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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SANTA CLARA
14 UNLIMITED CIVIL JURISDICTION
15

16 JOHN MOORE,

17 Plaintiff,

18 v.

19 DAS COMPANIES, INC.; and DOES 1 – 150,
20 inclusive,

21 Defendants.
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Case No. 115CV283927

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff John Moore (“Moore”), and
4 DAS Companies, Inc. (“DAS”), with Moore and DAS each individually referred to as a “Party” and
5 collectively as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 DAS employs ten or more individuals 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 Code
13 section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Moore alleges that DAS manufactures, imports, sells, or distributes for sale in California,
16 tools with vinyl/PVC grips that contain di(2-ethylhexyl)phthalate (“DEHP”) without first providing
17 the exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a
18 chemical known to the State of California to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are tools with vinyl/PVC grips containing
21 DEHP that are manufactured, imported, sold, or distributed for sale in California by DAS including,
22 but not limited to, *RoadPro 44-Piece Terminal Kit, RPTK2, UPC #0 45464 23357 1*, hereinafter the
23 “Products”.

24 **1.6 Notice of Violation**

25 On or about February 27, 2015, Moore served DAS, and certain requisite public enforcement
26 agencies with a “60-Day Notice of Violation” (“Notice”) alleging that DAS violated Proposition 65
27 by failing to warn its customers and consumers in California that the Products expose users to DEHP.
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1 To the best of the Parties' knowledge, no public enforcer has commenced and is diligently
2 prosecuting the allegations set forth in the Notice.

3 **1.7 Complaint**

4 On August 4, 2015 Moore filed the instant action ("Complaint") naming DAS as a defendant
5 for 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 DAS denies the material, factual, and legal allegations contained in the Notice and Complaint,
9 and maintains that all of the products it has sold and distributed for sale in California, including the
10 Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be
11 construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law,
12 nor shall compliance with this Consent Judgment constitute or be construed as an admission of any
13 fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not, however,
14 diminish or otherwise affect DAS's obligations, responsibilities, and duties under this Consent
15 Judgment.

16 **1.9 Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over DAS as to the allegations contained in the Complaint, that venue is proper in the
19 County of Santa Clara and that the Court has jurisdiction to enter and enforce the provisions of this
20 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that the
23 Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

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

25 **2.1 Reformulation Commitment**

26 Except as provided in Section 2.2 below, on or before December 1, 2015 and continuing
27 thereafter, DAS agrees to only manufacture for sale or purchase for sale in or into California,
28 "Reformulated Products". For purposes of this Settlement Agreement, "Reformulated Products" are

1 Products containing DEHP in concentrations less than 0.1 percent (1,000 parts per million) when
2 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and
3 8270C or other methodology utilized by federal or state government agencies for the purpose of
4 determining DEHP content in a solid substance.

5 **2.2 Exception**

6 DAS may ship, sell or offer to be shipped for sale in California a Product that does not meet
7 the Reformulated Products standard, if each of the following requirements are met: (i) DAS has
8 determined that no Reformulated Product or equivalent DEHP-free substitute product is “reasonably
9 commercially available”; (ii) the Product is not primarily intended for use by individuals twelve years
10 of age or younger; and (iii) DAS complies with warning requirements set forth in Section 2.3 below
11 for all future Product runs beginning no later than December 1, 2015. For purposes of this Section
12 “reasonable commercial availability” shall include consideration by DAS of the following factors:
13 availability and supply of a Reformulated Product or equivalent DEHP-free product; cost of the
14 Reformulated Product or equivalent DEHP-free product; and performance characteristics of the
15 Reformulated Product or equivalent DEHP-free product, including but not limited to performance,
16 safety, and stability. If DAS intends to invoke this paragraph 2.2, an officer of the company shall set
17 forth its basis in writing, no later than November 1, 2015, to Plaintiff at the address set forth in
18 paragraph 8 below.

19 **2.3 Product Warnings**

20 Provided that it meets the conditions in Section 2.2, commencing no later than December 1,
21 2015, DAS shall provide a clear and reasonable warning on all Products sold or offered for sale in
22 California which are not Reformulated Products as set forth below. Each such warning shall be
23 prominently placed on the Product or its packaging with such conspicuousness as compared with
24 other words, statements, designs, or devices as to render it likely to be read and understood by an
25 ordinary individual under customary conditions before purchase or use. Each warning shall be
26 provided in a manner such that the consumer or user understands to which specific Product the
27 warning applies, so as to minimize the risk of consumer confusion. For Products which are not
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1 Moore's counsel with written certification that, as of the date of the certification, all Products
2 shipped, sold or distributed for sale in California are Reformulated Products, and that they will
3 continue to provide only Reformulated Products in the future. The option to provide a written
4 certification of reformulation in lieu of making the final civil penalty payment required by this
5 Section is a material term, and time is of the essence. DAS shall deliver its certificate, if any, to
6 Moore's counsel at the address provided in Section 3.3 below. In the event that DAS does not timely
7 certify its compliance or make the final civil penalty payment required by this Section, Moore may
8 seek relief under any available legal remedy. If successful, the Parties further agree that Moore shall
9 be entitled to his reasonable attorneys' fees and costs pursuant to general contract principles and
10 Code of Civil Procedure section 1021.5.

11 **3.2 Reimbursement of Attorney's Fees and Costs**

12 The parties acknowledge that Moore and his counsel offered to resolve this dispute without
13 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
14 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
15 other settlement terms had been finalized, DAS expressed a desire to resolve Moore's fees and costs.
16 The Parties then attempted to (and did) reach an accord on the compensation due to Moore and his
17 counsel under general contract principles and the private attorney general doctrine codified at
18 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
19 execution of this Consent Judgment and reasonably anticipated through the motion to approve
20 process.. In accordance with Section 3.3 below, DAS shall pay \$41,500 for the fees and costs
21 incurred by Moore investigating, bringing this matter to DAS's attention, litigating, negotiating a
22 settlement in the public interest, and all efforts reasonably incurred to obtain court approval of the
23 settlement, as well as ensure compliance with its terms.

24 **3.3 Payments Held in Trust**

25 All payments due under this Consent Judgment shall be held in trust until such time as the
26 Court approves the Parties' settlement. Except the final civil penalty payment required by Section
27 3.1.2, all payments due under this agreement shall be delivered within five (5) days of the date that
28 this Consent Judgment is fully executed by the Parties, and held in trust by Plaintiff's counsel, or a

1 third party escrow agent determined by Plaintiff, until the Court grants the motion for approval of
2 this Consent Judgment contemplated by Section 5.

3 **3.4 Payment Address**

4 All payments required by this Consent Judgment shall be delivered to the following address:

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

8 **4. CLAIMS COVERED AND RELEASED**

9 **4.1 Moore’s Public Release of Proposition 65 Claims**

10 Moore, acting on his own behalf and in the public interest, releases DAS and it’s parents,
11 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
12 attorneys (“Releasees”) and each entity to whom it directly or indirectly distributes or sells the
13 Products including, but not limited to, it’s downstream distributors, wholesalers, customers,
14 retailers, franchisers, cooperative members, licensors and licensees (“Downstream Releasees”) for
15 any violations arising under Proposition 65 for unwarned exposures to DEHP from Products sold by
16 DAS prior to the Effective Date, as set forth in the Notice. Compliance with the terms of this
17 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to alleged
18 failures to warn about DEHP from the Products sold by DAS before the Effective Date, as set forth
19 in the Notice.

20 **4.2 Moore’s Individual Release of Claims**

21 Moore, in his individual capacity only and *not* in his representative capacity, also provides a
22 release to DAS, Releasees, and Downstream Releasees which shall be effective as a full and final
23 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
24 attorneys’ fees, damages, losses, claims, liabilities and demands of Moore of any nature, character or
25 kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
26 exposures to DEHP in the Products sold or distributed for sale by DAS before the Effective Date.
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1 **4.3 DAS’s Release of Moore**

2 DAS, on its own behalf, and on behalf of its past and current agents, representatives,
3 attorneys, successors, and assignees, hereby waives any and all claims against Moore and his
4 attorneys and other representatives, for any and all actions taken or statements made by Moore and
5 his attorneys and other representatives, whether in the course of investigating claims, otherwise
6 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

7 **5. COURT APPROVAL**

8 This Consent Judgment is not effective until it is approved and entered by the Court and shall
9 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
10 has been fully executed by the Parties.

11 **6. SEVERABILITY**

12 If, subsequent to the Court’s approval and entry of this Consent Judgment as a judgment, any
13 provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be
14 adversely affected.

15 **7. GOVERNING LAW**

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

23 **8. NOTICE**

24 Unless specified herein, all correspondence and notice required by this Consent Judgment
25 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
26 return receipt requested; or (iii) a recognized overnight courier to the following addresses:
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1 To: DAS:

To Moore:

2 Michael Abel, President
3 DAS Companies, Inc.
4 724 Lawn Road
Palmyra, PA 17078

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

5 Any Party may, from time to time, specify in writing to the other, a change of address to which all
6 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, when
10 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 Health and Safety
13 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
14 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
15 furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, and
16 those of their counsel, to support the entry of this agreement as a judgment, and to obtain judicial
17 approval of their settlement in a timely manner. For purposes of this Section, “best efforts” shall
18 include, at a minimum, cooperating on the drafting and filing of the necessary moving papers,
19 supporting the motion, and appearing at the hearing before the Court, if required.

20 **11. MODIFICATION**

21 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
22 entry of a modified consent judgment by the Court; or (ii) a successful motion or application of any
23 Party, and the entry of a modified consent judgment by the Court.

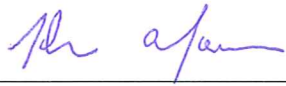
24 **12. AUTHORIZATION**

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

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AGREED TO:

Date: August 11, 2015

By: 
JOHN MOORE

AGREED TO:

Date: August 11, 2015

By: 
John W. Borst, Chief Financial Officer
DAS COMPANIES, INC.