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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA
10 UNLIMITED CIVIL JURISDICTION

11
12 JOHN MOORE,
13 Plaintiff,
14 v.
15 DAS DISTRIBUTORS, INC.; *et al.*,
16 Defendants.

Case No. RG11585401

**[PROPOSED] CONSENT
JUDGMENT**

Health & Safety Code § 25249.6 *et seq.*

1 **1. INTRODUCTION**

2 **1.1 John Moore and DAS Distributors, Inc.**

3 This Consent Judgment is entered into by and between John Moore (“Moore” or “Plaintiff”)
4 and DAS Distributors, Inc, DAS, Inc. (“DAS” or “Defendant”), with Moore and DAS collectively
5 referred to as the “parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 DAS 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 § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Moore alleges that DAS has distributed, and/or offered for sale in California notepad and
16 business card holders with vinyl/PVC covers and vinyl/PVC kit bag products containing what
17 Moore asserts are excessive amounts of di(2-ethylhexyl)phthalate (“DEHP” or “Listed Chemical”)
18 without first providing the requisite “clear and reasonable” exposure warnings required by
19 Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the state of
20 California to cause birth defects and other reproductive harm.

21 **1.5 Product Description and Definitions**

22 The products covered by this Consent Judgment are the following notepad and business card
23 holders with vinyl/PVC covers and vinyl/PVC kit bags containing DEHP that are distributed for sale
24 in California by DAS:

- 25 1. RoadPro Pad Holder with Calculator, RPPT6672-5 (#04546425766 9) (also known as
26 the “Mini Organizer w/Calc & Notebook Brwn”);
27 2. Road Pro executive Notepad and Holder, RP-72009EN (#04546472009 5) (also
28 known as Notebook, RoadPro Executive, w/Flip Calc”);

- 1 3. Professional Driver's Binder, black, PDBBK (#04546490029 9);
- 2 4. Business Card Holder Deluxe, Holds 73, NCH-72BK (#04546490023 7);
- 3 5. Business Card Holder, Holds 36 black, NCH 36BK (#04546490024 4);
- 4 6. Organizer-Deluxe, BLK Zipper Closure, ORGZBK (#04546490027 5);
- 5 7. Clipboard/ Padfolio, 9x12, Black, DCB-111BK (#04546490063 3);
- 6 8. Organizer-Deluxe, BLK, Velcro Closure, ORGVBK (#04546490025 1);
- 7 9. Mini Org with Calculator & Notebook Black, RPPT6747-5 (#04546425765 2); and
- 8 10. Road Pro Kit Bags, TKL-001 BN (#04546400057 9) (also known as "Shave Kit, Brn
- 9 Patchwork Leather Zippered").

10 All such notepad and business card holders with vinyl/PVC covers and vinyl/PVC kit bags
11 containing DEHP are referred to collectively hereinafter as the "Products."

12 1.6 For purposes of this Consent Judgment, "future Product runs" shall mean Products
13 that DAS manufactures and/or causes to be manufactured after the Effective Date for sale in
14 California; and/or Products that DAS distributes and/or ships, and/or causes to be distributed or
15 shipped, for sale in California, after the Effective Date.

16 1.7 Notices of Violation

17 On April 8, 2011, Moore served DAS and various public enforcement agencies with a
18 document entitled 60-Day Notice of Violation that informed DAS and the public enforcers that
19 DAS was allegedly in violation of Proposition 65 for failing to warn its customers and consumers in
20 California that the coverings for Products expose users to DEHP. On August 16, 2012, Moore
21 served DAS and various public enforcement agencies with a document entitled Supplemental 60-
22 Day Notice of Violation that informed DAS and the public enforcers that DAS was allegedly in
23 violation of Proposition 65 for failing to warn its customers and consumers in California that the
24 notepad and business card holders with vinyl/PVC covers Products and vinyl/PVC kit bag Products
25 expose users to DEHP (collectively, "Notices").

26 1.7 Complaint

27 On July 14, 2011, Moore filed the instant action ("Complaint") naming DAS as a defendant
28 and stating a cause of action for the violations of Health & Safety Code § 25249.6 alleged in the

1 Notice dated April 08, 2011. Following the expiration of more than 66 days after Plaintiff's service
2 of the Supplemental Notice of Violation, and upon entry of this Consent Judgment, the Complaint
3 shall be deemed amended nunc pro tunc to include the violations of Proposition 65 alleged in the
4 Supplemental Notice with respect to the Products (notepad and business card holders with
5 vinyl/PVC covers Products and vinyl/PVC kit bag Products).

6 **1.8 No Admission**

7 DAS denies the material, factual, and legal allegations contained in the Notices and
8 Complaint, and maintains that all of the products that it has sold in California, including the
9 Products, have been, and are, in compliance with all laws, including Proposition 65. Nothing in this
10 Consent Judgment shall be construed as an admission by DAS of any fact, finding, conclusion of
11 law, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or
12 be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of
13 law, the same being specifically denied by DAS. This section shall not, however, diminish or
14 otherwise affect DAS' obligations, responsibilities and duties under this Consent Judgment.

15 **1.9 Consent to Jurisdiction**

16 For purposes of this Consent Judgment only, the parties stipulate that this Court has
17 jurisdiction over DAS as to the allegations in the Complaint, that venue is proper in Alameda
18 County, and that this Court has jurisdiction to enter and enforce the provisions of the Consent
19 Judgment under Code of Civil Procedure § 664.6, as a full, final, and binding resolution of all
20 claims which were raised or could have been raised in the Complaint against DAS, based on the
21 facts alleged by Moore in the Notices and Complaint.

22 **1.10 Effective Date**

23 For purposes of this Consent Judgment, the term "Effective Date" shall mean October 31,
24 2012 .

25 **2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION**

26 **2.1 Reformulation Commitment**

27 Commencing on the Effective Date and continuing thereafter, except as described in section
28 2.3 below, DAS shall ensure that all future Product runs take this Reformulation Commitment into

1 account such that DAS shall not ship, sell or offer to ship for sale in California Products from any
2 future Product runs unless such Products are “DEHP Free” as described in section 2.2, below. For
3 purpose of this Consent Judgment, “DEHP Free” Products shall mean Products that meet the
4 Reformulation Standards of section 2.2 below, and such Products are referred to herein as
5 “Reformulated Products.”

6 **2.2 Reformulation Standards**

7 Reformulated Products shall mean that each accessible component of each Product contains
8 the Listed Chemical in concentrations that do not exceed 1,000 parts per million (0.1%) when
9 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and
10 8270C or any other methodology utilized by federal or state agencies for the purpose of determining
11 DEHP content in a solid substance.

12 However, DAS may ship, sell or offer to be shipped for sale in California a Product that
13 does not meet the DEHP Standard, if the following conditions are met: (i) DAS has determined that
14 no Reformulated Product or equivalent DEHP-free substitute product is “reasonably commercially
15 available”; (ii) the Product is not primarily intended for use by individuals twelve years of age or
16 younger; and (iii) DAS complies with the warning requirements set forth in Section 2.3 below for
17 all future Product runs beginning on the Effective Date. For purposes of this Section “reasonable
18 commercial availability” shall include consideration of the following factors: availability and supply
19 of a Reformulated Product or equivalent DEHP-free product; cost of the Reformulated Product or
20 equivalent DEHP-free product; performance characteristics of the Reformulated Product or
21 equivalent DEHP-free product, including but not limited to performance, safety, and stability.

22 **2.3 Product Warnings**

23 Commencing on the Effective Date, DAS shall order all future Product runs, for all Products
24 other than Reformulated Products sold in California, provided the conditions in Section 2.2 are met,
25 to provide clear and reasonable warnings as set forth below. Each warning shall be prominently
26 placed with such conspicuousness as compared with other words, statements, designs, or devices as
27 to render it likely to be read and understood by an ordinary individual under customary conditions
28 before purchase or use. Each warning shall be provided in a manner such that the consumer or user

1 understands to which specific Product the warning applies, so as to minimize the risk of consumer
2 confusion. For Products containing DEHP, DAS shall use the following warning language on all
3 future Product runs beginning on the Effective Date:

4
5 **WARNING: This product contains one or more phthalate chemicals**
6 **known to the state of California to cause birth defects**
7 **and other reproductive harm.**

8 **2.4 Vendor Notification Requirement**

9 To the extent is has not already done so, no more than thirty (30) days after the Effective
10 Date, DAS shall provide the reformulation standards specified in section 2.2 for Reformulated
11 Products to any and all of its vendors of Products that will be sold or offered for sale to California
12 consumers, and shall instruct each vendor to use its best efforts to provide only Reformulated
13 Products, as such Products are defined in Section 2.2.

14 **3. MONETARY PAYMENTS**

15 **3.1 Initial Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

16 DAS shall make payments totaling \$37,500, to be apportioned in accordance with Health &
17 Safety Code section 25249.12, subdivisions (c)(1) and (d), with 75% of these funds earmarked for
18 the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") and the
19 remaining 25% of these penalty monies earmarked for Moore. The first civil penalty payment of
20 \$12,500 shall be paid on or before the Effective Date.

21 **3.2 Second Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

22 On or before March 1, 2013, DAS shall pay a second civil penalty of \$25,000. As an
23 incentive to reformulate the Products, however, the second civil penalty shall be waived in its entirety
24 if an Officer of DAS certifies in writing that as of February 1, 2013, DAS will sell, ship and offer for
25 sale in California only Reformulated Products. Such certification must be received by The Chanler
26 Group between February 1, 2013 and March 1, 2013. The second civil penalty payment shall be
27 apportioned in accordance with California Health & Safety Code § 25249.12(c) & (d), with 75% of
28 these funds remitted to OEHHA and the remaining 25% of the penalty remitted to Moore.

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3.2 Reimbursement of Plaintiff's Fees and Costs

The Parties acknowledge that Moore and his counsel preferred to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. DAS then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on the compensation due to Moore and his counsel under the private attorney general doctrine codified at California Code of Civil Procedure section 1021.5, for all work performed in this matter, except fees that may be incurred on appeal. Under these legal principles, DAS shall pay the amount of \$80,000 for fees and costs incurred investigating, litigating and enforcing this matter, including the fees and costs incurred (and yet to be incurred) negotiating, drafting, and obtaining the Court's approval of this Consent Judgment in the public interest, as follows:

- a. \$40,000 due on or before October 31, 2012; and
- b. \$40,000 due on or before January 30, 2013.

3.3 Payment Procedures

3.3.1 Funds Held In Trust: All payments made under this Consent Judgment

shall be held in trust pending the Court's approval of this Consent Judgment. The Parties acknowledge that Moore gave DAS the option of depositing the funds into its attorney's trust account, but that DAS elected to have the funds held in trust by The Chanler Group. The settlement funds shall be made payable by checks, as follows:

- (a) "The Chanler Group in Trust for OEHHA" in an amount equal to 75% of the civil penalty;
- (b) "The Chanler Group in Trust for Moore in an amount equal to 25% of the penalty; and
- (c) "The Chanler Group in Trust" in the amount of \$80,000.

3.3.2 Issuance of 1099 Forms. After the Consent Judgment has been approved,

DAS shall issue three separate 1099 forms, as follows:

1 (a) The first 1099 shall be issued to the Office of Environmental Health Hazard
2 Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) for the civil penalties
3 payable to OEHHA;

4 (b) The second 1099 shall be issued to Moore for the civil penalties payable to
5 Moore, whose address and tax identification number shall be furnished upon request; and

6 (c) The third 1099 shall be issued to The Chanler Group (EIN: 94-3171522) in
7 the amount of \$80,000.

8 3.3.3 Payment Address

9 All payments transmitted to The Chanler Group shall be delivered to the following
10 address:

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

14 4. CLAIMS COVERED AND RELEASED

15 4.1 **Moore's Public Release of Proposition 65 Claims.** Moore acting on his own behalf
16 and in the public interest releases DAS from all claims for violations of Proposition 65 up through the
17 Effective Date based on exposure to the Listed Chemical from the Products as set forth in the
18 Notices. Compliance with the terms of this Consent Judgment constitutes compliance with
19 Proposition 65 with respect to exposures to the Listed Chemical from the Products as set forth in the
20 Notices.

21 4.2 **Moore's Individual Release of Claims.** In further consideration of the promises and
22 agreements herein contained, and for the payments to be made pursuant to Section 3, Moore also, in
23 his individual capacity only and *not* in his representative capacity, acting on his own behalf, on behalf
24 of his past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives
25 all rights to institute or participate in directly or indirectly, any form of legal action and releases
26 DAS, its parents, subsidiaries, registered or trademarked names and/or brands, affiliated entities
27 under common ownership or control, its directors, officers, employees, attorneys and each entity to
28 whom DAS directly or indirectly distributes or sells Products (collectively "Releasees") from all

1 claims for including, without limitation, all actions and causes of action, in law or in equity, suits,
2 liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses (including, but
3 not limited to, investigation fees, expert fees, and attorney's fees but exclusive of fees and costs on
4 appeal) of any nature whatsoever, fixed or contingent, against Releasees that arise under Proposition
5 65 that were or could have been asserted by Moore, as such claims relate to Releasees' alleged failure
6 to warn about exposures to phthalates contained in the Products manufactured, imported, distributed,
7 sold and/or offered for sale by Releasees before the Effective Date as set forth in the Notices.

8 Moore also, in his individual capacity only but *not* in his representative capacity, provides a
9 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
10 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
11 liabilities and demands of Moore of any nature, character or kind, whether known or unknown,
12 suspected or unsuspected, limited to and arising out of alleged or actual exposures to DEHP in the
13 Products manufactured, distributed or sold in California by DAS. Moore acknowledges that he is
14 familiar with Section 1542 of the California Civil Code, which provides as follows:

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

20 Moore, in his individual capacity only and *not* in his representative capacity, expressly waives and
21 relinquishes any and all rights and benefits which he may have under, or which may be conferred on
22 him by the provisions of Section 1542 of the California Civil Code, as well as under any other state
23 or federal statute or common law principle of similar effect, to the fullest extent that he may lawfully
24 waive such rights or benefits pertaining to the released matters. In furtherance of such intention, the
25 release hereby given shall be and remain in effect as a full and complete release notwithstanding the
26 discovery or existence of any such additional or different claims or facts arising out of the released
27 matters. The parties further understand and agree that the foregoing releases shall not extend
28 upstream to any entities that manufactured the Products for DAS (except for Products manufactured
by DAS, if any) or any component parts thereof, or to any distributors or suppliers who sold the
Products or any component parts thereof to DAS.

1 By agreeing to the terms of this Consent Judgment and entering into the foregoing releases,
2 Moore, on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or
3 assignees, and not for the public interest, hereby represents and warrants that as of the date of
4 execution of this Consent Judgment, Moore has not asserted, nor does he presently intend to assert,
5 nor does he have any present knowledge of any basis to assert, any claims against DAS related to or
6 arising under Proposition 65 save and except those claims set forth in the complaints in the Actions
7 which are being settled and released by this Consent Judgment.

8 **4.3 Defendant's Release of Moore.** DAS on behalf of itself, its past and current agents,
9 representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against
10 Moore, his attorneys and other representatives, for any and all actions taken or statements made (or
11 those that could have been taken or made) by Moore and his attorneys and other representatives,
12 whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against
13 it in this matter with respect to the Products. DAS acknowledges that it is familiar with Section
14 1542 of the California Civil Code, which provides as follows:

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

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

27 By agreeing to the terms of this Consent Judgment and entering into the foregoing releases,
28 DAS, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby
represents and warrants that as of the date of execution of this Consent Judgment, DAS has not
asserted, nor does it presently intend to assert, nor does it have any present knowledge of any basis

1 to assert, any claims against Moore related to or arising under the enforcement of Proposition 65
2 against it in this the released matters.

3 **5. COURT APPROVAL**

4 This Consent Judgment is not effective until it is approved and entered by the Court and
5 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
6 after it has been fully executed by all Parties, in which event any monies that have been provided to
7 Moore or his counsel pursuant to section 3.1 and 3.2 shall be refunded within thirty (30) days after
8 receiving written notice from DAS that the one-year period has expired.

9 **6. SEVERABILITY**

10 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
11 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions
12 remaining shall not be adversely affected.

13 **7. GOVERNING LAW**

14 The terms of this Consent Judgment shall be governed by the laws of the State of California
15 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
16 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then DAS shall
17 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that,
18 the Products are so affected.

19 **8. NOTICES**

20 Unless specified herein, all correspondence and notices required to be provided pursuant to
21 this Consent Judgment shall be in writing and sent by (i) personal delivery, (ii) first-class, registered
22 or certified mail, return receipt requested, or (iii) overnight courier on any party by the other party at
23 the following addresses:

24 For DAS:

25 Lisa Salisbury, Esq.
26 Salisbury Law Group
27 1600 Dove St., Suite 107
28 Newport Beach, CA 92660

///

1 For Moore:

2 Proposition 65 Coordinator
3 The Chanler Group
4 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

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

7 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

11 **10. POST EXECUTION ACTIVITIES**

12 Moore agrees to comply with the reporting form requirements referenced in California
13 Health & Safety Code § 25249.7(f). In addition, the parties acknowledge that, pursuant to
14 California Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial approval
15 of this Consent Judgment. In furtherance of obtaining such approval, Moore and DAS and their
16 respective counsel agree to mutually employ their best efforts to support the entry of this agreement
17 as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely
18 manner. For purposes of this section, "best efforts" shall include, at a minimum, cooperating on the
19 drafting and filing of any papers in support of the required motion for judicial approval.

20 **11. MODIFICATION**

21 This Consent Judgment may only be modified by: (1) written agreement of the parties and
22 upon entry of a modified consent judgment by the Court; or (2) upon a successful motion of any
23 party and entry of a modified consent judgment by the Court.

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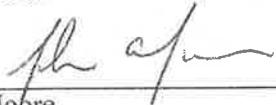
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12. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment and have read, understood, and agree to all of the terms and conditions of this Consent Judgment.

AGREED TO:

AGREED TO:

By: 
John Moore

By: _____
John Borst, Chief Financial Officer
DAS DISTRIBUTORS, INC.

Date: OCTOBER 12, 2012

Date: _____

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12. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment and have read, understood, and agree to all of the terms and conditions of this Consent Judgment.

AGREED TO:

By: _____
John Moore

Date: _____

AGREED TO:

By: _____
John Borst, Chief Financial Officer
DAS DISTRIBUTORS, INC.

Date: 10/11/12