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PETER ENGLANDER
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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SANTA CLARA
12 UNLIMITED CIVIL JURISDICTION
13
14

15 PETER ENGLANDER,

16 Plaintiff

17 v.

18 AMES TRUE TEMPER, INC.,

19 Defendant.

Case No. 113CV242946

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Parties.** This [Proposed] Consent Judgment (“Consent Judgment”) is entered into
3 by and between plaintiff Peter Englander (“Plaintiff”) and Ames True Temper, Inc. (“Ames”).
4 Plaintiff and Ames are collectively referred to as the “Parties.”

5 **1.2 Plaintiff.** Plaintiff is an individual residing in the State of California who seeks
6 to promote awareness of exposure to toxic chemicals and improve human health by reducing or
7 eliminating hazardous substances contained in consumer and industrial products.

8 **1.3 Defendant.** Ames employs ten or more persons and is alleged to be a person in
9 the course of doing business for purposes of California Health and Safety Code §25249.5 *et seq.*
10 (“Proposition 65”).

11 **1.4 Notice of Violation.**

12 **1.4.1** On November 21, 2012, Plaintiff served a “60-Day Notice of Violation”
13 under Proposition 65 (“Notice”) on Ames alleging that Ames violated Proposition 65 by
14 exposing persons to di(2-ethylhexyl)phthalate (“DEHP”) in the grips of hand tools without
15 first providing a clear and reasonable warning regarding the risk of reproductive harm
16 from such chemicals.

17 **1.5 Listed Phthalate Chemicals.** DEHP, butyl benzyl phthalate (“BBP”), and di-n-
18 butyl phthalate (“DBP”) are phthalate chemicals listed under Proposition 65 as chemicals
19 known to cause birth defects or other reproductive harm. DEHP, BBP, and DBP are
20 collectively referred to herein as the “Listed Chemicals.”

21 **1.6 Covered Products.** The products that are addressed by this Consent Judgment
22 (the “Covered Products”) are replacement handles, hand tools, specialty tools, snow tools,
23 pruning tools, striking tools, long handled tools, wheelbarrows, and carts with a poly vinyl
24 chloride or other soft plastic, vinyl, or synthetic leather component used to by a person to grip
25 the handle or tool during reasonably foreseeable use (“Hand Tool Grips”) that are sold, or
26 offered for sale, and/or distributed for sale in California by Ames, as further identified on
27 Exhibit A.

1 **1.7 Complaint.** As no authorized public prosecutor of Proposition 65 filed a claim
2 against Ames based on the allegations set forth in the Notice by the expiration of the 60-day
3 notice period, Plaintiff filed a complaint in the Superior Court of California for the County of
4 Santa Clara (the “Court”) alleging Proposition 65 violations against Ames as to DEHP in the
5 Covered Products (hereinafter “Action” or “Complaint”).

6 **1.8 Consent to Jurisdiction.** For purposes of this Consent Judgment only, the
7 Parties stipulate that the Court has subject matter jurisdiction over the allegations in the
8 Complaint and personal jurisdiction over Ames as to the acts alleged in the Complaint, that
9 venue is proper in the County of Santa Clara, and that the Court has jurisdiction to enter and
10 oversee this Consent Judgment pursuant to Proposition 65 and California Code of Civil
11 Procedure § 664.6.

12 **1.9 No Admission.** Nothing in this Consent Judgment is or shall be construed as an
13 admission by the Parties of any fact, conclusion of law, issue of law or violation of law, nor
14 shall compliance with the Consent Judgment constitute or be construed as an admission by
15 Ames of any fact, conclusion of law, issue of law, or violation of law. Nothing in this Consent
16 Judgment shall prejudice, waive or impair any right, remedy, argument or defense the Parties
17 may have in any other legal proceeding. This Consent Judgment is the product of negotiation
18 and compromise and is accepted by the Parties for purposes of settling, compromising and
19 resolving issues disputed in this Action. This Section shall not, however, diminish or otherwise
20 affect Ames’s obligations, responsibilities, and duties under this Consent Judgment.

21 **1.10 Effective Date.** For purposes of this Consent Judgment, the term “Effective
22 Date” shall mean the date that this Consent Judgment is fully executed by the Parties.

23 **2. INJUNCTIVE RELIEF: REFORMULATION**

24 **2.1 Reformulation Obligation.** In lieu of Proposition 65 warnings, Ames agrees
25 that, beginning on the Court’s approval of this Consent Judgment, but in no event later than
26 October 31, 2013, all Hand Tool Grips manufactured for the Covered Products shall be
27 reformulated to achieve a maximum concentration, by weight, of 1,000 parts per million or less
28 of each of the Listed Chemicals when analyzed pursuant to EPA testing methodologies 3580A

1 and 8270C or equivalent methodologies utilized by federal or state agencies for the purpose of
2 determining phthalate content in a solid substance (the “Reformulation Standard”). Ames
3 represents and warrants that, as of the Effective Date, in response to Plaintiff’s Notice, it has
4 already begun to implement this reformulation commitment and will require its Hand Tool Grip
5 manufacturers to meet the Reformulation Standard as expeditiously as reasonably possible, but
6 in no event later than October 31, 2013.

7 **3. MONETARY PAYMENTS**

8 **3.1 Civil Penalties.** Pursuant to Health & Safety Code § 25249.7(b), Ames shall pay
9 civil penalties totaling \$100,000 in two separate installments. Each penalty payment Ames
10 makes shall be allocated according to Health & Safety Code § 25249.12(c)(1) and (d) with 75%
11 of the penalty amount paid to the California Office of Environmental Health Hazard Assessment
12 (“OEHHA”), and the remaining 25% of the penalty paid to Plaintiff.

13 **3.1.1 Initial Civil Penalty.** On or before May 15, 2013, Ames shall pay an
14 initial civil penalty of \$25,000. Ames shall issue two checks made payable to: (a)
15 “OEHHA” in the amount of \$18,750; and (b) “The Chanler Group in Trust for Peter
16 Englander in the amount of \$6,250.

17 **3.1.2 Final Civil Penalty.** On or before December 15, 2013, Ames will make a
18 final civil penalty payment of \$75,000. Plaintiff agrees to waive \$25,000 of the final civil
19 penalty payment, however, if no later than November 15, 2013, a duly authorized official
20 of Ames certifies in writing to Plaintiff that all Hand Tool Grips manufactured for the
21 Covered Products offered for sale by Ames in California shall also be reformulated to
22 achieve a maximum concentration, by weight, of 1,000 parts per million or less for
23 Diisodecyl phthalate (“DIDP”) and Di(n-octyl) phthalate (“DnOP”) when analyzed
24 pursuant to EPA testing methodologies 3580A and 8270C or equivalent methodologies
25 utilized by federal or state agencies for the purpose of determining phthalate content in a
26 solid substance Plaintiff further agrees to waive an additional \$50,000 of the final civil
27 penalty, such that no final civil penalty payment is owed under this Consent Judgment, if a
28 duly authorized official of Ames certifies in writing by November 15, 2013, that 100% of

1 the Covered Products manufactured, imported, or purchased for sale by Ames nationwide
2 comply with the Reformulation Standard established by Section 2.1 and have been
3 reformulated to achieve a maximum concentration, by weight, of 1,000 parts per million
4 or less for DIDP and Di(n-octyl) phthalate DnOP. The option to provide a certification or
5 reformulation in lieu of making all or a portion of the final civil penalty payment under
6 this Section is a material term, and time, relative to the identified date for the certification,
7 is of the essence.

8 **3.2 Payment in Lieu of Further Civil Penalties.** On or before May 15, 2013, Ames
9 shall make an additional payment of \$1,500 to Silent Spring Institute (“Silent Spring”), a not-
10 for-profit institution dedicated to science that serves the public interest. This payment in lieu of
11 further civil penalties is made in accordance with California Code of Regulations title 11, §
12 3203(b). Silent Spring will use the funds in one or more of the following ways: (a) to continue
13 its work identifying the links between exposures to potentially harmful chemicals, including the
14 Listed Chemicals, and the associated risks of cancer or reproductive and developmental harm, as
15 well as to educate the public about such exposures; (b) to conduct exposure- and risk-based
16 prioritization of Proposition 65-listed chemicals, and those chemicals OEHHA identifies as
17 candidates for listing, in order to identify exposures of public health significance; (c) to monitor
18 compliance with the reformulation requirements of this and similar settlements addressing
19 Proposition 65-listed chemical exposures; or (d) to conduct exposure assessments to evaluate
20 the risks associated with exposures to DEHP, DBP, BBP and other Proposition 65-listed
21 chemicals.

22 **3.3 Reimbursement of Plaintiff’s Fees and Costs.** The Parties acknowledge that
23 Englander and his counsel offered to resolve this dispute without reaching terms on the amount
24 of fees and costs to be reimbursed to them, thereby leaving the issue to be resolved after the
25 material terms of the agreement had been settled. Shortly after all other settlement terms had
26 been finalized, Ames expressed a desire to resolve the fees and costs. The Parties then
27 attempted to (and did) reach an accord on the compensation due Englander and his counsel
28 under general contract principles and the private attorney general doctrine codified at Code of

1 Civil Procedure § 1021.5 for all work performed in this matter exclusive of fees and costs
2 incurred on appeal, if any. Under these legal principles, on or before May 15, 2013, Ames shall
3 pay \$46,000 for the fees and costs incurred investigating, litigating, and enforcing this matter,
4 including the fees and costs incurred (and to be incurred) drafting, negotiating, and obtaining the
5 Court's approval of this Consent Judgment in the public interest.

6 **3.4 Payment Procedures**

7 **3.4.1 Payment Addresses.** Payments shall be delivered as follows:

8 (a) All payments owed to Englander, Silent Spring, and Englander's
9 counsel, pursuant to Sections 3.1, 3.2 and 3.3 shall be delivered to the following address:

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

15 (b) All payments owed to OEHHA pursuant to Section 3.1, shall be
16 delivered directly to OEHHA (Memo line "Prop. 65 Penalties") at the following address:

17 Mike Gyrics
18 Fiscal Operations Branch Chief
19 Office of Environmental Health Hazard Assessment
20 P.O. Box 4010
21 Sacramento, CA 95812-4010

22 **3.4.2 Proof of Payment to OEHHA.** For any payment required to be made to
23 OEHHA under Section 3.1, Ames agrees to provide a copy of the checks to The Chanler
24 Group at the address set forth above in 3.4.1(a) as proof that such payment has been
25 rendered.

26 **3.4.3 Tax Documentation.** For each payment made under this Consent
27 Judgment, Ames shall issue separate 1099 forms to each of the following payees:

28 (a) "Peter Englander," whose address and tax identification number
will be provided after this Consent Judgment has been fully executed by the Parties;

(b) "Silent Spring Institute" whose address and tax identification
number will be provided after this Consent Judgment has been fully executed by the
Parties;

1 (c) "California Office of Environmental Health Hazard Assessment,"
2 (EIN: 68-0284486), at P.O. Box 4010, Sacramento, CA 95814; and

3 (d) "The Chanler Group" (EIN: 94-3171522) at the address provided
4 in 3.4.1(a) above.

5 **3.4.4 Court Approval; Reimbursement.** If the Court does not approve the
6 Consent Judgment, all funds tendered into any trust account, or otherwise received by The
7 Chanler Group, shall be refunded in full as required by Section 6 below. In the event that
8 the Court does not approve the Consent Judgment and Ames requests a reimbursement of
9 civil penalty payments made directly to OEHHA under Section 3.1, if, after a period of
10 ninety days, OEHHA has not reimbursed Ames, The Chanler Group agrees to refund the
11 amount of Ames payment to OEHHA and seek reimbursement of that amount from
12 OEHHA.

13 **4. CLAIMS COVERED AND RELEASED**

14 **4.1 Plaintiff's Public Release of Proposition 65 Claims.** In consideration of the
15 promises and commitments contained herein, Plaintiff on behalf of himself and his past and
16 current agents, representatives, attorneys, successors, and/or assignees, and in the public interest,
17 hereby releases Ames, all of its parents, subsidiaries, affiliated entities that are under common
18 ownership or control, directors, officers, employees, and attorneys ("Releasees"); and each entity
19 to whom they directly or indirectly distribute or sell Covered Products, including but not limited
20 to distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and
21 licensees ("Downstream Defendant Releasees"), from all claims for violations of Proposition 65
22 based on exposure to DEHP through the Covered Products arising up through the date on which
23 the Court enters this Consent Judgment. Upon entry of this Consent Judgment by the Court,
24 going forward, Ames' compliance with the terms of Section 2 of this Consent Judgment shall be
25 deemed to constitute compliance with Proposition 65 with respect to DEHP in the Covered
26 Products, including as to Covered Products sold in California pending full implementation of the
27 Reformulation Obligation set forth in Section 2 of this Consent Judgment.

1 **4.2 Plaintiff's Private Release of Proposition 65 Claims.** Plaintiff, on behalf of
2 himself and his past and current agents, representatives, attorneys, successors, and/or assignees
3 and *not* in his representative capacity, also agrees to release Ames, its Releasees, and its
4 Downstream Defendant Releases as to Proposition 65 claims arising up to the Effective Date
5 relating to the Listed Chemicals, including BBP and DBP, in the Covered Products.

6 **4.3 Ames' Release of Plaintiff.** Ames waives any and all claims against Plaintiff and
7 his attorneys and other representatives, for any and all actions taken or statements made (or those
8 that could have been taken or made) by Plaintiff and his attorneys and other representatives,
9 whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65
10 against Ames in connection with this matter.

11 **5. SEVERABILITY**

12 If, subsequent to the Court's approval of this Consent Judgment, any of the provisions
13 contained herein are held by a court to be unenforceable, the validity of the enforceable
14 provisions remaining shall not be adversely affected unless the Court finds that any unenforceable
15 provision is not severable from the remainder of the Consent Judgment.

16 **6. COURT APPROVAL**

17 This Consent Judgment is not effective until it is approved and entered by the Court and
18 shall be null and void if, for any reason, it is not approved and entered by Court within twelve
19 months of it being fully executed by the Parties, at which time, Plaintiff's counsel shall, within
20 thirty days, fully reimburse to Ames any funds that Ames has tendered to it or its trust account
21 pursuant to this agreement.

22 **7. GOVERNING LAW**

23 The terms of this Consent Judgment shall be governed by the laws of the State of
24 California and apply within the State of California. In the event that Proposition 65 is repealed or
25 otherwise rendered inapplicable by reason of law generally, or as to the Covered Products, than
26 Ames shall provide written notice to Plaintiff of any asserted change in the law, and shall have no
27 further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
28 Covered Products are so affected.

1 **8. ENFORCEMENT**

2 Any Party may, by motion or application for an order to show cause before this Court, or
3 by any other procedure lawfully available, seek to enforce the terms and conditions contained in
4 this Consent Judgment.

5 **9. NOTICE**

6 When any Party is entitled to receive any notice under this Consent Judgment, the notice
7 shall be sent by regular first class mail and electronic mail to the person identified below.

8 To Plaintiff:

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

14 To Ames:

15 President
16 Ames True Temper, Inc.
17 465 Railroad Avenue
18 Camp Hill, PA, 17011

19 and with a copy to:

20 David Parsells, Esq.
21 Stevens & Lee, P.C.
22 620 Freedom Business Center, Suite 200
23 King of Prussia, PA 19406

24 Any Party may modify the person and address to whom the notice is to be sent by sending each
25 other Party notice by mail and/or other verifiable form of written communication.

26 **10. MODIFICATION**

27 Except as provided in this Section, this Consent Judgment may be modified only by a
28 written agreement of the Parties or by the Court upon motion for good cause shown. In addition,
upon the written request of Ames, made on or before July 1, 2014, Plaintiff shall issue a 60-Day
Notice of Violation pursuant to Health & Safety Code § 25249.7(d) as to BBP and/or DBP in the
Covered Products. Ames shall cooperate with Plaintiff in providing additional information or
representations necessary to enable Plaintiff to issue such Notice and a valid Certificate of Merit
therefor. Upon the expiration of the requisite notice period and provided that no authorized

1 public prosecutor of Proposition 65 has filed a lawsuit based on the claims alleged in the Notice,
2 Plaintiff shall file with the Court and, at least ten days prior to such filing, serve notice on the
3 Attorney General's office of, an application for an approval of an amended Consent Judgment to
4 reflect the expansion of the public interest release provisions of Section 4.1 above so as to include
5 BBP and/or DBP within its scope in addition to DEHP. Pursuant to Code of Civil Procedure §§
6 1021 and 1021.5, Plaintiff and his counsel may seek from Ames through and with appropriate
7 support in support of the application, Plaintiff's reasonable fees and costs incurred issuing the
8 notice and preparing and filing the application and the amended Consent Judgment. The Parties
9 agree that this amount is not to exceed \$18,000 exclusive of fees incurred on appeal, if any.
10 Payment of the required amount shall be d to "The Chanler Group" within ten business days of
11 the filing of the application.

12 **11. ADDITIONAL POST-EXECUTION ACTIVITIES**

13 Plaintiff agrees to comply with the reporting form requirements referenced in Health and
14 Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to California Health
15 & Safety Code § 25249.7(f)(4), a noticed motion is required to obtain judicial approval of this
16 Consent Judgment. In furtherance of obtaining such approval, the Parties and their respective
17 counsel agree to mutually employ their best efforts to support the entry of this agreement as a
18 Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely
19 manner. For purposes of this paragraph, "best efforts" shall include, at a minimum, cooperating
20 on the drafting and filing of any papers in support of the required motion for judicial approval,
21 on which Plaintiff's counsel shall take the lead role.

22 **12. ENTIRE AGREEMENT**

23 This Consent Judgment contains the sole and entire agreement and understanding of the
24 Parties. No representations, oral or otherwise, express or implied, other than those contained
25 herein, have been made by any Party hereto. No other agreements shall be deemed to exist or to
26 bind any of the Parties.

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13. COUNTERPARTS, FACSIMILE SIGNATURES

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

14. AUTHORIZATION

Each signatory to this Consent Judgment certifies that he or she is fully authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into and execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

AGREED TO:

Plaintiff, PETER ENGLANDER



Signature
Date: April 22, 2013

AGREED TO:

Defendant, AMES TRUE TEMPER, INC.

Signature
By: _____
Print Name
Its: _____
Title
Date: _____

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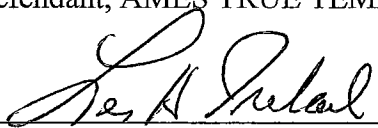
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AGREED TO:
Plaintiff, PETER ENGLANDER

AGREED TO:
Defendant, AMES TRUE TEMPER, INC.

Signature



Signature

Date: _____

By: Les H. Ireland
Print Name

Its: President
Title

Date: 4/26/13

EXHIBIT A

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Covered Products:

Long Handled Tools:

- Cultivator
- Hook
- Edger
- Fork
- Hoe
- Posthole Digger
- Rakes
- Leaf Rakes
- Shovel
- Scraper
- Scoop
- Spade
- Tampers

Wheelbarrows & Carts

Specialty Tools:

- Hound Dog
- Hand Tools
- Cutters

Pruning Tools:

- Pruner
- Scissor
- Trimmer
- Shear
- Lopper
- Saw
- Knife
- Pole Tree Trimmer

Replacement Handles

Striking Tools:

- Sledge Hammer
- Axe
- Pick & Mattock
- Splitting Wedge
- Striking Accessories
- Wood Splitter
- Hammers
- Utility Bars

Snow Tools