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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA
10 UNLIMITED CIVIL JURISDICTION
11

12 PETER ENGLANDER,
13

14 Plaintiff,

15 v.

16 LAKIM INDUSTRIES INCORPORATED,
and DOES 1-150, inclusive,
17

Defendants.

) Case No. RG 13667222
)
)

) **[PROPOSED] CONSENT JUDGMENT AS**
) **TO DEFENDANT LAKIM INDUSTRIES)**
) **INCORPORATED**
)
)

1 **1. INTRODUCTION**

2 **1.1 Peter Englander and Lakim Industries Incorporated.**

3 This Consent Judgment is entered into by and between plaintiff Peter Englander
4 (“Englander” or “Plaintiff”) and defendant Lakim Industries Incorporated, doing business as
5 Quali-Tech (“Lakim” or “Defendant”), with Englander and Lakim collectively referred to as the
6 “Parties.”

7 **1.2 Peter Englander.**

8 Englander is an individual residing in the State of California who seeks to promote
9 awareness of exposure to toxic chemicals and improve human health by reducing or eliminating
10 hazardous substances contained in consumer and commercial products.

11 **1.3 Lakim Industries Incorporated.**

12 Lakim employs ten or more persons and is a person in the course of doing business for
13 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &
14 Safety Code §25249.5 et seq. (“Proposition 65”).

15 **1.4 General Allegations.**

16 Englander alleges that Lakim has manufactured, imported, distributed and/or sold hand
17 tool grips causing an exposure to Di(2-ethylhexyl)phthalate (“DEHP”) for use in the State of
18 California without the requisite Proposition 65 warnings. DEHP is listed pursuant to Proposition
19 65 as a chemical known to the State of California to cause cancer, birth defects, and other
20 reproductive harm.

21 **1.5 Notices of Violation.**

22 On November 21, 2012, Englander served Lakim and various public enforcement
23 agencies with a document entitled “60-Day Notice of Violation,” that alleged that Lakim violated
24 Proposition 65 by failing to warn consumers that hand tool grips including, but not limited to, the
25 *Extenda Adjustable Extension Frame Roller Lite Plus!*, #6RL-KL050P (#0 28076 09150 0),
26 exposed users in California to DEHP (the “Notice”).

1 On March 13, 2013, Englander served Lakim, HD Supply Repair & Remodel, LLC
2 (“HD”), and various public enforcement agencies, with a document entitled “Supplemental 60-
3 Day Notice of Violation,” to allege the violations concerning the Covered Products set forth in
4 the Notice, against HD (the “Supplemental Notice”). The Notice and the Supplemental Notice
5 shall collectively be referred to hereinafter as the “Notices.” To the best of the Parties’
6 knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set
7 forth in the Notices.

8 **1.6 Complaint.**

9 On February 13, 2013, Englander, acting in the interest of the general public in California,
10 filed a Complaint in the instant action (“Complaint”) naming Lakim as a defendant and alleging
11 violations of Health & Safety Code §§ 25249.6, *et seq.* based on, *inter alia*, alleged occupational
12 and consumer exposures to DEHP contained in the Covered Products sold in California without
13 the clear and reasonable warning required by Proposition 65. Upon entry of this Consent
14 Judgment by the Court, the Complaint shall be deemed amended to include the allegations against
15 Lakim contained in the Supplemental Notice.

16 **1.7 No Admission.**

17 The Parties enter into this Consent Judgment as a full and final settlement of all claims
18 that were raised in the Notice and Complaint or that could have been raised in the Notice and
19 Complaint, arising out of the facts or conduct alleged therein. Lakim denies the material, factual
20 and legal allegations contained in the Notices and the Complaint, and maintains that all of the
21 products it has manufactured, imported, distributed and/or sold in the State of California,
22 including the Covered Products, have been, and are, in compliance with all laws. By execution of
23 this Consent Judgment and agreeing to comply with its terms, Lakim does not admit any facts or
24 conclusions of law, including, but not limited to, any facts or conclusions of law suggesting or
25 demonstrating any violations of Proposition 65 or any other statutory, common law or equitable
26 requirements relating to DEHP in Covered Products, such being specifically denied by Lakim.
27 Nothing in this Consent Judgment shall be construed as an admission by Lakim of any fact,
28 conclusion of law, issue of law or violation of law, nor shall compliance with this Consent

1 Judgment constitute or be construed as an admission by Lakim of any fact, conclusion of law,
2 issue of law, or violation of law. Nothing in this Consent Judgment shall prejudice, waive or
3 impair any right, remedy, argument or defense Lakim may have in this or any other or future legal
4 proceedings. This Consent Judgment is the product of negotiation and compromise and is
5 accepted by Lakim for purposes of settling, compromising, and resolving issues disputed in this
6 action. However, this Section shall not diminish or otherwise affect the obligations,
7 responsibilities and duties of Lakim under this Consent Judgment.

8 **1.8 Consent to Jurisdiction.**

9 For purposes of this Consent Judgment only, Lakim stipulates that this Court has
10 jurisdiction over Lakim as to the allegations contained in the Complaint, that venue is proper in
11 the County of Alameda and that this Court has jurisdiction to enter and enforce the provisions of
12 this Consent Judgment.

13 **2. DEFINITIONS**

14 **2.1** “Covered Product[s]” means any plastic and/or vinyl/PVC hand tool grips
15 manufactured, imported, distributed and/or sold in the State of California by Lakim including, but
16 not limited to, the *Extenda Adjustable Extension Frame Roller Lite Plus!*, #6RL-KL050P (#0
17 28076 09150 0).

18 **2.2** “Effective Date” means the date this Consent Judgment is approved by the court
19 including any tentative ruling not challenged by either of the Parties.

20 **2.3** “Vendor” means a person or entity that manufactures, imports, distributes, or
21 supplies a product to Lakim.

22 **3. INJUNCTIVE RELIEF: PRODUCT REFORMULATION**

23 **3.1 Reformulation Standards.**

24 As of the Effective Date, Lakim shall only manufacture Covered Products which contain
25 less than or equal to 1000 parts per million (“ppm”) of DEHP in any accessible component when
26 analyzed pursuant to EPA testing methodologies 3580A and 8270C, or equivalent
27 methodologies utilized by federal or state agencies for the purpose of determining DEHP content
28 in a solid substance (“Reformulated Covered Products”). By entering into this Consent

1 Judgment, the Parties do not intend to expand or restrict any obligations or responsibilities that
2 may be imposed upon Lakim by laws other than Proposition 65, nor do the Parties intend this
3 Consent Judgment to affect any defenses available to Lakim under such other laws.

4 **3.2 Vendor Notification Requirement.**

5 To the extent it has not already done so, no more than thirty (30) business days after the
6 Effective Date, Lakim shall provide the reformulation standards specified in Section 3.1 for
7 Reformulated Covered Products to any and all of its vendors of Covered Products or their
8 component parts that will be sold or offered for sale to California consumers, and shall instruct
9 each vendor to provide only Reformulated Covered Products or component parts that meet the
10 reformulation standards for Reformulated Covered Products in Section 3.1 above.

11 **4. MONETARY PAYMENTS**

12 In settlement of all the claims referred to in this Consent Judgment, Lakim shall pay a
13 total of \$25,000 in civil penalties in accordance with this Section. Each penalty payment will be
14 allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75%
15 of the funds remitted to the California Office of Environmental Health Hazard Assessment
16 (“OEHHA”) and the remaining 25% of the penalty remitted to Englander, as follows:

17 **4.1 Initial Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b).**

18 Lakim shall pay an initial civil penalty in the amount of \$5,000 on, or before, July 31,
19 2013. Lakim shall issue two separate checks to: (a) “OEHHA” in the amount of \$3,750; and (b)
20 “The Chanler Group in Trust for Peter Englander” in the amount of \$1,250. All penalty payments
21 shall be delivered to the addresses listed in Section 4.4.1 below.

22 **4.2 Final Civil Penalty Pursuant to Health & Safety Code §25249.7(b).**

23 Lakim shall pay a final civil penalty in the amount \$20,000 on, or before, December 31,
24 2013. The final civil penalty shall be waived in its entirety, if, on or before December 16, 2013,
25 an Officer of Lakim certifies in writing that it, as of December 2, 2013, has manufactured for sale
26 in California only Reformulated Covered Products and that it will continue to manufacture,
27 distribute, sell and offer for sale in California only Reformulated Covered Products. Such
28 certification must be received by The Chanler Group on or before December 16, 2013. The

1 certification in lieu of paying the final civil penalty provided by this Section is a material term,
2 and time is of the essence. Unless waived, Lakim shall issue two separate checks for its final
3 civil penalty payment to: (a) "OEHHA" in the amount of \$15,000; and (b) "The Chanler Group in
4 Trust for Peter Englander" in the amount of \$5,000.

5 **4.3 Reimbursement of Plaintiff's Fees and Costs.**

6 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
7 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
8 the fee issue to be resolved after the material terms of the agreement had been settled. Lakim
9 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms
10 had been finalized. The Parties then attempted to (and did) reach an accord on the compensation
11 due to Englander and his counsel under general contract principles and the private attorney
12 general doctrine codified at California Code of Civil Procedure section 1021.5, for all work
13 performed (and to be performed) in this matter, except fees that may be incurred in connection
14 with a third-party (including the Office of the Attorney General) appeal (if any). Under these
15 legal principles, Lakim shall pay the amount of \$32,000 to reimburse Plaintiff's fees and costs
16 incurred investigating, litigating and enforcing this matter, including the fees and costs incurred
17 (and yet to be incurred) negotiating, drafting, and obtaining the Court's approval of this Consent
18 Judgment in the public interest. This payment shall be made payable to The Chanler Group and
19 shall be delivered to the address in Section 4.4.1(a) below.

20 **4.4 Payment Procedures.**

21 **4.4.1 Funds Held In Trust**

22 (a) All payments owed to Englander, pursuant to Sections 4.1 through 4.3,
23 shall be delivered to the following payment address:

24 The Chanler Group
25 Attn: Proposition 65 Controller
26 2560 Ninth Street
27 Parker Plaza, Suite 214
28 Berkeley, CA 94710

1 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to
2 Sections 4.1 and 4.2, shall be delivered directly to OEHHA (Memo
3 line "Prop 65 Penalties") at the following addresses:

4 For United States Postal Service Delivery:

5 Mike Gyrics
6 Fiscal Operations Branch Chief
7 Office of Environmental Health Hazard Assessment
8 P.O. Box 4010
9 Sacramento, CA 95812-4010

10 For Non-United States Postal Service Delivery:

11 Mike Gyrics
12 Fiscal Operations Branch Chief
13 Office of Environmental Health Hazard Assessment
14 1001 I Street
15 Sacramento, CA 95814

16 With a copy of the checks payable to OEHHA mailed to The Chanler
17 Group at the address set forth above in 4.4.1(a), as proof of payment to
18 OEHHA.

19 If for any reason this Consent Judgment is not entered by the Court within nine (9)
20 months of July 31, 2013, Plaintiff shall meet and confer with Lakim about mutually agreeable
21 steps the parties can take to ensure entry of the Consent Judgment. If such steps cannot be
22 agreed between the Parties, Plaintiff shall return promptly any and all moneys paid and held in
23 trust herein under Sections 4.1, 4.2 (if not waived) and 4.3 upon Lakim's written request.

24 **4.4.2 Issuance of 1099 Forms**

25 After each penalty payment, Lakim shall issue separate 1099 forms for each
26 payment to Englander, whose address and tax identification number shall be furnished upon
27 request after this Consent Judgment has been fully executed by the Parties, and OEHHA at the
28 addresses listed in Section 4.4.1 above.

29 **5. CLAIMS COVERED AND RELEASED**

30 **5.1** Englander, acting on behalf of himself and in the public interest, hereby releases
31 Lakim, its parents, subsidiaries, affiliated entities that are under common ownership, directors,

1 officers, employees, attorneys, shareholders (“Defendant Releasees”), and any of its downstream
2 distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors,
3 licensees, and any other person or entity to whom they directly or indirectly distribute or sell
4 Covered Products (“Downstream Defendant Releasees”), from any alleged or actual violation of
5 Proposition 65 that has been asserted by Englander in the public interest in his Notices and
6 Complaint regarding the alleged failure to warn about exposure to DEHP in Covered Products
7 sold or distributed by Lakim prior to the Effective Date. Compliance with this Consent
8 Judgment shall constitute compliance with Proposition 65 with respect to DEHP in Covered
9 Products.

10 **5.2** Englander on behalf of himself, his past and current agents, representatives,
11 attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives all
12 rights to institute or participate in, directly or indirectly, any form of legal action and releases all
13 claims, including, without limitation, all actions, and causes of action, in law or in equity, suits,
14 liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses (including,
15 but not limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever,
16 whether known or unknown, fixed or contingent (collectively “Claims”), against Lakim,
17 Defendant Releasees, and Downstream Defendant Releasees arising from any violation of
18 Proposition 65 regarding the failure to warn about exposure to DEHP in Covered Products sold or
19 distributed prior to the Effective Date.

20 **5.3** Englander also, in his individual capacity only and *not* in his representative
21 capacity, provides a general release herein which shall be effective as a full and final accord and
22 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees,
23 damages, losses, claims, liabilities and demands of Englander of any nature, character or kind,
24 known or unknown, suspected or unsuspected, arising out of alleged exposure to any chemical
25 listed under Proposition 65 from use of the Covered Products manufactured prior to the Effective
26 Date. Englander acknowledges that he is familiar with Section 1542 of the California Civil Code,
27 which provides as follows:
28

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

4 Englander, in his individual capacity only and *not* in his representative capacity, expressly waives
5 and relinquishes any and all rights and benefits which he may have under, or which may be
6 conferred on him by the provisions of Section 1542 of the California Civil Code as well as under
7 any other state or federal statute or common law principle of similar effect, to the fullest extent
8 that he may lawfully waive such rights or benefits pertaining to the released matters. In
9 furtherance of such intention, the release hereby given shall be and remain in effect as a full and
10 complete release notwithstanding the discovery or existence of any such additional or different
11 claims or facts arising out of the released matters.

12 The Parties further understand and agree that this release shall not extend upstream to any
13 entities, other than Lakim, that manufactured the Covered Products or any component parts
14 thereof, or any distributors or suppliers who sold the Covered Products or any component parts
15 thereof to Lakim.

16 **5.4** Lakim waives any and all Claims against Englander, his attorneys, and other
17 representatives for any and all actions taken or statements made (or those that could have been
18 taken or made) by Englander and his attorneys and other representatives, whether in the course of
19 investigating claims or otherwise seeking enforcement of Proposition 65 against them in this
20 matter, and/or with respect to the Covered Products.

21 **5.5** Lakim also provides a general release herein which shall be effective as a full and
22 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
23 attorneys' fees, damages, losses, claims, liabilities and demands of Lakim of any nature, character
24 or kind, known or unknown, suspected or unsuspected, arising out of the subject matter of the
25 Action. Lakim acknowledges that it is familiar with Section 1542 of the California Civil Code,
26 which provides as follows:
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A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Lakim expressly waives and relinquishes any and all rights and benefits which it may have under, or which may be conferred on it by, the provisions of Section 1542 of the California Civil Code, as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters. In furtherance of such intention, the release hereby given shall be and remain in effect as a full and complete release notwithstanding the discovery or existence of any such additional or different claims or facts arising out of the released matters.

6. COURT APPROVAL

6.1 By this Consent Judgment and upon its approval, the Parties waive their right to a trial on the merits, and waive their rights to initiate appellate review of this Consent Judgment, and of any and all interim rulings, including all pleading, procedural, and discovery orders.

6.2 The parties acknowledge that, pursuant to California Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment, which Englander shall file and which Lakim shall support as reasonably necessary.

6.3 If this Consent Judgment is not approved by the Court: (a) this Consent Judgment and any and all prior agreements between the Parties merged herein shall terminate and become null and void, and the action shall revert to the status that existed prior to the execution date of this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall have any effect, nor shall any such matter be admissible in evidence for any purpose in this action, or in any other proceeding; and (c) the Parties agree to meet and confer to determine whether to modify the terms of the Consent Judgment and to resubmit it for approval as set forth in Section 4.4.1 above.

1 **7. GOVERNING LAW**

2 **7.1** The terms of this Consent Judgment shall be governed by the laws of the State of
3 California, and shall apply only to Covered Products offered for sale in the State of California. In
4 the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law
5 generally, or as to the Products, then Lakim may provide written notice to Englander of any
6 asserted change in the law, and shall have no further obligations pursuant to this Consent
7 Judgment with respect to, and to the extent that, the Covered Products are so affected.

8 **7.2** The Parties, including their counsel, have participated in the preparation of this
9 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
10 Consent Judgment was subject to revision and modification by the Parties and has been accepted
11 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
12 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
13 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
14 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
15 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in
16 this regard, the Parties hereby waive California Civil Code § 1654.

17 **8. NOTICES**

18 **8.1** Unless specified herein, all correspondence and notices required to be provided
19 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i)
20 first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any
21 Party by the other Party at the following addresses:

22 To Lakim:
23 Mr. Song Kim
24 Quali-Tech
25 3635 Newton Ave.
26 Unit A
27 Torrance, CA 90506-6651

1 With copy to:

2 J. Robert Maxwell, Esq.
3 Rogers Joseph O'Donnell
4 311 California Street, 10th Floor
5 San Francisco, California 94104
6 415-956-2828
7 415-956-6457 fax

8 To Englander:

9 Proposition 65 Coordinator
10 The Chanler Group
11 2560 Ninth Street
12 Parker Plaza, Suite 214
13 Berkeley, CA 94710-2565

14 **8.2** Any Party, from time to time, may specify in writing to the other Party a change of
15 address to which all notices and other communications shall be sent.

16 **9. MODIFICATION**

17 **9.1 Modification.** This Consent Judgment may be modified by written agreement of
18 the Parties and upon entry of a modified Consent Judgment by the court, or by motion of any
19 Party and entry of a modified Consent Judgment by the court.

20 **9.2 Subsequent Legislation.** If, subsequent to the Effective Date, legislation or
21 regulation is adopted that addresses the DEHP content of Covered Products sold in California
22 hereunder, any Party shall be entitled to request that the Court modify the reformulation standard
23 in Section 3.1 of this Consent Judgment for good cause shown.

24 **9.3 Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
25 or to allege a violation thereof shall first attempt in good faith to meet and confer with the other
26 Party prior to filing a motion to modify the Consent Judgment.

27 **10. ENTIRE AGREEMENT**

28 **10.1** This Consent Judgment contains the sole and entire agreement and understanding
of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
negotiations, commitments, or understandings related thereto, if any, are hereby merged herein.
No supplementation, modification, waiver, or termination of this Consent Judgment shall be
binding unless executed in writing by the Party to be bound thereby. No waiver of any of the
provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of the

1 other provisions hereof whether or not similar, nor shall such waiver constitute a continuing
2 waiver unless set forth in writing between the Parties.

3 **11. RETENTION OF JURISDICTION**

4 **11.1** This Court shall retain jurisdiction of this matter to implement or modify the
5 Consent To Judgment and shall retain jurisdiction to enforce this Consent Judgment, or any
6 provision thereof, under C.C.P §664.6.

7 **12. COUNTERPARTS; FACSIMILE SIGNATURES**

8 **12.1** This Consent Judgment may be executed in counterparts and by facsimile or
9 portable document format (pdf), each of which shall be deemed an original, and all of which,
10 when taken together, shall constitute one and the same document.

11 **13. AUTHORIZATION**

12 **13.1** The undersigned are authorized to execute this Consent Judgment on behalf of
13 their respective Parties and have read, understood, and agree to all of the terms and conditions of
14 this Consent Judgment.

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AGREED TO:

AGREED TO:

Date: July 23, 2013

Date: 07/22/13

By: 
Plaintiff PETER ENGLANDER

By: 
Defendant LAKIM INDUSTRIES
INCORPORATED