

1 Clifford A. Chanler, State Bar No. 135534
2 THE CHANLER GROUP
3 2560 Ninth Street
4 Parker Plaza, Suite 214
5 Berkeley, CA 94710-2565
6 Telephone: (510) 848-8880
7 Facsimile: (510) 848-8118

8 Attorneys for Plaintiff
9 MARK MOORBERG

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

13 MARK MOORBERG,
14 Plaintiff,

15 v.

16 SCHUMACHER ELECTRIC
17 CORPORATION, *et al.*,
18 Defendants.

Case No. 115CV288446

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*, and
Cal. Code Civ. Proc. § 664.6)

27
28

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Mark Moorberg
4 (“Moorberg”), and defendant Schumacher Electric Corporation (“Schumacher”), with Moorberg and
5 Schumacher each individually referred to as a “Party” 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 Schumacher employs ten or more individuals and is a “person in the course of doing
12 business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and
13 Safety Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

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

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are the *Schumacher Electric Booster Cables*,
22 *models BC-1210 (UPC 026666147002); BC-1408 (UPC 026666147019); BC-1606 (UPC*
23 *026666147026), and BC-1804 (UPC 026666147033)* with vinyl/PVC grips containing DEHP that
24 are manufactured, imported, sold, or distributed for sale in California by Schumacher (“Products”).

25 **1.6 Notice of Violation**

26 On July 13, 2015, Moorberg served Schumacher, the California Attorney General, and all
27 other requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging
28 that Schumacher violated Proposition 65 when it failed to warn its customers and consumers in

1 California of the health hazards associated with exposures to DEHP from the Products. No public
2 enforcer has commenced and is diligently prosecuting an action to enforce the violations alleged in
3 the Notice.

4 **1.7 Complaint**

5 On November 24, 2015, Moorberg filed the instant action (“Complaint”), for the violations of
6 Proposition 65 that are the subject of the Notice.

7 **1.8 No Admission**

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

16 **1.9 Jurisdiction**

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

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
23 the motion for approval of the Consent Judgment contemplated by Section 5 is granted by the Court.

24 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS**

25 Commencing 6-months following the Effective Date, and continuing thereafter, Schumacher
26 agrees to only manufacture for sale or purchase for sale in California, “Reformulated Products.” For
27 purposes of this Consent Judgment, “Reformulated Products” are defined as Products with a
28 maximum DEHP concentration of 1,000 parts per million (0.1 %) in any component analyzed

1 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, or
2 equivalent methodologies utilized by state or federal agencies for the purpose of determining DEHP
3 content in a solid substance.

4 **3. MONETARY SETTLEMENT TERMS**

5 **3.1 Civil Penalty Payments**

6 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred
7 to in this Consent Judgment, Schumacher shall pay \$4,000 in civil penalties. The civil penalty
8 payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with
9 seventy-five percent (75%) of the funds paid to the California Office of Environmental Health
10 Hazard Assessment ("OEHHA"), and twenty-five percent (25%) of the funds remitted to Moorberg.
11 Moorberg's counsel shall be responsible for delivering any penalty paid under this Consent Judgment
12 to OEHHA.

13 **3.1.1 Initial Civil Penalty**

14 Schumacher shall make an initial civil penalty payment of \$2,000. Schumacher shall
15 provide its payment in a single check made payable to "Mark Moorberg, Client Trust Account."

16 **3.1.2 Final Civil Penalty**

17 On October 1, 2016, Schumacher shall make a final civil penalty payment of \$2,000.
18 Pursuant to title 11 California Code of Regulations section 3203(c), Moorberg agrees that the final
19 civil penalty payment shall be waived in its entirety if, no later than September 15, 2016, an officer of
20 Schumacher provides Moorberg with a signed declaration certifying that all of the Products
21 Schumacher is shipping for sale or distributing for sale in California as of the date of its declaration
22 are Reformulated Products, and that Schumacher will continue only to offer Reformulated Products
23 for sale in California in the future. The option to provide a declaration certifying completed
24 reformulation in lieu of making the final civil penalty payment otherwise required by this Consent
25 Judgment is a material term, and time is of the essence.

26 ///

27 ///

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

3.2 Reimbursement of Attorney’s Fees and Costs

The parties acknowledge that Moorberg and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after the other settlement terms had been finalized, Schumacher expressed a desire to resolve Moorberg’s fees and costs. The Parties then attempted to (and did) reach an accord on the compensation due to Moorberg and his counsel under general contract principles and the private attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work performed through the mutual execution of this Consent Judgment. Schumacher shall pay \$20,000 for the fees and costs incurred by Moorberg investigating, bringing this matter to the attention of Schumacher’s management, litigating, and negotiating a settlement in the public interest.

3.3 Payments Held in Trust

With the exception of the final civil penalty payment required by Section 3.1.2, all payments due under this Consent Judgment shall be delivered within five days of the date this Consent Judgment is fully executed by the Parties, and held in trust by Schumacher’s counsel until the Court approves the Parties’ settlement. Schumacher’s counsel shall confirm in writing to Moorberg’s counsel upon its receipt of the settlement funds from Schumacher and, thereafter, hold the funds in trust until the Effective Date, and deliver the payments to Moorberg’s counsel within five days of the Court’s approval of this Consent Judgment. In the event the final civil penalty payment becomes due prior to the Effective Date, Schumacher shall deliver the funds to its counsel to hold in trust until, and disburse within five days after, the Effective Date.

3.4 Payment Address

All payments required by this Consent Judgment shall be delivered to:

The Chanler Group
Attn: Proposition 65 Controller
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 Moorberg’s Public Release of Proposition 65 Claims**

3 Moorberg, acting on his own behalf and in the public interest, releases Schumacher and its
4 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
5 and attorneys (“Releasees”) and each entity to whom it directly or indirectly distributes or sells the
6 Products including, but not limited to, its downstream distributors, wholesalers, customers,
7 retailers, franchisers, cooperative members, licensors and licensees (“Downstream Releasees”) for
8 any violations arising under Proposition 65 for the failure to warn about exposures to DEHP from
9 Products sold by Schumacher prior to the Effective Date, as set forth in the Notice. Compliance
10 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
11 the failure to warn about exposures to DEHP in Products sold by Schumacher after the Effective
12 Date.

13 **4.2 Moorberg’s Individual Release of Claims**

14 Moorberg, in his individual capacity only and *not* in his representative capacity, also provides
15 a release to Schumacher, Releasees, and Downstream Releasees which shall be effective as a full and
16 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
17 attorneys’ fees, damages, losses, claims, liabilities and demands of Moorberg of any nature, character
18 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
19 exposures to DEHP in Products sold or distributed for sale by Schumacher before the Effective Date.

20 **4.3 Schumacher’s Release of Moorberg**

21 Schumacher, on its own behalf, and on behalf of its past and current agents, representatives,
22 attorneys, successors, and assignees, hereby waives any and all claims against Moorberg and his
23 attorneys and other representatives, for any and all actions taken or statements made by Moorberg
24 and his attorneys and other representatives, whether in the course of investigating claims, otherwise
25 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

26 **5. COURT APPROVAL**

27 This Consent Judgment is not effective until it is approved and entered by the Court and shall
28 be null and void if, for any reason, it is not approved and entered by the Court within one year after it

1 has been fully executed by the Parties, or by such additional time as the Parties may agree to in
2 writing.

3 **6. SEVERABILITY**

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

7 **7. GOVERNING LAW**

8 The terms of this Consent Judgment shall be governed by the laws of the state of California
9 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
10 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Schumacher
11 may provide written notice to Moorberg of any asserted change in the law, and shall have no further
12 injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
13 Products are so affected.

14 **8. NOTICE**

15 All correspondence and notice required by this Consent Judgment shall be in writing and sent
16 by: (i) personal delivery; (ii) first-class, registered, or certified mail, return receipt requested; or (iii) a
17 recognized overnight courier to the following addresses:

18 For Schumacher:

19 Schumacher Electric Corporation
20 Attn: Legal Department
21 801 E. Business Center Drive
22 Mount Prospect, IL 60056

23 with a copy to:

24 Bruce Nye, Esq.
25 Adams, Nye, Becht, LLP
26 222 Kearney Street,
27 7th Floor
28 San Francisco, CA 94108-4521

///

///

///

1 For Moorberg:

2 Proposition 65 Coordinator
3 The Chanler Group
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565

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

9 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

13 **10. POST EXECUTION ACTIVITIES**

14 Moorberg agrees to comply with the reporting form requirements referenced in Health and
15 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
16 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
17 furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, and
18 those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial
19 approval of their settlement in a timely manner. For purposes of this Section, "best efforts" shall
20 include, at a minimum, cooperating on the drafting and filing of the necessary moving papers,
21 supporting the motion, and appearing at the hearing before the Court.

22 **11. MODIFICATION**

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

26 ///

27 ///

28 ///

///

1 **12. AUTHORIZATION**

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

4 **AGREED TO:**

AGREED TO:

5
6 Date: 4/8/2016

Date: 4/8/16

7
8 By: 

MARK MOORBERG

By: 

SCHUMACHER ELECTRIC
CORPORATION