

1 Josh Voorhees, State Bar No. 241436
2 THE CHANLER GROUP
3 2560 Ninth Street
4 Parker Plaza, Suite 214
5 Berkeley, CA 94710-2565
6 Telephone: (510) 848-8880
7 Facsimile: (510) 848-8118
8 Email: josh@chanler.com

9 Attorneys for Plaintiffs
10 ANTHONY E. HELD, PH.D., P.E.;
11 PETER ENGLANDER;
12 WHITNEY R. LEEMAN, PH.D.; and
13 JOHN MOORE

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF ALAMEDA
16 UNLIMITED CIVIL JURISDICTION

17 ANTHONY E. HELD, PH.D., P.E.; PETER
18 ENGLANDER; WHITNEY R. LEEMAN,
19 PH.D.; and JOHN MOORE,

20 Plaintiffs,

21 v.

22 READY AMERICA, INC.; ABLE PLANET,
23 INCORPORATED; E.S.I. CASES &
24 ACCESSORIES, INC.; GROCERY OUTLET
25 INC.; QUICK FITTING, INC.; TAP
26 PLASTICS, INC., A CALIFORNIA
27 CORPORATION; and DOES 1-150, inclusive,

28 Defendants.

Case No. RG16803507

**[PROPOSED] CONSENT JUDGMENT
AS TO TAP PLASTICS, INC.**

(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 TAP Plastics, Inc. (“TAP”), with Moore and TAP 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 TAP**

11 TAP 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, California Health and
13 Safety Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Moore alleges that TAP manufactures, imports, sells, or distributes for sale in California,
16 categories and product types described as Vinyl/PVC Tool Grips and Vinyl/PVC Tubing that contain
17 Di(2-ethylhexyl)phthalate (“DEHP”) without first providing the exposure warning required by
18 Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of
19 California to cause birth defects and other reproductive harm.

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are Vinyl/PVC Tool Grips including but not
22 limited to, the *Regal Brand 8” Long Nose Plier, Model No. LN-8, UPC #0 82021 39441 2* (“Nose
23 Pliers”) and Vinyl/PVC Tubing containing DEHP that are sold or offered for sale in California,
24 including but not limited to *Tubing, 3/8 ID ½ OD, #46491* (“Tubing”) (collectively hereinafter, the
25 “Covered Products”).

26 **1.6 Notice of Violation**

27 On or about October 21, 2015, Moore served TAP, and certain requisite public enforcement
28 agencies with a “60-Day Notice of Violation” (“Notice”) alleging that TAP violated Proposition 65 by

1 failing to warn its customers and consumers in California that the Covered Products expose users to
2 DEHP. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently
3 prosecuting the allegations set forth in the Notice.

4 **1.7 Complaint**

5 On February 10, 2016, Anthony E. Held, PH.D., P.E. filed the instant action naming Ready
6 America as a defendant for the alleged violations of Health and Safety Code section 25249.6 that are
7 the subject of an additional Notice. On February 16, 2016, the first amended complaint was filed
8 ("Complaint") adding three additional plaintiffs – Peter Englander, Whitney Leeman, Ph.D., and John
9 Moore, and five additional defendants--Able Planet, Inc., E.S.I. Cases & Accessories, Inc., Grocery
10 Outlet, Inc., Quick Fitting, Inc., and, as relevant to this Consent Judgment, TAP Plastics, Inc. with
11 respect to the alleged violations of Health and Safety Code section 25249.6 that are the subject of the
12 Notice to TAP.

13 **1.8 No Admission**

14 TAP denies the material, factual, and legal allegations contained in the Notice and Complaint,
15 and maintains that the products TAP has sold and distributed for sale in California, including the
16 Covered Products, have been, and are, in compliance with all laws, and further denies any
17 involvement in formulation or manufacture of, or original labelling or control over, any the Covered
18 Products. TAP alleges that it is a retailer who has not formulated, manufactured, or mislabeled any
19 products set forth above. TAP alleges that it purchased at wholesale, for retail sale, certain
20 Vinyl/PVC Tool Grips from Service Tool Company, Inc. ("STC") and certain Vinyl/PVC Tubing
21 from TPI Partners, Inc. ("TPI"), and further alleges that it is entitled to indemnity from STC and TPI,
22 respectively.

23 Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,
24 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment
25 constitute or be construed as an admission of any fact, finding, conclusion of law, issue of law, or
26 violation of law. This Section shall not, however, diminish or otherwise affect TAP's obligations,
27 responsibilities, and duties under this Consent Judgment.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1.9 Jurisdiction and Venue

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

1.10 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” means the date on which the Motion for Approval of the Consent Judgment is granted by the Court.

2. INJUNCTIVE RELIEF: REFORMULATION

2.1 Labeled or Reformulated Covered Products

Commencing on the Effective Date, and continuing thereafter, those Covered Products that TAP sells, offers for sale, or distributes for sale in California shall bear a clear and reasonable warning pursuant to Section 2.3, unless they are “Reformulated Covered Products” as defined in Section 2.2.

2.2 Reformulated Covered Products

For purposes of this Consent Judgment, “Reformulated Covered Products” are defined as Covered Products in which any accessible component contains DEHP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other methodology utilized by federal or state government agencies for the purpose of determining DEHP content in a solid substance.

2.3 Clear and Reasonable Warning

Commencing on the Effective Date and continuing thereafter, those Covered Products sold, offered for sale, or distributed for sale in California by TAP that are not Reformulated Covered Products, shall be accompanied by a clear and reasonable warning, in accordance with this section. The warning required by this section shall be prominently placed in relation to the Covered Product with such conspicuousness when compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. For purposes of this Consent Judgment, a clear and reasonable warning for the

1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Civil Penalty Payments**

3 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
4 this Consent Judgment, TAP shall pay \$6,000 in civil penalties. The civil penalty payment shall be
5 allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five
6 percent (75%) of the funds paid to the California Office of Environmental Health Hazard Assessment
7 (“OEHHA”), and twenty-five percent (25%) of the funds remitted to Moore.

8 TAP shall make the civil penalty payment following the procedure set forth in Section 3.3 and
9 3.4 below in two checks for the following amounts made payable to: (a) “OEHHA” in the amount of
10 \$4,500; and (b) “John Moore, Client Trust Account” in the amount of \$1,500. Moore’s counsel shall
11 be responsible for delivering to OEHHA the amount due to OEHHA under this Consent Judgment.

12 **3.2 Reimbursement of Attorney’s Fees and Costs**

13 The parties acknowledge that Moore and his counsel offered to reach agreement on the
14 material terms of this dispute before reaching terms on the amount of fees and costs to be reimbursed
15 to them, thereby leaving the issue to be resolved after the material terms of this Consent Judgment
16 had been agreed to in principal. The Parties thereafter attempted to (and did) reach an accord on the
17 compensation due to Moore and his counsel under general contract principles and the private attorney
18 general doctrine codified at California Code of Civil Procedure section 1021.5 for all work performed
19 through the mutual execution of this Consent Judgment. TAP shall pay a total of \$29,000 for the fees
20 and costs incurred by Moore investigating, bringing this matter to the attention of the responsible
21 parties, litigating, negotiating and completing this settlement and Consent Judgment in the public
22 interest.

23 **3.3 Payments**

24 All payments due under this agreement shall be delivered within five (5) days of the
25 Effective Date to the address found in Section 3.4 below.

1 **3.4 Payment Address**

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

3 The Chanler Group
4 Attn: Proposition 65 Controller
5 2560 Ninth Street
6 Parker Plaza, Suite 214
7 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, hereby releases TAP, and each
11 entity to whom TAP directly or indirectly transfers, distributes, or sells the Covered Products
12 including, but not limited to TAP’s downstream distributors, wholesalers, customers, retailers,
13 franchisers, cooperative members, licensors and licensees, and their dbas, and further releases
14 Harker Associates, Inc., Service Tool Company, Inc., TPI Partners, Inc., Excelon, and Thermoplastic
15 Processes, and all of the respective parents, subsidiaries, affiliated entities under common
16 ownership, directors, officers, employees, agents, attorneys, representatives, successors, and assigns
17 of TAP and said other entities, (collectively, the “Releasees”), for any violations arising under
18 Proposition 65 for unwarned exposures to DEHP from Covered Products offered or sold by TAP
19 prior to the Effective Date. Further, compliance with Section 2 of this Consent Judgment shall
20 constitute compliance with Proposition 65 by TAP and any other Releasee with respect to the
21 alleged or actual failure to warn about exposures to DEHP in Covered Products sold or offered for
22 sale by TAP on or after the Effective Date.

23 **4.2 Moore’s Individual Release of Claims**

24 Moore, in his individual capacity only and *not* in his representative capacity, also hereby
25 releases TAP and all other Releasees, which Release shall be effective as a full and final accord and
26 satisfaction, from all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages,
27 injuries, losses, claims, liabilities and demands of Moore of any nature, character or kind, whether
28 known or unknown, suspected or unsuspected, arising out of or in any way related to alleged or actual
 exposures to DEHP in the Covered Product sold or offered for sale by TAP prior to the Effective
 Date.

1 **4.3 TAP Plastics' Release of Moore**

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

7 **4.4 Mutual Waiver of California Civil Code Section 1542**

8 The Parties each acknowledge he/it is familiar with Section 1542 of the Civil Code, which
9 provides as follows:

10 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
11 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
12 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN
13 BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER
14 SETTLEMENT WITH THE DEBTOR.

15 Moore, waives and relinquishes as to TAP and all Releasees, and TAP, waives and
16 relinquishes as to Moore and his agents, any and all rights and benefits which either may have against
17 the other under, or which may be conferred upon them by, the provisions of Civil Code section 1542,
18 as well as under any other state or federal statute or common law principle of similar effect, to the
19 fullest extent each may lawfully waive such rights or benefits pertaining to the released matters as
20 described in Sections 4.2 and 4.3, above.

21 **5. COURT APPROVAL**

22 This Consent Judgment shall not be deemed effective until it is approved and entered by the
23 Court and shall be null and void if, for any reason, it is not approved and entered by the Court within
24 one year after it has been signed by the Parties.

25 **6. ENFORCEMENT AND PREVAILING PARTY**

26 In the event any dispute between the Parties arises out of this Consent Judgment, the Parties
27 shall meet and confer in an attempt to resolve the dispute informally. If after thirty (30) days such
28 attempts at informal resolution fail, the disputing party may pursue enforcement of this Consent
Judgment through any legal means available including by motion or application for an order to show

1 cause before the Court. The prevailing party shall be entitled to recover its reasonable attorney's fees
2 and costs incurred as a result of such motion or application.

3 **7. SUCCESSORS AND ASSIGNS**

4 This Consent Judgment shall be binding upon and inure to the benefit of the Parties and their
5 respective divisions, subdivisions, and subsidiaries, and the successors or assigns of any of them.

6 **8. SEVERABILITY**

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

10 **9. GOVERNING LAW**

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

18 **10. NOTICE**

19 Unless specified herein, all correspondence and notice required by this Consent Judgment
20 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
21 return receipt requested; or (iii) a recognized overnight courier to the following addresses:
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TAP Plastics

David Freeberg, President
TAP Plastics, Inc., A California Corporation
3011 Alvarado Street, Suite A
San Leandro, CA 94577

with a copy to:

Joshua A. Bloom, Esq.
Meyers Nave
555 12th Street, Suite 1500
Oakland, CA 94607

and:

Mark Cameron
Miller Starr Regalia
1331 N. California Boulevard, Fifth Floor
Walnut Creek, CA 94596

Moore

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

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

11. COUNTERPARTS; FACSIMILE SIGNATURES

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

12. POST EXECUTION ACTIVITIES

Moore agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, and those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of this Section, "best efforts" shall include, at a minimum, cooperating on the drafting and filing of the necessary moving papers, supporting the motion, and appearing at the hearing before the Court.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

13. MODIFICATION

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

14. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date: _____

Date: _____

By: _____
JOHN MOORE

By: _____
David Freeberg, President
TAP PLASTICS, INC.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

13. MODIFICATION

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

14. AUTHORIZATION

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

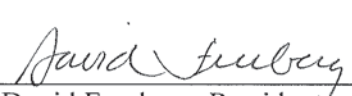
AGREED TO:

AGREED TO:

Date: 10/27/2016

Date: 10/18/2016

By: 
JOHN MOORE

By: 
David Freeberg, President/
TAP PLASTICS, INC.