

1 Christopher Martin, State Bar No. 186021
2 THE CHANLER GROUP
3 2560 Ninth Street
4 Parker Plaza, Suite 214
5 Berkeley, CA 94710
6 Telephone: (510) 848-8880
7 Facsimile: (510) 848-8118

8 Attorneys for Plaintiff
9 JOHN MOORE

FILED

MAR 16 2012

KIM F. JENSEN
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: A. Garcia, Deputy

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 COUNTY OF MARIN

12 UNLIMITED CIVIL JURISDICTION

13 JOHN MOORE,

14 Plaintiff,

15 v.

16 DO IT BEST CORP.; and DOES 1 through
17 150, inclusive,

18 Defendants.

Case No. CIV1005992

**~~PROPOSED~~ JUDGMENT PURSUANT
TO TERMS OF PROPOSITION 65
SETTLEMENT AND ~~PROPOSED~~
CONSENT JUDGMENT AS TO
DEFENDANT DO IT BEST CORP.**

Date: March 16, 2012

Time: 8:30 a.m.

Dept. E

Judge: Hon. Faye D'Opal

1 Plaintiff John Moore and Defendant Do It Best Corp., having agreed through their
2 respective counsel that Judgment be entered pursuant to the terms of their settlement
3 agreement in the form of a Consent Judgment, and following this Court's issuance of an
4 Order approving this Proposition 65 settlement and Consent Judgment,

5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to
6 Health & Safety Code § 25249.7(f)(4) and Code of Civil Procedure § 664.6, judgment is
7 hereby entered in accordance with the terms of the Consent Judgment attached hereto as
8 Exhibit 1. By stipulation of the parties, the Court will retain jurisdiction to enforce the
9 settlement under Code of Civil Procedure § 664.6.

10
11 **IT IS SO ORDERED.**

12
13 **MAR 16 2012**
14 Dated: _____

FAYE DEWANE

JUDGE OF THE SUPERIOR COURT

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EXHIBIT 1

1 Christopher M. Martin, State Bar No. 186021
THE CHANLER GROUP
2 2560 Ninth Street, Suite 214
Berkeley, CA 94710
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Facsimile: (510) 848-8118
4
5 Attorneys for Plaintiff
JOHN MOORE

6
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 FOR THE COUNTY OF MARIN
9 UNLIMITED CIVIL JURISDICTION
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11 JOHN MOORE,

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14 DO IT BEST CORP.; and DOES 1 through 150,
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16 Defendants.
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Case No. CIV1005992

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT DO IT BEST CORP.**

1 **1. INTRODUCTION**

2 **1.1 John Moore and Do It Best Corp.**

3 This Consent Judgment is entered into by and between plaintiff John Moore, (hereinafter
4 “Moore” or “Plaintiff”) and defendant Do It Best Corp., (hereinafter “Do It Best” or
5 “Defendant”), with Plaintiff and Defendant collectively referred to as the “Parties” and each
6 individually referred to as a “Party.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

12 Do It Best employs ten or more persons and is a person in the course of doing business
13 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
14 & Safety Code §25249.6 *et seq.* (hereinafter “Proposition 65”).

15 **1.4 General Allegations**

16 Moore alleges that Do It Best manufactured, distributed and/or sold vinyl floor tiles
17 containing di(2-ethylhexyl)phthalate (hereinafter “DEHP”) in the State of California without the
18 requisite health hazard warnings. DEHP is listed pursuant to Proposition 65 as known to the
19 State of California to cause birth defects and other reproductive harm.

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as follows: vinyl
22 floor tiles containing DEHP, including, but not limited to the *Vinyl Floor Tile, Blue Tradition*
23 *Tile. SKU # 287326 (#0 09326 26167 6)* and which Defendant manufactured, distributed, and/or
24 sold in the State of California. All such vinyl floor tiles containing DEHP are referred to
25 hereinafter as the “Products.”

1 **1.6 Notices of Violation**

2 On September 1, 2010, Moore served Do It Best and various public enforcement
3 agencies with a document entitled “60-Day Notice of Violation” (hereinafter “Notice”) that
4 provided Do It Best and public enforcers with notice of alleged violations of California Health
5 & Safety Code §25249.6 for failing to warn consumers that the Products exposed users in
6 California to DEHP.

7 **1.7 Complaint**

8 On November 12, 2010, Moore, who was and is acting in the interest of the general
9 public in California, filed a complaint (hereinafter “Complaint” or “Action”) in the Superior
10 Court in and for the County of Marin against Do It Best and Does 1 through 150, alleging
11 violations of California Health & Safety Code §25249.6 based on the alleged exposures to
12 DEHP contained in the Products.

13 **1.8 No Admission**

14 Do It Best denies the material factual and legal allegations contained in Moore's Notice
15 and Complaint, and maintains that all Products sold and distributed in California have been and
16 are in compliance with all laws. Nothing in this Consent Judgment shall be construed as an
17 admission by Do It Best of any fact, finding, issue of law, or violation of law; nor shall
18 compliance with this Consent Judgment constitute or be construed as an admission by Do It
19 Best of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
20 denied by Do It Best. However, this section shall not diminish or otherwise affect Do It Best’s
21 obligations, responsibilities, and duties under this Consent Judgment.

22 **1.9 Consent to Jurisdiction**

23 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
24 jurisdiction over Do It Best as to the allegations contained in the Complaint, that venue is proper
25 in the County of Marin, and that this Court has jurisdiction to enter and enforce the provisions
26 of this Consent Judgment.

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1.10 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” shall mean November 15, 2011.

2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION

2.1 Reformulation Standards and Commitment

After the Effective Date, Do It Best shall only distribute for sale in California Products that are “DEHP Free”. For purposes of this Consent Judgment, Products that are “DEHP Free” shall mean Products containing less than or equal to 1,000 parts per million (0.1%) of DEHP when analyzed pursuant to Environmental Protection Agency testing methodologies 3580A and 8270C or any other methodology utilized by federal and state agencies for the purpose of determining DEHP content in a solid substance. DEHP Free Products shall be deemed to comply with Proposition 65 as it relates to the presence of DEHP in the Products and shall be exempt from any Proposition 65 warning requirements regarding exposure to DEHP.

3. MONETARY PAYMENTS

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

Do It Best shall make a payment of \$4,000 to be apportioned in accordance with Health & Safety Code section 25249.12, subdivisions (c)(1) and (d), with 75% of these funds earmarked for the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of these penalty monies earmarked for Moore.

3.2 Reimbursement of Plaintiff’s Fees and Costs

The Parties acknowledge that Moore and his counsel offered 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. Do It Best 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 general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure section 1021.5, for all

1 work performed in this matter, except fees that may be incurred on appeal. Under these legal
2 principles, Do It Best shall pay the amount of \$31,000 for fees and costs incurred investigating,
3 litigating and enforcing this matter, including the fees and costs incurred (and yet to be
4 incurred) negotiating, drafting, and obtaining the Court's approval of this Consent Judgment
5 in the public interest.

6 **3.3 Payment Procedures**

7 **3.3.1 Funds Held In Trust.** All payments required by Sections 3.1 and 3.2
8 shall be delivered on or before December 8, 2011 to either The Chanler Group or the attorney of
9 record for Do It Best and shall be held in trust pending the Court's approval of this Consent
10 Judgment.

11 Payments delivered to The Chanler Group shall be made payable, as follows:

- 12 (a) One check made payable to "The Chanler Group in Trust for
13 OEHHA" in the amount of \$3,000;
14 (b) One check made payable to "The Chanler Group in Trust for John
15 Moore" in the amount of \$1,000; and
16 (c) One check made payable to "The Chanler Group in Trust" in the
17 amount of \$31,000.

18 Payments delivered to Reed Smith LLP shall be made payable, as follows:

- 19 (a) One check made payable to "Reed Smith LLP in Trust for
20 OEHHA" in the amount of \$3,000;
21 (b) One check made payable to "Reed Smith LLP in Trust for John
22 Moore" in the amount of \$1,000; and
23 (c) One check made payable to "Reed Smith LLP in Trust for The
24 Chanler Group" in the amount of \$31,000.

25 If Do It Best elects to deliver payments to its attorney of record, the attorney of record
26 shall confirm, in writing within five days of deposit, that the funds have been deposited in a trust
27 account.

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1 Within two days of the date of the hearing on which the Court approves the Consent
2 Judgment, the payments being held in trust by the attorney of record for Do It Best shall be
3 delivered to The Chanler Group in three separate checks payable, as follows:

- 4 (a) One check made payable to “The Chanler Group in Trust for
5 OEHHA” in the amount of \$3,000;
6 (b) One check made payable to “The Chanler Group in Trust for John
7 Moore” in the amount of \$1,000; and
8 (c) One check made payable to “The Chanler Group” in the amount of
9 \$31,000.

10 **3.3.2 Issuance of 1099 Forms.** After the Consent Judgment has been approved
11 and the settlement funds have been transmitted to plaintiff’s counsel, Do It Best shall issue three
12 separate 1099 forms, as follows:

- 13 (a) The first 1099 shall be issued to the Office of Environmental
14 Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN:
15 68-0284486) in the amount of \$3,000;
16 (b) The second 1099 shall be issued to Moore in the amount of \$1,000,
17 whose address and tax identification number shall be furnished upon
18 request; and
19 (c) The third 1099 shall be issued to The Chanler Group (EIN: 94-
20 3171522) in the amount of \$31,000.

21 **3.3.3 Payment Address:** All payments to the Chanler Group shall be delivered
22 to the following payment address:

23 The Chanler Group
24 Attn: Proposition 65 Controller
25 2560 Ninth Street
26 Parker Plaza, Suite 214
27 Berkeley, CA 94710
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1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 Full, Final and Binding Resolution of Proposition 65 Allegations**

3 This Consent Judgment is a full, final and binding resolution between Moore, on behalf
4 of himself and the public, and Do It Best, of any violation of Proposition 65 that was or could
5 have been asserted by Moore against Do It Best, its parents, subsidiaries, affiliated entities that
6 are under common ownership, directors, officers, employees, attorneys, and each entity to whom
7 Do It Best directly or indirectly distributes or sells Products, including but not limited to
8 downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members,
9 licensors, and licensees (“Releasees”), based on their failure to warn about alleged exposures to
10 DEHP contained in the Products that were sold by Do It Best.

11 **4.2 Moore’s Public Release of Proposition 65 Claims**

12 In further consideration of the promises and agreements herein contained, Moore on
13 behalf of himself, his past and current agents, representatives, attorneys, successors, and/or
14 assignees, and in the interest of the general public, hereby waives all rights to institute or
15 participate in, directly or indirectly, any form of legal action and releases all claims, including,
16 without limitation, all actions, and causes of action, in law or in equity, suits, liabilities,
17 demands, obligations, damages, costs, fines, penalties, losses, or expenses, including, but not
18 limited to, investigation fees, expert fees, and attorneys’ fees against the Releasees arising under
19 Proposition 65 with respect to DEHP in the Products sold by Do It Best (collectively “claims”).

20 **4.3 Moore’s Individual Release of Claims**

21 Moore also, in his individual capacity only and *not* in his representative capacity,
22 provides a general release which shall be effective as a full and final accord and satisfaction, and
23 as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages,
24 losses, claims, liabilities and demands of Moore of any nature, character or kind, whether known
25 or unknown, suspected or unsuspected, arising out of the subject matter of this dispute,
26 including but not limited to, any alleged or actual exposures to DEHP from the Products and any
27 failure by Do it Best to warn about DEHP being in the Products.

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1 **4.4 Do It Best's Release of Moore**

2 Do It Best, on behalf of itself and its Releasees, waives any and all claims against
3 Moore, his attorneys and other representatives, for any and all actions taken or statements made
4 by Moore and his attorneys and other representatives, whether in the course of investigating
5 claims or otherwise seeking enforcement of Proposition 65 in this matter with respect to the
6 Products.

7 **5. COURT APPROVAL**

8 This Consent Judgment is not effective until it is approved and entered by the court and
9 shall be null and void if, for any reason, it is not approved and entered by the court within one
10 year after it has been fully executed by all Parties, in which event any monies that have been
11 provided to Moore or his counsel pursuant to Section 3 above, shall be refunded within fifteen
12 (15) days after receiving written notice from Do It Best that the one-year period has expired.

13 **6. SEVERABILITY**

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

17 **7. GOVERNING LAW**

18 The terms of this Consent Judgment shall be governed by the laws of the State of
19 California and apply within the State of California. In the event that Proposition 65 is repealed
20 or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Do
21 It Best shall provide written notice to Moore of any asserted change in the law, and shall have
22 no further obligations pursuant to this Consent Judgment with respect to, and to the extent that,
23 the Products are so affected.

24 **8. NOTICES**

25 Unless specified herein, all correspondence and notices required to be provided pursuant
26 to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
27
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1 (registered or certified mail) return receipt requested; or (ii) overnight courier on any Party by
2 the other Party at the following addresses:

3 To Do It Best:

4 John E. Dittoe
5 Reed Smith LLP
6 101 2nd Street, Suite 1800
7 San Francisco, CA 94105

7 With a copy to:

8 Dan Starr
9 Vice President Human Resources & General Counsel
10 Do It Best Corp.
11 6502 Nelson Road
12 Ft. Wayne, IN 46803

11 To Moore:

12 Proposition 65 Coordinator
13 The Chanler Group
14 2560 Ninth Street
15 Parker Plaza, Suite 214
16 Berkeley, CA 94710-2565

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

18 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

19 This Consent Judgment may be executed in counterparts and by facsimile, each of which
20 shall be deemed an original, and all of which, when taken together, shall constitute one and the
21 same document.

22 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

23 Moore agrees to comply with the reporting form requirements referenced in California
24 Health & Safety Code §25249.7(f).

25 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

26 The Parties agree to mutually employ their, and their counsel's, reasonable best efforts to
27 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent
28

1 Judgment by the Court in a timely manner. The Parties acknowledge that, pursuant to
2 California Health and Safety Code section 25249.7, a noticed motion is required to obtain
3 judicial approval of this Consent Judgment, which Moore shall file, and which Do It Best shall
4 not oppose. If any third party objection to the noticed motion is filed, Moore and Do It Best
5 shall work together to file a joint reply and appear at any hearing before the Court. If the
6 Superior Court does not approve the motion to approve this Consent Judgment, and the Parties
7 choose not to pursue a modified Consent Judgment within 30 days of said denial, or in the event
8 that the Superior Court approve this Consent Judgment and any person successfully appeals that
9 approval, all payments made pursuant to this Consent Judgment will be returned to Do It Best.

10 **12. MODIFICATION**

11 This Consent Judgment may be modified only: (1) by written agreement of the parties
12 and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful
13 motion of any Party and entry of a modified Consent Judgment by the court. The Attorney
14 General shall be served with notice of any proposed modification to this Consent Judgment at
15 least fifteen (15) days in advance of its consideration by the Court. Moore shall be entitled to
16 his reasonable fees and costs incurred in the modification process under CCP §1021.5 if Do It
17 Best seeks to modify the terms of this Consent Judgment.

18 **13. AUTHORIZATION**

19 The undersigned are authorized to execute this Consent Judgment on behalf of their
20 respective parties and have read, understood, and agree to all of the terms and conditions of this
21 Consent Judgment.

22 **AGREED TO:**

AGREED TO:

23 Date: November 15, 2011

Date: _____

24
25 By: 
26 Plaintiff JOHN MOORE

By: _____
Defendant DO IT BEST CORP.

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2 California Health and Safety Code section 25249.7, a noticed motion is required to obtain
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20 respective parties and have read, understood, and agree to all of the terms and conditions of this
21 Consent Judgment.

22 **AGREED TO:**

AGREED TO:

23 Date: _____

Date: Nov. 16, 2011

24
25 By: _____
26 Plaintiff JOHN MOORE

By: Dan B. Stearns
Defendant DO IT BEST CORP.
VP of HR and General Counsel