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VAUGHAN & BUSHNELL MANUFACTURING CO.

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF ALAMEDA

15 UNLIMITED CIVIL JURISDICTION
16

17 PETER ENGLANDER,

18 Plaintiff,

19 v.

20 VAUGHAN & BUSHNELL
21 MANUFACTURING CO., and DOES 1-150,
inclusive,

22 Defendants.
23
24
25

Assigned for all purposes to the
Hon. Frank Roesch

Case No. RG12659338

**CONSENT JUDGMENT AS
TO DEFENDANT VAUGHAN &
BUSHNELL MANUFACTURING CO.**

Date:

Time:

Dept: 24

Judge: Hon. Frank Roesch

1 **1. INTRODUCTION**

2 **1.1 Peter Englander and Vaughan & Bushnell Manufacturing Co.**

3 This Consent Judgment is entered into by and between plaintiff Peter Englander
4 ("Englander" or "Plaintiff") and defendant Vaughan & Bushnell Manufacturing Co. ("V&B" or
5 "Defendant"), with Englander and V&B collectively referred to as the ("Parties").

6 **1.2 Peter Englander.**

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

10 **1.3 Vaughan & Bushnell**

11 V&B 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, California Health &
13 Safety Code §25249.5 et seq. ("Proposition 65").

14 **1.4 General Allegations.**

15 Englander alleges that V&B has manufactured, imported, distributed and/or sold hammers
16 with grips containing Di(2-ethylhexyl)phthalate ("DEHP") for use in the State of California
17 without the requisite health hazard warnings. DEHP is listed pursuant to Proposition 65 as a
18 chemical known to the State of California to cause birth defects and other reproductive harm.

19 **1.5 Notice of Violation.**

20 On July 11, 2012, Englander served V&B and various public enforcement agencies with a
21 document entitled "60-Day Notice of Violation," that alleged that V&B violated Proposition 65
22 by failing to warn consumers that hand tool grips including, but not limited to, the *V5 19 oz. A/S*
23 *Vaughan M/F Hammer (#0 51218 13030 0)*, exposed users in California to DEHP.

24 **1.6 Complaint.**

25 On December 11, 2012, Englander, acting in the interest of the general public in
26 California, filed a Complaint in the instant action ("Complaint") naming V&B, Inc. as a
27 defendant and alleging violations of Health & Safety Code §§ 25249.6, *et seq.* based on, *inter*

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1 *alia*, alleged occupational and consumer exposures to DEHP contained in the Covered Products
2 sold in California without the clear and reasonable warning required by Proposition 65.

3 **1.7 No Admission.** By execution of this Consent Judgment and agreeing to comply
4 with its terms, V&B does not admit any facts or conclusions of law, including, but not limited to,
5 any facts or conclusions of law suggesting or demonstrating any violations of Proposition 65 or
6 any other statutory, common law or equitable requirements relating to DEHP in Covered
7 Products. Nothing in this Consent Judgment shall be construed as an admission by V&B of any
8 fact, conclusion of law, issue of law or violation of law, nor shall compliance with the Consent
9 Judgment constitute or be construed as an admission by V&B of any fact, conclusion of law,
10 issue of law, or violation of law. Nothing in this Consent Judgment shall prejudice, waive or
11 impair any right, remedy, argument or defense V&B may have in this or any other or future legal
12 proceedings. This Consent Judgment is the product of negotiation and compromise and is
13 accepted by V&B for purposes of settling, compromising, and resolving issues disputed in this
14 action. However, this section shall not diminish or otherwise affect the obligations,
15 responsibilities and duties of V&B under this Consent Judgment.

16 **1.8 Consent to Jurisdiction.** For purposes of this Consent Judgment only, V&B
17 stipulates that this Court has jurisdiction over V&B as to the allegations contained in the
18 Complaint, that venue is proper in the County of Alameda and that this Court has jurisdiction to
19 enter and enforce the provisions of this Consent Judgment.

20 **2. DEFINITIONS.**

21 2.1 “Covered Products” means hammers with grips.

22 2.2 “Effective Date” means the date this Consent Judgment is approved by the court,
23 either orally on the record, or by written order, whichever is earlier.

24 2.3 “DEHP Limits” means the maximum concentration of DEHP and DEHP
25 composites by weight specified in Section 3.1.

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1 **3. INJUNCTIVE RELIEF: REFORMULATION**

2 3.1 DEHP Limits. As of the Effective Date, V&B shall not manufacture any Covered
3 Product that will be sold or offered for sale to California consumers or businesses with a grip that
4 contains DEHP in concentrations of more than 0.1 percent (1,000 parts per million) by weight in
5 each accessible component when analyzed pursuant to U.S. Environmental Protection Agency
6 testing methodologies 3580A and 8270C or any other methodology authorized by federal or state
7 agencies for the purpose of determining the DEHP content in a solid substance (“Reformulated
8 Covered Products”).

9 **4. ENFORCEMENT OF CONSENT JUDGMENT**

10 4.1 After the Effective Date, any Party may, after meeting and conferring, by motion,
11 application for an order to show cause, or any other available remedy at law before this Court,
12 enforce the terms and conditions contained in this Consent Judgment.

13 **5. MONETARY PAYMENTS**

14 5.1 **Initial Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

15 V&B shall make an initial payment of \$12,000 to be apportioned in accordance with
16 Health & Safety Code section 25249.12, subdivisions (c)(1) and (d), with 75% of these funds
17 earmarked for the State of California’s Office of Environmental Health Hazard Assessment
18 (“OEHHA”) and the remaining 25% of these penalty monies earmarked for Englander. This
19 payment shall be delivered to The Chanler Group no later than five (5) days after the Effective
20 Date, and shall be made payable, as follows:

21 5.1.1 One check made payable to “The Chanler Group in Trust for OEHHA” in
22 the amount of \$9,000; and

23 5.1.2 One check made payable to “The Chanler Group in Trust for Englander” in
24 the amount of \$3,000.

25 5.2 **Final Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

26 V&B shall pay a final civil penalty of \$28,000 on February 28, 2014 which shall be
27 apportioned in accordance with Health & Safety Code section 25249.12, subdivisions (c)(1) and
28 (d), with 75% of these funds earmarked for the State of California’s Office of Environmental

1 Health Hazard Assessment (“OEHHA”) and the remaining 25% of these penalty monies
2 earmarked for Englander. This payment shall be delivered to The Chanler Group no later than
3 February 28, 2014, and shall be made payable, as follows:

4 5.2.1 One check made payable to “The Chanler Group in Trust for OEHHA” in
5 the amount of \$21,000; and

6 5.2.2 One check made payable to “The Chanler Group in Trust for Englander” in
7 the amount of \$7,000.

8 However, the final civil penalty shall be waived in its entirety if an Officer of V&B
9 certifies in writing that it, as of February 1, 2014, has manufactured for sale in California only
10 Reformulated Covered Products and that it will continue to manufacture, distribute, sell and offer
11 for sale in California only Reformulated Covered Products. Such certification must be received
12 by The Chanler Group on or before February 14, 2014. The certification in lieu of paying the
13 final civil penalty provided by this section is a material term, and time is of the essence.

14 **5.3 Reimbursement of Plaintiff’s Fees and Costs**

15 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
16 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
17 leaving this fee issue to be resolved after the material terms of the agreement had been settled.
18 V&B then expressed a desire to resolve the fee and cost issue shortly after the other settlement
19 terms had been finalized. The Parties then attempted to (and did) reach an accord on the
20 compensation due to Englander and his counsel under general contract principles and the private
21 attorney general doctrine codified at California Code of Civil Procedure section 1021.5, for all
22 work performed in this matter, except fees that may be incurred on appeal. Under these legal
23 principles, V&B shall pay the amount of \$42,250 for fees and costs incurred investigating,
24 litigating and enforcing this matter, including the fees and costs incurred (and yet to be incurred)
25 negotiating, drafting, and obtaining the Court’s approval of this Consent Judgment in the public
26 interest.

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1 This payment shall be delivered and made payable to The Chanler Group no later than
2 five (5) days after the Effective Date.

3 **5.4 Issuance of 1099 Forms.** After the Consent Judgment has been approved and the
4 settlement funds have been transmitted to Plaintiff's counsel, V&B shall issue separate 1099
5 forms, as follows:

6 5.4.1 The first 1099 shall be issued to the Office of Environmental Health Hazard
7 Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount of
8 \$9,000;

9 5.4.2 The second 1099 shall be issued to Englander in the amount of \$3,000,
10 whose address and tax identification number shall be furnished upon request; and

11 5.4.3 The third 1099 shall be issued to The Chanler Group (EIN: 94-3171522) in
12 the amount of \$42,250.

13 5.4.4 If the final penalty in Section 5.2 above is paid, the fourth 1099 shall be
14 issued to the Office of Environmental Health Hazard Assessment, P.O. Box 4010,
15 Sacramento, CA 95814 (EIN: 68-0284486) in the amount of \$21,000; and

16 5.4.5 If the final penalty in 5.2 above is paid, the fifth 1099 shall be issued to
17 Englander in the amount of \$7,000, whose address and tax identification number shall be
18 furnished upon request.

19 **5.5 Payment Address:** All payments to the Chanler Group shall be delivered to the
20 following payment address:

21 The Chanler Group
22 Attn: Proposition 65 Controller
23 2560 Ninth Street
24 Parker Plaza, Suite 214
25 Berkeley, CA 94710

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1 **6. CLAIMS COVERED AND RELEASE**

2 6.1 This Consent Judgment is a full, final, and binding resolution between Englander
3 and V&B and its parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates,
4 and sister companies and their successors and assigns (“Defendant Releasees”), and their
5 downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members,
6 licensors, and licensees, and any other person or entity to whom they directly or indirectly
7 distribute or sell Covered Products, (“Downstream Defendant Releasees”), of any violation of
8 Proposition 65 that has been asserted by Englander in the public interest, through a Proposition 65
9 60-Day Notice of Violation against V&B, Defendant Releasees, and Downstream Defendant
10 Releasees regarding the failure to warn about exposure to DEHP in Covered Products. Defendant
11 Releasees’ compliance with this Consent Judgment shall constitute compliance with Proposition
12 65 with respect to DEHP in Covered Products after the Effective Date.

13 6.2 Englander on behalf of himself, his past and current agents, representatives,
14 attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives all
15 rights to institute or participate in, directly or indirectly, any form of legal action and releases all
16 claims, including, without limitation, all actions, and causes of action, in law or in equity, suits,
17 liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses (including,
18 but not limited to, investigation fees, expert fees, and attorneys’ fees) of any nature whatsoever,
19 whether known or unknown, fixed or contingent (collectively “Claims”), against V&B,
20 Defendant Releasees, and Downstream Defendant Releasees arising from any violation of
21 Proposition 65 regarding the failure to warn about exposure to DEHP in Covered Products.

22 6.3 Englander also, in his individual capacity only and *not* in his representative
23 capacity, provides a general release herein which shall be effective as a full and final accord and
24 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees,
25 damages, losses, claims, liabilities and demands of Englander of any nature, character or kind,
26 known or unknown, suspected or unsuspected, arising out of the subject matter of the Complaint.

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1 Englander acknowledges that he is familiar with Section 1542 of the California Civil Code,
2 which provides as follows:

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

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

16 This release is expressly limited to those claims that arise under Proposition 65, as such
17 claims relate to Defendant's alleged failure to warn about exposures to or identification of the
18 DEHP contained in the Covered Products, as such claims are identified in the Proposition 65 60-
19 Day Notice to Defendant and to the extent that any alleged violations occur prior to thirty (30)
20 days after the Effective Date. This Release does not release any person, party or entity from any
21 liability for any violation of Proposition 65 regarding the Covered Products that occur more than
22 thirty (30) days after the Effective Date.

23 The Parties further understand and agree that this release shall not extend upstream to any
24 entities, other than Defendant, that manufactured the Covered Products or any component parts
25 (or raw materials such as PVC) thereof, or any distributors or suppliers who sold the Covered
26 Products or any component parts thereof to Defendant.

27 6.4 V&B waives any and all Claims against Englander, his attorneys, and other
28 representatives for any and all actions taken or statements made (or those that could have been
taken or made) by Englander and his attorneys and other representatives, whether in the course of

1 investigating claims or otherwise seeking enforcement of Proposition 65 against them in this
2 matter, and/or with respect to the Covered Products.

3 6.5 V&B also provides a general release herein which shall be effective as a full and
4 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
5 attorneys' fees, damages, losses, claims, liabilities and demands of V&B of any nature, character
6 or kind, known or unknown, suspected or unsuspected, arising out of the subject matter of the
7 Action. V&B acknowledges that it is familiar with Section 1542 of the California Civil Code,
8 which provides as follows:

9 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
10 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
11 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.

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

19 **7. COURT APPROVAL**

20 7.1 By this Consent Judgment and upon its approval, the Parties waive their right to
21 trial on the merits, and waive rights to seek appellate review of any and all interim rulings,
22 including all pleading, procedural, and discovery orders.

23 7.2 The Parties acknowledge that, pursuant to California Health & Safety Code
24 §25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment,
25 which Englander shall file. V&B shall support the entry of this Consent Judgment.

26 7.3 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
27 and any and all prior agreements between the Parties merged herein shall terminate and become
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1 null and void, and the action shall revert to the status that existed prior to the execution date of
2 this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the
3 negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall
4 have any effect, nor shall any such matter be admissible in evidence for any purpose in this
5 action, or in any other proceeding; and (c) the Parties agree to meet and confer to determine
6 whether to modify the terms of the Consent Judgment and to resubmit it for approval.

7 **8. ATTORNEYS' FEES**

8 8.1 Should Plaintiff prevail on any motion, application for an order to show cause, or
9 any other available remedy at law to enforce or redress a violation of this Consent Judgment,
10 Plaintiff shall be entitled to his reasonable attorneys' fees and costs incurred as a result of such
11 motion, application, or other remedy at law. Should V&B prevail on any motion application for
12 an order to show cause or other proceeding, V&B may be awarded its reasonable attorneys' fees
13 and costs as a result of such motion or application upon a finding by the court that Plaintiff's
14 prosecution of the motion or application lacked substantial justification. For purposes of this
15 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
16 Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, *et seq.*

17 8.2 Except as otherwise provided in this Consent Judgment, each Party shall bear its
18 own attorneys' fees and costs.

19 8.3 Nothing in this Section 8 shall preclude a Party from seeking an award of
20 sanctions pursuant to law.

21 **9. GOVERNING LAW**

22 9.1 The terms of this Consent Judgment shall be governed by the laws of the State of
23 California, and shall apply only to Covered Products offered for sale in the State of California. In
24 the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law
25 generally, or as to the Products, then V&B may provide written notice to Englander of any
26 asserted change in the law, and shall have no further obligations pursuant to this Consent
27 Judgment with respect to, and to the extent that, the Covered Products are so affected.

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1 9.2 The Parties, including their counsel, have participated in the preparation of this
2 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
3 Consent Judgment was subject to revision and modification by the Parties and has been accepted
4 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
5 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
6 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
7 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
8 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in
9 this regard, the Parties hereby waive California Civil Code § 1654.

10 **10. NOTICES**

11 10.1 Unless specified herein, all correspondence and notices required to be provided
12 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i)
13 first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any
14 Party by the other Party at the following addresses:

15 To V&B:

16 Charles Vaughan, President
17 Vaughan & Bushnell Manufacturing Co.
18 11414 Maple Avenue
19 P.O. Box 390
20 Hebron, IL 60034

21 With a copy to:

22 Jeffrey B. Margulies, Esq.
23 Fulbright & Jaworski LLP
24 555 South Flower Street, Forty-First Floor
25 Los Angeles, California 90071
26 213-892-9286
27 213-892-9494 fax
28 jeff.margulies@nortonrosefulbright.com

 To Englander:

 Proposition 65 Coordinator
 The Chanler Group
 2560 Ninth Street
 Parker Plaza, Suite 214
 Berkeley, CA 94710-2565

1 10.2 Any Party, from time to time, may specify in writing to the other Party a change of
2 address to which all notices and other communications shall be sent.

3 **11. MODIFICATION**

4 11.1 **Modification.** This Consent Judgment may be modified by written agreement of
5 the Parties and upon entry of a modified Consent Judgment by the court, or by motion of any
6 Party and entry of a modified Consent Judgment by the court.

7 11.2 **Subsequent Legislation.** If, subsequent to the Effective Date, legislation or
8 regulation is adopted that addresses the DEHP content of Covered Products sold in California,
9 any Party shall be entitled to request that the Court modify the reformulation standard of Section
10 3.1 of this Consent Judgment for good cause shown.

11 11.3 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
12 shall attempt in good faith to meet and confer with the other Party prior to filing a motion to
13 modify the Consent Judgment.

14 **12. ENTIRE AGREEMENT**

15 12.1 This Consent Judgment contains the sole and entire agreement and understanding
16 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
17 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
18 and therein. No supplementation, modification, waiver, or termination of this Consent Judgment
19 shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of
20 the provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of the
21 other provisions hereof whether or not similar, nor shall such waiver constitute a continuing
22 waiver.

23 **13. RETENTION OF JURISDICTION**

24 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
25 Consent Judgment and shall retain jurisdiction to enforce this Consent Judgment, or any provision
26 thereof, under C.C.P §664.6.

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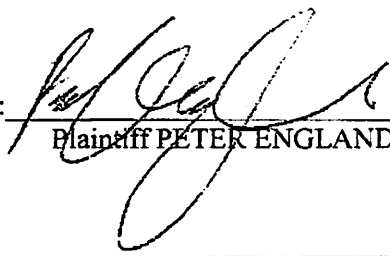
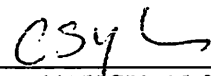
1 **14. COUNTERPARTS; FACSIMILE SIGNATURES**

2 14.1 This Consent Judgment may be executed in counterparts and by facsimile or
3 portable document format (pdf), each of which shall be deemed an original, and all of which,
4 when taken together, shall constitute one and the same document.

5 **15. AUTHORIZATION**

6 15.1 The undersigned are authorized to execute this Consent Judgment on behalf of
7 their respective Parties and have read, understood, and agree to all of the terms and conditions of
8 this Consent Judgment.

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AGREED TO:	AGREED TO:
Date: <u>June 25, 2013</u>	Date: <u>6-28-2013</u>
By:  Plaintiff PETER ENGLANDER	By:  Defendant VAUGHAN & BUSHNELL MANUFACTURING CO.