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7 Attorneys for Plaintiff, King Pun Cheng

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO

10 KING PUN CHENG,
11 Plaintiff,
12 vs.
13 LEWIS LIFETIME TOOLS
14 Defendant.

Case No.:37-2016-00042424-CU-NP-CTL

UNLIMITED JURISDICTION

**STIPULATION AND [PROPOSED]
ORDER RE ENTRY OF CONSENT
JUDGMENT AS TO LEWIS
LIFETIME TOOLS**

Complaint Filed: November 28, 2016

17 **1. Introduction**

18 **1.1 Parties**

19 This Consent Judgment is hereby entered into by and between Kingpun Cheng, as an
20 individual and acting in the interest of the public, (hereinafter “Cheng”) and Richmond
21 Engineering, Inc., a California corporation doing business as Lewis Lifetime Tools (hereinafter
22 “Lewis”) and selling products under the brand name Yard Butler, among other brand names.
23 Lewis and Cheng shall be collectively referred to as the “Parties” and each of them as a “Party.”
24 Cheng is an individual residing in California who seeks to promote awareness of exposures to
25 toxic chemicals and improve human health by reducing or eliminating hazardous substances
26 contained in consumer products.
27
28

1 **1.2 General Allegations**

2 Cheng alleges that Lewis offered for sale and sold in the State of California, Gopher/Mole
3 Bait Applicators, Terra Mattock garden hand tool, and other tools with vinyl grips that are in the
4 same product category and type, including but not limited to “Gopher/Mole Bait Applicator”
5 UPC 033607000012 and “Terra Mattock” UPC 033607007059, containing DINP, a chemical
6 listed under Proposition 65 as a chemical known to the State of California to cause cancer and
7 that it did so without providing the warning Cheng alleges is required by Proposition 65.
8 Gopher/Mole Bait Applicator and Terra Mattock are examples of the product category and type
9 of tools with vinyl grips, all of which are covered by this Consent Judgment and are referred to
10 herein as “Covered Products.”¹ Lewis claims that it has relied in good faith on the representation
11 of the supplier of the vinyl grips that they do not contain levels of DINP requiring cautionary
12 warnings under Proposition 65.
13
14

15 **1.3 Notice of Violation**

16 On or about September 26, 2016, Cheng issued a 60 Day Notice of Violation to Lewis,
17 Home Depot, and various public enforcement agencies pursuant to Health & Safety Code
18 §25249.7(d) alleging that Lewis and Home Depot Inc. and Home Depot USA, Inc. (Collectively
19 “Home Depot”) were in violation of Proposition 65 for failing to warn California consumers that
20 the Covered Products exposed them to DINP (“60 Day Notice”). The 60 Day Notice is referred
21 to herein as “Notice.” No public enforcer diligently prosecuted the claims threatened in the
22 Notice within sixty days plus service time after service of the Notice to them by Cheng.
23

24 ¹ Other examples of tools containing the same vinyl grip and thus falling into the same
25 Product Category and Type that are the subject of a Proposition 65 Notice and are encompassed
26 in “Covered Products” include, but are not limited to: Bulb and Garden Planter; Compost Aerator;
27 Concrete Mixer; Core Aerator; Deep Root Irrigator; Rocket Weeder; Sod Plugger, Spike Aerator;
28 Step Edger; Twist & Tiller; High Capacity Hose Reel; Hose Trucks (2-wheeled, 4 wheeled &
compact); Mighty Wheel; Swivel Reels (free standing, patio base & wall mount); Terra Bulb
Planter; Terra Planter; Terra Tiller; Terra Weeder; Whisk Rake and other rakes.

1 1.4 **Complaint**

2 On or about November 28, 2016, Cheng filed a Complaint against Lewis for civil
3 penalties and injunctive relief (“Complaint”) in San Diego Superior Court, Case No. 37-2016-
4 00042424-CU-NP-CTL. The Complaint alleges, among other things, that Lewis violated
5 Proposition 65 by failing to give clear and reasonable warnings of exposure to DINP from the
6 Covered Products.
7

8 1.5 **Consent to Jurisdiction**

9 For purposes of this Consent Judgment, the Parties consent that this Court has jurisdiction
10 over the allegations of violations contained in the Complaint and personal jurisdiction over the
11 named Defendant as to the acts alleged in the Complaint, that venue is proper in the County of
12 San Diego and that this Court has jurisdiction to enter this Consent Judgment as a full settlement
13 and resolution of the allegations contained in the Notices, Complaint, and of all claims which
14 were or could have been raised by any person or entity based in whole or in part, directly or
15 indirectly, on the prior conduct of the Parties or on the facts alleged in the Complaint or arising
16 therefrom or related to.
17

18 1.6 For purposes of this Consent Judgment, the term “Effective Date” shall mean the
19 date at which the Motion to Approve the Consent Judgment has been granted by the Court.
20

21 **2. Injunctive Relief**

22 Commencing on the Effective Date, Lewis shall only sell, offer for sale, or distribute for
23 sale in California, Covered Products that are either (a) reformulated pursuant to Section 2.1 or (b)
24 include a warning as provided in Section 2.3.

25 2.1 **Reformulation Option.**

26 The Covered Products shall be deemed to comply with Proposition 65 with regard to
27 DINP, and be exempt from any Proposition 65 warning requirements for DINP, if the exposed
28

1 vinyl grip and other components that are part of the Covered Products meet the following criteria:
2 the products contain DINP in concentration of less than 0.1 percent (1,000 part per million).
3 Lewis may comply with the above requirements by relying on information obtained from its
4 suppliers regarding the content of vinyl from which the components are made, provided such
5 reliance is in good faith. Obtaining test results showing that the DINP content is no more than 0.1
6 percent, using a method of sufficient sensitivity to establish a limit of quantification (as
7 distinguished from detection) of less than 1,000 ppm shall be deemed to establish good faith
8 reliance. For purposes of this Consent Judgment, Covered Products in compliance with this
9 standard are “Reformulated Products.”
10

11 **2.2 Warning Alternative.**

12 As an alternative to reformulating the Covered Products, commencing on the Effective
13 Date, Covered Products that Lewis ships for sale, sells or offers for sale in California that are not
14 Reformulated Products as set forth in Section 2.1 above shall be accompanied by a clear and
15 reasonable warning as described in Section 2.3 below.
16

17 **2.3 Clear and Reasonable Warnings.**

18 Where required under Section 2.2 above, Lewis shall provide Proposition 65 warnings
19 substantially as follows:
20

21 **WARNING:** This product contains DINP, a chemical known to the State of California to
22 cause cancer.

23 OR

24 **WARNING:** This product contains chemicals known to the State of California to cause
25 cancer.

26 2.3.1 Where utilized as an alternative to meeting the criteria set forth in Section 2.1,
27 Lewis shall provide the warning language set forth in Section 2.3 either on the packaging or a
28

1 sticker affixed to the packaging of the Covered Products or affixed to the Covered Products.
2 Such warning shall be prominently affixed to or printed on each Product's label or package or the
3 Product itself. If printed on the label, the warning shall be contained in the same section that
4 states other safety warnings, if any, concerning the use of the Product. Lewis may continue to
5 utilize, on an ongoing basis, unit packaging containing substantively the same Proposition 65
6 warnings as those set forth in Section 2.3 above, but only to the extent such packaging materials
7 have already been printed within ninety days after the Effective Date.
8

9 2.3.2 The requirements for warnings, set forth in Section 2.3 above are imposed
10 pursuant to the terms of this Consent Judgment. The Parties recognize that these are not the
11 exclusive methods of providing a warning under Proposition 65 and its implementing regulations
12 and that they may or may not be appropriate in other circumstances.
13

14 2.3.3 If Proposition 65 warnings for DINP or other specified chemicals should no longer
15 be required by Proposition 65, Lewis shall have no further warning obligations pursuant to this
16 Consent Judgment. In the event that a change in the law requires modification of such warnings,
17 Lewis may cease to implement or may modify the warnings required under this Consent
18 Judgment in compliance with the change in the law per Section 12 of this Consent Judgment. In
19 the event that the Office of Environmental Health Hazard Assessment promulgates one or more
20 regulations requiring or permitting warning text and/or methods of transmission different than
21 those set forth above, Lewis shall be entitled to either use, at its discretion, such other warning
22 text and/or method of transmission without being deemed in breach of this Consent Judgment, or
23 continue to comply with the warning provisions in this Consent Judgment per Section 12 of this
24 Consent Judgment.
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1 2.4 **Products Manufactured Prior to the Effective Date**

2 Notwithstanding anything else in this Consent Judgment, Covered Products that were
3 manufactured prior to the Effective Date shall be subject to the release of liability pursuant to
4 section 5 of this Consent Judgment, without regard to when such Covered Products were, or are
5 in the future, distributed or sold to customers. As a result, the obligations of Lewis as set forth in
6 this Consent Judgment, including but not limited to Section 2, do not apply to these products
7 manufactured, shipped or sold prior to the Effective Date.
8

9 **3. Entry of Consent Judgment**

10 3.1 With regard to all claims that have been raised or which could be raised with
11 respect to failure to warn pursuant to Proposition 65 with regard to DINP in the Covered
12 Products, Lewis shall pay a civil penalty of \$1,000 pursuant to Health and Safety Code section
13 25249.7(b), to be apportioned in accordance with California Health & Safety Code § 25192, with
14 75% of these funds remitted to the State of California’s Office of Environmental Health Hazard
15 Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to Cheng, as provided by
16 California Health & Safety Code § 25249.12(c)(1) and (d) and the instructions directly below.
17

18 3.2 **Payment Procedures**

19 Lewis shall issue two separate checks for the penalty payment: (a) one check made
20 payable to “OEHHA” (tax identification number: 68-0284486) in an amount representing 75% of
21 the total penalty (i.e., \$750); and (b) one check in an amount representing 25% of the total penalty
22 (i.e., \$250) made payable directly to Cheng. Lewis shall mail these payments within five (5) days
23 after the Effective Date at which time such payments shall be mailed to the following addresses
24 respectively:
25

26 Proposition 65 Settlement Coordinator
27 California Department of Justice
28 1515 Clay Street, 20th Floor
 Oakland, CA 94612-1413

1
2 Mr. Kingpun Cheng
3 C/O Sy and Smith, PC
4 11622 El Camino Real, Suite 100
5 San Diego, CA 92130

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20 4. **Reimbursement of Fees and Costs**

21 The Parties reached an accord on the compensation due to Cheng and his counsel
22 under the private attorney general doctrine and principles of contract law. Under these legal
23 principles, Lewis shall reimburse Cheng's counsel for fees and costs incurred as a result of
24 investigating, bringing this matter to Lewis Tools' attention, and negotiating a settlement. Lewis
25 shall pay Cheng's counsel \$10,000 for all attorneys' fees, expert and investigation fees, and
26 related costs associated with this matter, the Notices and associated fees and costs in two equal
27 installments of \$5,000 each as follows: Lewis shall wire said monies or send a check payable to
28 "Sy and Smith, PC" of the first installment within ninety (90) days of the Effective Date and of
the second and final installment within one hundred and eighty (180) days of the first payment
Sy and Smith, PC will provide Lewis with wire instruction and tax identification information on
or before the Effective Date if requested. Other than the payment required hereunder, each side is
to bear its own attorneys' fees and costs.

21 5. **Release of all Claims and Matters Covered by This Consent Judgment**

22 5.1 **Release of Lewis and Customers, Retailers, and Related or Affiliates Entities.**

23 This Consent Judgment is a full, final, and binding resolution between Cheng, acting on behalf of
24 himself and in the public interest, and Lewis and its customers of all matters that are or could
25 have been alleged in the Complaint, including any violation of Proposition 65 alleged in any and
26 all 60 Day Notices of Proposition 65 made to the California Attorney General, District Attorneys,
27 and/or City Attorneys by anyone acting for themselves or on behalf of the public interest that are
28 outstanding to the fullest extent that any violation could have been asserted by Cheng or anyone

1 acting in the public interest against Lewis, arising out of, or relating to Lewis' compliance with
2 Proposition 65, or regulations promulgated thereunder, with respect to exposures to DINP from
3 the Covered Products and components thereof whether based on actions committed by Lewis or
4 by any other entity within the chain of manufacture, distribution and sale of the Covered
5 Products, including without limitation The Home Depot and Dixieline.
6

7 To this end, Cheng releases Lewis and its Related and Affiliated Entities and their
8 respective officers, directors, attorneys, representatives, shareholders, agents, and employees,
9 sister and parent entities, successors, and assigns, and each entity to whom it directly or indirectly
10 distributed or distributes or sold or sells the Covered Products including, but not limited to, their
11 customers, distributors, wholesalers, licensors, licensees, auctioneers, retailers (including, but not
12 limited to, Home Depot, Inc., Home Depot U.S.A., Inc., Dixieline, their parents and all affiliates
13 and subsidiaries thereof), their respective employees, agents and assigns, franchisees, dealers,
14 customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries,
15 (collectively "Releasees") from all claims for violations of Proposition 65 up through the
16 Effective Date, and consistent with the provisions of Section 2.4, above, based on exposure to
17 DINP from the Covered Products as set forth in the Notices. Compliance with the terms of this
18 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to DINP
19 from the Covered Products.
20
21

22 In addition to the foregoing, Cheng, on behalf of himself, his past and current agents,
23 representatives, attorneys, and successors and/or assignees, and not in his representative capacity,
24 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
25 action and releases any other claims, cause of action, obligation, costs, expenses, attorneys' fees,
26 damages, losses, liabilities, and demands that he could make against Lewis or the Releasees with
27 respect to violations of Proposition 65 based upon the Covered Products. The Parties
28

1 acknowledge that the claims released above may include unknown claims, and with respect to the
2 foregoing waivers and releases in this paragraph, Cheng hereby specifically waives any and all
3 rights and benefits which he now has, or in the future may have, conferred by virtue of the
4 provisions of Section 1542 of the California Civil Code, which provides as follows: A
5 GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES
6 NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
7 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE
8 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.
9

10 Cheng acknowledges and understands the significance and consequences of this specific
11 waiver of California Civil Code section 1542.

12 5.2 **Lewis Release of Cheng**

13
14 Lewis waives any and all claims against Cheng, his attorneys and other representatives,
15 for any and all actions taken or statements made (or those that could have been taken or made) by
16 Cheng and his attorneys and other representatives in the course of investigating claims or
17 otherwise seeking enforcement of Proposition 65 against it in this matter.

18 6. **Non-Disparagement**

19 The Parties agree to refrain from taking action or making statements, written, oral
20 or through any form of social media, which disparage or defame the goodwill or reputation of the
21 other Party or its products.
22

23 7. **Severability and Merger**

24 If, subsequent to the execution of this Consent Judgment, any of the provisions of
25 this document are held by a court to be unenforceable, the validity of the enforceable provisions
26 remaining shall not be adversely affected.
27
28

1 This Consent Judgment contains the sole and entire agreement of the Parties and
2 any and all prior negotiations and understandings related hereto shall be deemed to have been
3 merged within it. No representations or terms of agreement other than those contained herein
4 exist or have been made by any Party with respect to the other Party or the subject matter hereof.
5

6 **8. Governing Law**

7 The terms of this Consent Judgment shall be governed by the laws of the State of
8 California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by
9 reason of law generally, or as to the Covered Products, then Lewis shall have no further
10 obligations pursuant to this Consent Judgment with respect to the Covered Products to the extent
11 the Covered Products are so affected.
12

13 **9. Notices**

14 9.1 Unless specified herein, all correspondence and notices required to be provided
15 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by:
16 electronic mail and either (i) first-class, (registered or certified mail) return receipt requested; or
17 (ii) overnight courier on any Party by the other Party at the following addresses:
18

19 Lewis Lifetime Tools:

20 Cynthia G. Iliff
21 Attorney at Law
22 15472 Markar Road
23 Poway CA 92064
24 cynthailiff@gmail.com

25 and

26 For Cheng:

27 Parker A. Smith
28 Sy and Smith, PC
 11622 El Camino Real, Suite 100
 Del Mar, CA 92130
 parker@sysmithlaw.com

1 Any Party, from time to time, may specify in writing by the means set forth above to the
2 other Party a change of address to which all notices and other communications shall be sent.

3 **10. Counterparts; Facsimile Signatures**

4 10.1 This Consent Judgment may be executed in counterparts and by facsimile or
5 exchange by electronic means, each of which shall be deemed an original, and all of which, when
6 taken together, shall constitute one and the same document.
7

8 **11. Post Execution Activities**

9 Cheng agrees to comply with the requirements set forth in California Health & Safety
10 Code §25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
11 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
12 furtherance of obtaining such approval, Cheng agrees to employ his best efforts, and those of his
13 counsel, to support the entry of this agreement as judgment, and to obtain judicial approval of this
14 Consent Judgment in a timely manner.
15

16 **12. Modification**

17 This Consent Judgment may be modified only by further written agreement of the Parties
18 with court approval or by noticed motion.

19 **13. Attorney Fees**

20 A Party who unsuccessfully brings or contests an action to enforce this Consent Judgment,
21 other than for indemnity against third parties, shall be required to pay the prevailing Party's
22 reasonable attorney's fees and costs.
23

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
28

1 document and certifies that he or she is fully authorized by the Party he or she represents to
2 execute the Consent Judgment on behalf of the Party and legally bind that Party.
3

4
5 **15. Warranties and Representations Regarding Other Potential Claims**

6 Cheng and his attorneys, Sy and Smith, PC, represent and warrant that neither of them is
7 aware of any other actual or potential action, violation, or claim against Lewis or any of the
8 Releasees. Cheng and his attorneys, Sy and Smith, PC, agree, represent and warrant that neither
9 of them shall, themselves or by assisting others, file a notice or pursue a claim against Lewis or
10 any of the Releasees for alleged violation of Proposition 65 for a period of two (2) years from the
11 Effective Date herein.
12

13 **IT IS SO STIPULATED:**

14 Dated: 2/16/17

Dated: _____

15 By: 

By: _____

16 Parker A. Smith, Attorney for Plaintiff

Cynthia G. Iliff, Attorney for Defendant

17 Dated: 2017-2-14

Dated: _____

18 By: 

By: _____

19 Kingpun Cheng

Lewis Lifetime Tools

20
21
22
23 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

24
25 Dated: _____

26 _____
27 Judge of the Superior Court
28

1 document and certifies that he or she is fully authorized by the Party he or she represents to
2 execute the Consent Judgment on behalf of the Party and legally bind that Party.

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9 of them shall, themselves or by assisting others, file a notice or pursue a claim against Lewis or
10 any of the Releasees for alleged violation of Proposition 65 for a period of two (2) years from the
11 Effective Date herein.

12 **IT IS SO STIPULATED:**

13
14 Dated: _____

15 By: _____

16 Parker A. Smith, Attorney for Plaintiff

17 Dated: _____

18 By: _____

19 Kingpun Cheng

Dated: 2/13/17

By: 

Cynthia G. Iliff, Attorney for Defendant

Dated: 2/13/17

By: 

Lewis Lifetime Tools

20
21
22
23 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

24
25 Dated: _____

Judge of the Superior Court

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12

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14 Dated: 2/16/17

Dated: _____

15 By: 

By: _____

16 Parker A. Smith, Attorney for Plaintiff

Cynthia G. Iliff, Attorney for Defendant

17 Dated: 2017-2-14

Dated: _____

18 By: 

By: _____

19 Kingpun Cheng

Lewis Lifetime Tools

20
21
22
23 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

24
25 Dated: _____

26 _____
27 Judge of the Superior Court
28