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Brian C. Johnson, State Bar No. 235965
Josh Voorhees, State Bar No. 241436
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Telephone:(510) 848-8880
Facsimile: (510) 848-8118

Attorneys for Plaintiff
PETER ENGLANDER

(ENDORSED)
FILED
MAY 14 2013
D. M. Kirwan
County of Santa Clara, California
By: _____
Daisy Cox

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

PETER ENGLANDER,

Plaintiff,

v.

JONARD INDUSTRIES CORPORATION;
et al.,

Defendants.

Case No. 112CV234448

~~PROPOSED~~ JUDGMENT PURSUANT
TO TERMS OF PROPOSITION 65
SETTLEMENT AND CONSENT
JUDGMENT

Date: May 14, 2013
Time: 9:00 a.m.
Dept. 8
Judge: Hon. Peter Kirwan

KEVIN E. MCKENNEY

Exhibit 1

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 The parties to this Consent Judgment (“Consent Judgment”) are Plaintiff Peter Englander
4 (“Englander”) on the one hand, and Defendant Jonard Industries Corporation (“Jonard”) on the
5 other hand (each a “Party and collectively “Parties”).

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Jonard employs ten or more persons, and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety
13 Code section 25249.6 et seq. (“Proposition 65”).

14 **1.4 General Allegations**

15 Englander alleges that Jonard sells tools with vinyl/PVC grips containing di(2-
16 ethylhexyl)phthalate (“DEHP”) and lead without first providing the clear and reasonable warning
17 required by Proposition 65. DEHP and lead are listed pursuant to Proposition 65 as chemicals
18 known to the State of California to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are tools with vinyl/PVC grips
21 that are sold or distributed for sale in California by Jonard, including, but not limited to, the
22 *Jonard Industries Corp. Wire Stripper, JIC-2030 (#8 11490 01167 0).*

23 **1.6 Notice of Violation**

24 On or about August 1, 2012, Englander served Jonard and certain requisite public
25 enforcement agencies with a “60-Day Notice of Violation” (“Notice”) alleging that Jonard was in
26 violation of Proposition 65 for failing to warn its customers and consumers in California that the
27 Covered Products expose users to DEHP and lead. To the best of the Parties knowledge, no
28

1 public enforcer has commenced and is diligently prosecuting the allegations set forth in the
2 Notice.

3 **1.7 Complaint**

4 On October 17, 2012, Englander filed the instant action against Jonard (“Complaint”) for
5 the alleged violations of Health and Safety Code section 25249.6 that are the subject of the
6 Notice.

7 **1.8 No Admission**

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

16 **1.9 Consent to Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over Jonard as to the allegations in the Complaint, that venue is proper in Santa Clara
19 County and that this Court has jurisdiction to enter and enforce the provisions of this Consent
20 Judgment.

21 **2. DEFINITIONS**

22 2.1 “Accessible Component” means a component of a Covered Product that could be
23 used to grip or handle the Covered Product by a person during reasonably foreseeable use,
24 including but not limited any pouch sold with and intended for storage of any Covered Product.

25 2.2 “Covered Products” means and is limited to hand tools sold or distributed for sale
26 in California by Jonard.

27 2.3 “Effective Date” means date this Consent Judgment is approved by the court.
28

1 2.4 “Vendor” means a person or entity that Manufactures, imports, distributes, or
2 otherwise supplies a Covered Product to Jonard.

3 **3. INJUNCTIVE RELIEF: REFORMULATION**

4 3.1 **Vendor Notification**

5 No more than 30 days after the Effective Date, Jonard shall provide the Reformulation
6 Standards to its then-current Vendors of Covered Products that will be sold or offered for sale to
7 California consumers, and shall instruct each Vendor to use reasonable efforts to provide Covered
8 Products that comply with the Reformulation Standards of Section 3.2 expeditiously. In
9 addressing the obligation set forth in the preceding sentence, Jonard shall not employ statements
10 that will encourage a Vendor to delay compliance with the Reformulation Standard.

11 3.2 **Reformulation Standards**

12 3.2.1 Commencing on March 1, 2013, Jonard shall not, purchase for sale, import
13 for sale, or manufacture for sale, any Covered Product that will be sold or offered for sale to
14 California consumers with any Accessible Components that contain DEHP in concentrations
15 exceeding 0.1 percent (1,000 parts per million (“ppm”)) when analyzed pursuant to any
16 methodology utilized by federal or state agencies for the purpose of determining DEHP content in
17 a solid substance.

18 3.2.2 Commencing on March 1, 2013, Jonard shall not, purchase for sale, import
19 for sale, or manufacture for sale, any Covered Product that will be sold or offered for sale to
20 California consumers with any Accessible Components that contain lead in concentrations
21 exceeding 100 ppm when analyzed pursuant to any methodology utilized by federal or state
22 agencies for the purpose of determining DEHP content in a solid substance.

23 **4. ENFORCEMENT**

24 Any Party may, by motion or application for an order to show cause before this Court,
25 enforce the terms and conditions contained in this Consent Judgment.

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1 **5. PAYMENTS**

2 **5.1 Payments Pursuant to Health and Safety Code § 25249.7(b)**

3 Pursuant to Health and Safety Code section 25249.7(b)(2), except as provided in Section
4 5.1.2, Jonard shall pay \$24,000 in civil penalties. Each Penalty payment shall be allocated
5 according to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent of
6 the penalty amount remitted to the California Office of Environmental Health Hazard Assessment
7 and the remaining twenty-five percent of each penalty payment remitted to Englander.

8 **5.1.1 Initial Civil Penalty**

9 Within five days of the Effective Date, Jonard shall pay an initial civil penalty of
10 \$8,000.

11 **5.1.2 Final Civil Penalty; Waiver on Certification of Compliance**

12 On or before June 15, 2013, Jonard shall pay a final civil penalty of \$16,000,
13 except that, the final civil penalty will be waived, in its entirety, however, if no later than May 1,
14 2013, Jonard provides Englander's counsel with written confirmation that all of the Covered
15 Products purchased for sale, imported for sale, or manufactured for sale in California after March
16 1, 2013 comply with the Reformulation Standard, and that all Covered Products offered for sale
17 in California in the future will comply with the Reformulation Standard.

18 **5.2 Reimbursement of Attorneys' Fees and Costs**

19 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
20 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
21 the issue to be resolved after the material terms of the agreement had been settled. Shortly after
22 all other settlement terms had been finalized, Jonard expressed a desire to resolve the fees and
23 costs. The Parties then attempted to (and did) reach an accord on the compensation due
24 Englander and his counsel under general contract principles and the private attorney general
25 doctrine codified at Code of Civil Procedure section 1021.5 for all work performed in this matter
26 exclusive of fees and costs incurred on appeal, if any. Under these legal principles, within five
27 days of the Effective Date, Jonard shall pay \$34,000 for the fees and costs incurred investigating,
28 litigating, and enforcing this matter, including the fees and costs incurred (and to be incurred)

1 drafting, negotiating, and obtaining the Court’s approval of this Consent Judgment in the public
2 interest.

3 **5.3 Payment Procedures**

4 **5.3.1. Payment Addresses**

5 (a) All payments to Englander and The Chanler Group shall be delivered to
6 the following address:

7 The Chanler Group
8 Attn: Proposition 65 Controller
9 2560 Ninth Street
10 Parker Plaza, Suite 214
11 Berkeley, CA 94710

12 (b) All payments to OEHHA (EIN: 68-0284486) made pursuant to section
13 5.1, shall be delivered directly to OEHHA (Memo line “Prop 65 Penalties”) at the following
14 address:

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

20 With a copy of the check(s) payable to OEHHA mailed to The Chanler Group at the address
21 payment address provided in section 5.3.1(a), as proof of payment to OEHHA.

22 **5.3.2 Required Tax Documentation**

23 (a) Jonard agrees to provide appropriate 1099 form documentation for the
24 civil penalties paid to OEHHA. The form shall be transmitted to the “Office of Environmental
25 Health Hazard Assessment,” 1001 I Street, Sacramento, CA 95814 (EIN: 68-0284486);

26 (b) For the civil penalties paid to Englander, Jonard agrees to issue a 1099
27 form to “Peter Englander,” whose address and tax identification number shall be furnished after
28 this Consent Judgment is fully executed by the Parties.

(c) For the reimbursement of fees and costs pursuant to section 5.2, Jonard
shall issue a separate 1099 form to “The Chanler Group” (EIN: 94-3171522).

1 **6. CLAIMS COVERED AND RELEASED**

2 **6.1 Public Release of Proposition 65 Claims**

3 In consideration of the promises and commitments herein contained, Englander, on his
4 own behalf and on behalf of his past and current agents, representatives, attorneys, successors,
5 and/or assignees, and in the public interest, hereby waives and releases Jonard, its parents,
6 subsidiaries, affiliated entities under common ownership or control, directors, officers,
7 employees, and attorneys (“Releasees”); and each entity to whom it directly or indirectly
8 distributes or sells Covered Products, including but not limited to distributors, wholesalers,
9 customers, retailers, franchisees, cooperative members, licensors, and licensees (“Downstream
10 Defendant Releasees”), from all claims for violations of Proposition 65 based on exposures to
11 DEHP and lead from the Covered Products through the Effective Date. This waiver and release is
12 limited to those claims arising under Proposition 65 for unwarned exposures to DEHP and lead
13 from Covered Products sold by Jonard before the Effective Date. Jonard’s and Releasees’
14 compliance with this Consent Judgment constitute compliance with Proposition 65.

15 **6.2 Private Release in Plaintiff’s Individual, Non-representative Capacity**

16 Englander, in his individual capacity only and not in his representative capacity, also
17 provides a release to Jonard, Releasees, and Downstream Defendant Releasees which shall be
18 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
19 obligations, costs, expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of
20 Englander of any nature, character or kind, whether known or unknown, suspected or
21 unsuspected, arising out of alleged or actual unwarned exposures to DEHP and lead from the
22 Covered Products.

23 **6.3 Jonard’s Release of Englander**

24 Jonard waives any and all claims against Englander and his attorneys and other
25 representatives, for any and all actions taken or statements made (or those that could have been
26 taken or made) by Englander and his attorneys and other representatives, whether in the course of
27 investigating claims, otherwise seeking enforcement of Proposition 65 against it in this matter, or
28 with respect to the Covered Products.

1 **7. NOTICE**

2 When any Party is entitled to receive any notice under this Consent Judgment, the notice
3 shall be sent by: (a) first class, registered or certified mail; (b) personal delivery; and (c) a
4 recognized overnight courier on any one Party by the other Party at the following addresses:

5 For Englander:

6 The Chanler Group
7 Attn: Proposition 65 Coordinator
8 Parker Plaza
9 2560 Ninth Street, Suite 214
10 Berkeley, CA 94710

11 For Jonard:

12 Rich Gerszberg
13 Jonard Industries Corporation
14 134 Marbledale Road
15 Tuckahoe, NY 10707

16 With a copy to:

17 Jeffrey B. Margulies, Esq.
18 Fulbright & Jaworski, L.L.P.
19 555 South Flower Street, Forty-First Floor
20 Los Angeles, CA 90071

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

23 **8. POST SETTLEMENT ACTIVITIES AND COURT APPROVAL**

24 8.1 Englander agrees to comply with the reporting form requirements referenced in
25 Health and Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to
26 Health and Safety Code section 25249.7(f)(4), a noticed motion is required to obtain judicial
27 approval of the settlement. Plaintiff agrees to draft and file the necessary moving papers, and
28 Jonard shall support the motion for approval of the Consent Judgment, and appear at the hearing
of the motion if requested.

8.2 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
and any and all prior agreements between the parties as to the Notices or Complaint referenced

1 herein shall terminate and become null and void, and the action shall revert to the status that
2 existed prior to the execution date of this Consent Judgment; (b) no term of this Consent
3 Judgment or any draft thereof, or of the negotiation, documentation, or other part or aspect of
4 the Parties' settlement discussions, shall have any effect, nor shall any such matter be
5 admissible in evidence for any purpose in this action, or in any other proceeding; and (c) the
6 parties agree to meet and confer to determine whether to modify the terms of the Consent
7 Judgment and to resubmit it for approval.

8 **9. ATTORNEYS' FEES**

9 Except as otherwise provided in this Consent Judgment including a successful
10 enforcement of this Consent Judgment under section 4, which may entitle Englander to attorney's
11 fees under Code of Civil Procedure section 1021.5 or any other applicable law, each Party and
12 their privies, shall bear its own attorneys' fees and costs.

13 **10. OTHER TERMS**

14 10.1 The terms of this Consent Judgment shall be governed by the laws of the State of
15 California and apply within the State of California. In the event that Proposition 65 is repealed,
16 preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the
17 Covered Products, then Jonard may provide written notice to Englander of any asserted change
18 in the law, and shall have no further obligations pursuant to this Consent Judgment with respect
19 to, and to the extent that, the Covered Products are so affected. Nothing in this Consent
20 Judgment shall be interpreted to relieve Jonard from any obligation to comply with any
21 pertinent state or federal toxics control laws.

22 10.2 This Consent Judgment contains the sole and entire agreement and understanding
23 of the Parties with respect to the entire subject matter set forth in this Consent Judgment, and
24 any and all prior discussions, negotiations, commitments, or understandings related thereto, if
25 any, are deemed merged. There are no warranties, representations, or other agreements between
26 the Parties except as expressly set forth in this Consent Judgment. No representations, oral or
27 otherwise, express or implied, other than those specifically referred to in this Consent Judgment
28 have been made by any Party. No other agreements not specifically contained or referenced in

1 this Consent Judgment, oral or otherwise, shall be deemed to exist or to bind any of the Parties.
2 No supplementation, modification, waiver, or termination of this Consent Judgment shall be
3 binding unless executed in writing by the Party to be bound. No waiver of any of the provisions
4 of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other
5 provisions whether or not similar, nor shall such waiver constitute a continuing waiver.

6 10.3 This Consent Judgment may be modified only by: (a) an agreement or stipulation
7 of the Parties and the entry of a modified consent judgment by the Court, or (b) by the
8 successful motion, application, or such other procedure as is available at law to any Party, and
9 the entry of a modified consent judgment by the Court thereon.

10 10.3 Nothing in this Consent Judgment shall release, or in any way affect any rights
11 that Jonard might have against any other Party.

12 10.4 This Consent Judgment may be executed in counterparts and by facsimile or
13 portable document format (PDF) signature, each of which shall be deemed an original, and all of
14 which, when taken together, shall constitute one and the same document.

15 10.5 Each signatory to this Consent Judgment certifies that he or she is fully
16 authorized by the Party he or she represents to agree to the terms and conditions of this Consent
17 Judgment, and to enter into and execute the Consent Judgment on behalf of the Party
18 represented and to legally bind that Party.

19 10.6 The Parties, including their counsel, have participated in the preparation of this
20 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.
21 This Consent Judgment was subject to revision and modification by the Parties and has been
22 accepted and approved as to its final form by all Parties and their counsel. Accordingly, any
23 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
24 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
25 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are
26 to be resolved against the drafting Party should not be employed in the interpretation of this
27 Consent Judgment and, in this regard, the Parties hereby waive California Civil Code Section
28 1654.

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AGREED TO:

Plaintiff, PETER ENGLANDER

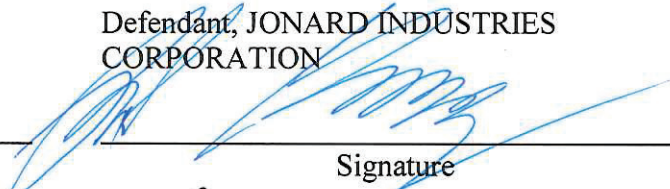


Signature

Date: February 14, 2013

AGREED TO:

Defendant, JONARD INDUSTRIES CORPORATION



Signature

By: Richard Gerszberg

Print Name

Its: President

Title

Date: 2/14/2013