to the Covered Products.

Such warning shall be prominently affixed to or printed on each Covered Product's label or package or the Covered Product itself. If printed on the label, the warning shall be contained in the same section that states other safety warnings, if any, concerning the use of the Covered Product; Defendants may continue to utilize, on an ongoing basis, unit packaging containing substantively the same Proposition 65 warnings as those set forth in Section 2.2 above, but only to the extent such packaging materials have already been printed within one hundred twenty days of the Effective Date, or

(b) In the owner's manual of another product in which the Covered Product is a

component, but only if the other product: (i) may cause serious injury or bodily harm unless used as directed; (ii) is sophisticated, difficult to understand or install, set-up, or assemble; or (iii) has one or more features a consumer must read about in order to know how to program or use the Covered Product. If the warning is given in the owner's manual pursuant to this subsection, it shall be located in one of the following places in the manual: the outside of the front cover; the inside of the front cover; the first page other than the cover; or the outside of the back cover. The warning shall be printed or stamped in the manual or contained in a durable label or sticker affixed to the manual in a font no smaller than the font used for other chemically-related safety warnings in the manual. Alternatively, the warning may be included in a safety warning section of the owner's manual. Lincoln may continue to utilize, on an ongoing basis, owner's manuals containing substantively the same Proposition 65 warnings and without the additional admonitions as those set forth in Section 2.2 above, but only to the extent such manuals have

1 already been printed within ninety days of the Effective Date. Owner's manual warnings may
2 only be allowed if the owner's manual is sold in the same package and at the same time as the
3 other product and not for Covered Products sold separately.

4 The requirements for warnings set forth above are imposed pursuant to the terms of this
5 Consent Judgment. The Parties recognize that these are not the exclusive methods of providing a
6 warning under Proposition 65 and its implementing regulations and that they may or may not be
7 appropriate in other circumstances.

9 **2.4 Changes in Law Affecting Health Hazard Warnings**

10 If Proposition 65 warnings for lead, lead compounds or other specified chemicals should
11 no longer be required, Defendants and Releasees shall have no further warning obligations
12 pursuant to this Consent Judgment. Except in the event that a change in the law requires
13 modification or ceases to require such warnings in the event that Defendants or Releasees
14 cease(s) to implement or modifies the warnings required under this Consent Judgment,
15 Defendants and Releasees shall provide written notice to Cheng (through counsel) of its intent to
16 do so, and of the basis for its intent, no less than thirty (30) days in advance.

18 **3. PAYMENTS PURSUANT TO HEALTH & SAFETY CODE** 19 **§25249.7(b)**

20 With regard to all claims that have been raised or which could be raised with respect to
21 failure to warn pursuant to Proposition 65 with regard to the Covered Products, Defendants shall
22 collectively pay a single civil penalty of \$500.00 pursuant to Health and Safety Code section
23 25249.7(b), to be apportioned in accordance with California Health & Safety Code § 25192, with
24 75% of these funds remitted to the State of California's Office of Environmental Health Hazard
25 Assessment and the remaining 25% of the penalty remitted to Cheng, as provided by California
26 Health & Safety Code § 25249.12(d) and the instructions directly below.

27 Defendants shall collectively issue two separate checks for the penalty payment: (a) one
28

1 check made payable to "OEHHA" (tax identification number: 68-0284486) in an amount
2 representing 75% of the total penalty (*i.e.*, \$375.00); and (b) one check in an amount representing
3 25% of the total penalty (*i.e.*, \$125.00) made payable directly to Cheng. Defendants shall mail
4 these payments within five (5) business days following the Effective Date and receipt of
5 appropriate tax identification numbers, to be held in trust by Lincoln's counsel, until the
6 Effective Date, at which time such payments shall be mailed to the following addresses

7 respectively:

8 Mike Gyurics
9 OEHHA
10 Fiscal Operations Branch
11 P.O. Box 4010
12 Sacramento, California 95812-4010

13 Mr. King Pun Cheng
14 C/O Parker A. Smith, Attorney at Law
15 11622 El Camino Real, Suite 100
16 Del Mar, CA 92130

17 **4. REIMBURSEMENT OF FEES AND COSTS**

18 The Parties reached an accord on the compensation due to Cheng and his counsel under
19 the private attorney general doctrine and principles of contract law. Under these legal principles,
20 Defendants shall reimburse Cheng's counsel for fees and costs, incurred as a result of
21 investigating, bringing this matter to Defendant attention, and negotiating a settlement in the
22 public interest. Defendants shall collectively pay Cheng's counsel nineteen thousand five
23 hundred dollars (\$19,500.00) for all attorneys' fees, expert and investigation fees, and related
24 costs associated with this matter and the Notice. Within fourteen (14) days after the Execution
25 Date, Defendants shall send a check covering all fees and costs to Defendant's counsel, who
26 shall: 1) hold such funds in Trust pending Court approval of this Consent Judgment; and 2)
27 promptly notify Cheng's counsel that the settlement funds have been received and placed into a
28 trust account. Defendants shall collectively mail a check payable to "Sy and Smith, PC", via
certified mail to the address for Cheng's counsel referenced above within five (5) business days
following the Execution Date and receipt of the appropriate tax identification number. Other than
the payment required hereunder, each side is to bear its own attorneys' fees and costs.

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5. RELEASE OF ALL CLAIMS

5.1 Cheng's Release of Defendant, Releasees, and Downstream Releasees

As to those matters raised in the Complaint and in the Notice of Violation, Cheng, on behalf of himself *and on behalf of the public interest*, hereby waives and releases any and all claims against Defendants, their parent companies, corporate affiliates, subsidiaries, predecessors, successors and assigns (collectively "Releasees") and each of their distributors, wholesalers, licensors, licensees, auctioneers, retailers (including but not limited to The Home Depot, Inc. and The Home Depot USA), franchisees, dealers, customers, owners, purchasers, users (collectively "Downstream Releasees") and their respective officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and parent entities for injunctive relief or damages, penalties, fines, sanctions, mitigation, fees (including fees of attorneys, experts, and others), costs, expenses, or any other sum incurred or claimed, for the alleged failure of Defendants, Releasees or Downstream Releasees to provide clear, accurate and reasonable warnings under Proposition 65 and/or under Business and Professions Code §17200, *et seq.* about exposure to listed chemicals arising from the sale, distribution, or use of any Covered Products sold, manufactured or distributed by Defendants, Releasees or Downstream Releasees in California prior to Ninety (90) days after the Effective Date. Compliance with the Consent Judgment by a Defendant or a Releasee shall constitute compliance with Proposition 65 by that Defendant, Releasee, or Downstream Releasee with respect to the presence of listed chemicals in the Covered Products. Plaintiff agrees that any and all claims in the underlying Proposition 65 sixty day notice letter and the Complaint are resolved with prejudice by this Consent Judgment.

In addition to the foregoing, Cheng, on behalf of himself, his past and current agents, representatives, attorneys, and successors and/or assignees, and *not* in his representative capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases any other Claims that he could make against Defendants, Releasees or Downstream Releasees arising up to Ninety (90) days after the Effective Date with respect to violations of Proposition 65 and/or Business and Professions Code §17200 based upon the

1 Covered Products. With respect to the foregoing waivers and releases in this paragraph, Cheng
2 hereby specifically waives any and all rights and benefits which he now has, or in the future may
3 have, conferred by virtue of the provisions of Section 1542 of the California Civil Code, which
4 provides as follows:

5
6 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
7 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
8 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
9 HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER
10 SETTLEMENT WITH THE DEBTOR.

11 **5.2 Defendant's Release of Cheng**

12 Defendants waive any and all claims against Cheng, his attorneys and other
13 representatives, for any and all actions taken or statements made (or those that could have been
14 taken or made) by Cheng and his attorneys and other representatives, in the course of
15 investigating claims or otherwise seeking enforcement of Proposition 65 against them in this
16 matter, and/or with respect to the Covered Products.

17 **6. SEVERABILITY AND MERGER**

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

21 This Consent Judgment contains the sole and entire agreement of the Parties and any and
22 all prior negotiations and understandings related hereto shall be deemed to have been merged
23 within it. No representations or terms of agreement other than those contained herein exist or
24 have been made by any Party with respect to the other Party or the subject matter hereof.

25 **7. GOVERNING LAW**

26 The terms of this Consent Judgment shall be governed by the laws of the State of
27 California and apply within the State of California. Compliance with the terms of this Consent
28 Judgment resolves any issue, now or in the future, as to the requirements of Proposition 65 with
respect to alleged exposures to lead arising from the Covered Products. In the event that
Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as

1 to the Covered Products, then Defendants shall provide written notice to Cheng of any asserted
2 change in the law, and shall have no further obligations pursuant to this Consent Judgment with
3 respect to, and to the extent that, the Covered Products are so affected.

4 **8. NOTICES**

5 Unless specified herein, all correspondence and notices required to be provided pursuant
6 to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
7 (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by the
8 other party at the following addresses:

9
10 For The Lincoln Electric Company; and
11 J.W. Harris Co., Inc. dba The Harris Products Group
12 22801 ST. Clair Avenue
13 Cleveland, Ohio 44117
14 Attention: General Counsel

15 and

16 Todd O. Maiden, Esq.
17 Reed Smith LLP.
18 101 Second Street, Suite 1800
19 San Francisco, CA 94105

20 and

21 For Cheng:

22 Parker Smith, Esq.
23 Sy and Smith, PC
24 11622 El Camino Real, Suite 100
25 Del Mar, CA 92130

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

28 **9. COUNTERPARTS; EMAIL OR FACSIMILE SIGNATURES**

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

1 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
2 **APPROVAL**

3 Cheng agrees to comply with the requirements set forth in California Health & Safety
4 Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment and
5 Defendants shall support approval of such Motion.

6 This Consent Judgment shall not be effective until it is approved and entered by the Court
7 and shall be null and void if, for any reason, it is not approved and entered by the Court within
8 twelve months after it has been fully executed by the Parties.

9 **11. MODIFICATION**

10 This Consent Judgment may be modified only by further stipulation of the Parties and the
11 approval of the Court or upon the granting of a motion brought to the Court by either Party.

12 **12. ATTORNEY'S FEES**

13 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
14 Judgment shall be required to pay the prevailing Party's reasonable attorney's fees and costs
15 unless the unsuccessful party has acted with substantial justification. For purposes of this
16 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
17 Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, *et seq.*

18 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
19 pursuant to law.
20

21 **13. RETENTION OF JURSDICTION**

22 This Court shall retain jurisdiction of this matter to implement or modify the Consent
23 Judgment.

24 **14. AUTHORIZATION**

25 The undersigned are authorized to execute this Consent Judgment on behalf of their
26 respective Parties and have read, understood and agree to all of the terms and conditions of this
27 document and certifies that he or she is fully authorized by the Party he or she represents to
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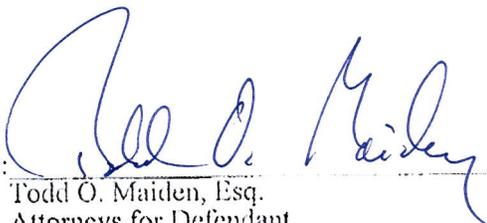
1 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.

2 Except as explicitly provided herein each Party is to bear its own fees and costs.

3 [Signatures Follow]

4
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6 APPROVED AS TO FORM:

7
8 Dated: 8 April 2016

9
10 By: 
11 Todd O. Maiden, Esq.
12 Attorneys for Defendant
13 The Lincoln Electric Company
14 J.W. Harris Co., Inc. dba The Harris Products
15 Group

16 Dated: March 30, 2016

17 By: 
18 Parker Smith, Esq.
19 Attorneys for Plaintiff,
20 King Pun Cheng

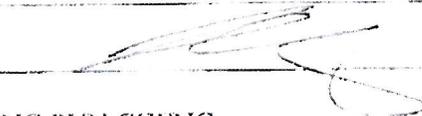
21 IT IS HEREBY SO STIPULATED:

22 AGREED TO:

23 AGREED TO:

24 Date: 2016.3.30

25 Date: March 29, 2016

26 By: 

27 KING PUN CHENG

28 By: 
STUEBER

On Behalf of:
THE LINCOLN ELECTRIC COMPANY
J.W. HARRIS CO., INC. DBA THE
HARRIS PRODUCTS GROUP