

1 Josh Voorhees, State Bar No. 241436  
2 Troy C. Bailey, State Bar No. 277424  
3 THE CHANLER GROUP  
4 2560 Ninth Street  
5 Parker Plaza, Suite 214  
6 Berkeley, CA 94710-2565  
7 Telephone: (510) 848-8880  
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff  
10 JOHN MOORE

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 FOR THE COUNTY OF MARIN  
13 UNLIMITED CIVIL JURISDICTION

14 JOHN MOORE,

15 Plaintiff,

16 v.

17 AMERICAN BILTRITE, *et al.*,

18 Defendants.

) Case No. CIV-1102414  
)  
)  
)

) **[PROPOSED] CONSENT JUDGMENT AS**  
) **TO DEFENDANT MANNINGTON MILLS,**  
) **INC.**

1       **1. INTRODUCTION**

2               **1.1 John Moore and Mannington Mills, Inc.**

3               This Consent Judgment is entered into by and between plaintiff John Moore (“Moore” or  
4               “Plaintiff”), and Mannington Mills, Inc. (“Mannington” or “Defendant”), each a “Party” and  
5               collectively “Parties.”

6               **1.2 John Moore**

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

10              **1.3 Mannington**

11              Mannington 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 Mannington has manufactured, imported, distributed, and/or sold vinyl  
16              sheet flooring containing butyl benzyl phthalate (“BBP”), without the requisite Proposition 65  
17              warnings. BBP is on the Proposition 65 list as a chemical known to cause birth defects and other  
18              reproductive harm.

19              **1.5 Notice of Violation**

20              On February 24, 2011, Moore served Mannington and various public enforcement agencies,  
21              with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided the recipients  
22              with notice of alleged violations of California Health & Safety Code § 25249.6 based on  
23              Mannington's alleged failure to warn consumers that its vinyl sheet flooring exposed users in  
24              California to BBP. To the best of the Parties’ knowledge, no public enforcer has prosecuted the  
25              allegations set forth in the Notice.

1           1.6    **Complaint**

2           On May 12, 2011, Moore filed his Complaint in the Superior Court in and for the County of  
3 Marin, naming Mannington as a defendant, *Moore v. American Biltrite, Inc. et al.*, Case No. CIV-  
4 1102414 (the “Action” or “Complaint”), alleging violations of California Health & Safety Code  
5 § 25249.6, based on, among other things, the alleged exposures to BBP contained in vinyl sheet  
6 flooring sold by Mannington.

7           1.7    **No Admission**

8           Mannington denies the material, factual, and legal allegations contained in Moore’s Notice  
9 and Complaint and maintains that all products that it or its affiliates have sold, manufactured,  
10 imported, distributed, and/or offered for sale in California have been and are in compliance with all  
11 laws. Nothing in this Consent Judgment shall be construed as an admission by Mannington of any  
12 fact, finding, issue of law, or violation of law, nor shall compliance with this Consent Judgment  
13 constitute or be construed as an admission by Mannington of any fact, finding, conclusion, issue of  
14 law, or violation of law. However, this section shall not diminish or otherwise affect Mannington’s  
15 obligations, responsibilities, and duties under this Consent Judgment.

16           1.8    **Consent to Jurisdiction**

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

21    **2.    DEFINITIONS**

22           2.1    The term “Covered Product” means vinyl sheet flooring manufactured, distributed  
23 and/or sold in California by Mannington.

24           2.2    The term “Effective Date” means the date on which a judgment based on this  
25 Consent Judgment is entered by the Court.

26           2.3    The term “Accessible Component” means any component of a Covered Product that  
27 could be touched by a person during reasonably foreseeable use.

1           2.4    The term “Reformulated Product” shall mean Covered Products that meet the  
2 reformulation standard set forth in Section 3.1.

3           **3.    INJUNCTIVE RELIEF**

4           3.1    **Reformulation**

5           Commencing on May 15, 2013, all Covered Products manufactured by, or on behalf of,  
6 Mannington, for sale in the State of California, shall contain BBP in concentrations of less than 0.1  
7 percent (1,000 parts per million) in each Accessible Component when analyzed pursuant to U.S.  
8 Environmental Protection Agency testing methodologies 3580A and 8270C or any other  
9 methodology utilized by federal or state agencies for the purpose of determining the BBP content in  
10 a solid substance.

11          **4.    MONETARY PAYMENTS**

12           In settlement of all the claims referred to in this Consent Judgment, Mannington shall pay a  
13 total of \$102,500 in accordance with this Section. Each penalty payment will be allocated in  
14 accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds  
15 remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the  
16 remaining 25% of the penalty remitted to Moore, as follows:

17          4.1    **Initial Civil Penalty**

18           Mannington shall pay an initial civil penalty in the amount of \$25,000 within five  
19 days of the Effective Date. Mannington shall issue two separate checks to: (a) “OEHHA” in the  
20 amount of \$18,750; and (b) “The Chanler Group in Trust for John Moore” in the amount of \$6,250.  
21 All penalty payments shall be delivered to the addresses listed in Section 4.5 below.

22          4.2    **Final Civil Penalty**

23           Mannington shall pay a final civil penalty of \$70,000 on or before December 31,  
24 2013. The final civil penalty shall be waived in its entirety, however, if, no later than December 15,  
25 2013, an officer of Mannington provides Moore with written certification that, as of the date of such  
26 certification and continuing into the future, Mannington has met the reformulation standard  
27 specified in Section 3.1 above and that all Covered Products manufactured, distributed, sold and  
28

1 offered for sale in California by Mannington are Reformulated Products. Moore must receive any  
2 such certification on or before December 15, 2013. The certification in lieu of a final civil penalty  
3 payment provided by this Section is a material term, and time is of the essence. Mannington shall  
4 issue two separate checks for its final civil penalty payments to: (a) “OEHHA” in the amount of  
5 \$52,500; and (b) “The Chanler Group in Trust for John Moore” in the amount of \$17,500.

6 **4.3 Payment in Lieu of Further Civil Penalty**

7 Mannington shall pay the sum of \$7,500 to Silent Spring Institute (“Silent Spring”), a not-  
8 for-profit institution, in lieu of further civil fines pursuant to California Health & Safety Code §  
9 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). Silent Spring will use such  
10 funds in one or more of the following ways: (a) to continue its work identifying the links between  
11 exposure to environmental chemicals including lead and phthalates such as di(2-  
12 ethylhexyl)phthalate (“DEHP”), di-n-butyl phthalate (“DBP”) and butyl benzyl phthalate (“BBP”)  
13 that cause reproductive and developmental harm, as well as educating the public about such  
14 potential exposures; (b) to conduct exposure- and risk-based prioritization of chemicals listed under  
15 Proposition 65, or chemicals OEHHA has identified as candidates for listing, in order to identify  
16 exposures of potential public health significance; (c) to monitor compliance with the reformulation  
17 requirements of this and other, similar consent judgments addressing Proposition 65-listed chemical  
18 exposures; or (d) to conduct additional exposure measurements that evaluate the levels of chemical  
19 exposures to users of products that contain lead, DEHP, DBP and BBP.

20 **4.4 Reimbursement of Fees and Costs**

21 The Parties acknowledge that Moore and his counsel offered to resolve this dispute  
22 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving  
23 this fee issue to be resolved after the material terms of the agreement had been settled. Mannington  
24 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had  
25 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due to  
26 Moore and his counsel under general contract principles and the private attorney general doctrine  
27 codified at California Code of Civil Procedure (CCP) §1021.5, for all of the work performed  
28

1 through the mutual execution of this agreement. Mannington shall reimburse Moore and his  
2 counsel \$92,500 for fees and costs incurred as a result of investigating, bringing this matter to its  
3 attention, and negotiating a settlement in the public interest. Mannington shall make the check  
4 payable to “The Chanler Group” and shall deliver payment within five days of the Effective Date to  
5 the address listed in Section 4.5.1(a) below.

6 **4.5 Payment Procedures**

7 **4.5.1 Issuance of Payments.** Payments shall be delivered as follows:

- 8 (a) All Payments owed to Moore and his counsel, pursuant to Sections 4.1,  
9 4.2 and 4.4 shall be delivered to the following payment address:

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

- 15 (b) All Payments owed to OEHHA (EIN: 68-0284486), pursuant to  
16 Sections 4.1 and 4.2 shall be delivered directly to OEHHA (Memo  
17 line “Prop 65 Penalties”) at the following address:

18 For United States Postal Service Delivery:

19 Mike Gyrics  
20 Fiscal Operations Branch Chief  
21 Office of Environmental Health Hazard Assessment  
22 P.O. Box 4010  
23 Sacramento, CA 95812-4010

24 For Non-United States Postal Service Delivery:

25 Mike Gyrics  
26 Fiscal Operations Branch Chief  
27 Office of Environmental Health Hazard Assessment  
28 1001 I Street  
Sacramento, CA 95814

- (c) The payment owed to Silent Spring, pursuant to Section 4.3, shall be  
made payable to “The Chanler Group in Trust for Silent Spring

1 Institute” and shall be delivered to the payment address listed in  
2 Section 4.5.1(a).

3 With a copy of the checks payable to OEHHA mailed to The Chanler Group  
4 at the address set forth in 4.5.1 (a), as proof of payment to OEHHA.

5 4.5.2 **Issuance of 1099 Forms.** After each penalty payment, Manington shall issue  
6 separate 1099 forms for each payment to Moore, whose address and tax identification  
7 number shall be furnished upon request after this Consent Judgment has been fully executed  
8 by the parties, and OEHHA at the address listed in Section 4.5.1(b) above.

9 **5. CLAIMS COVERED AND RELEASED**

10 5.1 **Moore’s Release of Proposition 65 Claims**

11 Moore acting on behalf of himself and in the the public interest releases Mannington, its  
12 parents, subsidiaries, affiliated entities under common ownership, sister and related companies,  
13 directors, officers, shareholders, employees, attorneys, successors and assigns and each entity to  
14 whom Defendant directly or indirectly distributes or sells the Covered Products, including, but not  
15 limited to, downstream distributors, wholesalers, customers, resellers, retailers, franchisees,  
16 cooperative members, licensors, and licensees that sold or distributed the Covered Products  
17 (collectively “Releasees”), from all claims for violations of Proposition 65 up through the Effective  
18 Date based on exposure to BBP from the Covered Products as set forth in the Notice. Compliance  
19 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to  
20 BBP in the Covered Products.

21 5.2 **Moore’s Individual Release of Claims**

22 Moore also, in his individual capacity only and *not* in his representative capacity, provides a  
23 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all  
24 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,  
25 liabilities and demands of plaintiff of any nature, character or kind, whether known or unknown,  
26 suspected or unsuspected, limited to and arising out of alleged or actual exposures to BBP in the  
27 Covered Products manufactured, imported, distributed, sold or offered for sale by Mannington.

1           5.3    **Mannington’s Release of Moore**

2           Mannington on behalf of itself, its past and current agents, representatives, attorneys,  
3           successors, and/or assignees, hereby waives any and all claims against Moore his attorneys and  
4           other representatives, for any and all actions taken or statements made (or those that could have  
5           been taken or made) by Plaintiff and his attorneys and other representatives, whether in the course  
6           of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with  
7           respect to the Covered Products.

8           **6.    COURT APPROVAL**

9           6.1    By this Consent Judgment and upon its approval, the Parties waive their right to trial  
10          on the merits, and waive their rights to seek appellate review of any and all interim rulings,  
11          including all pleading, procedural, and discovery orders, only, however, as they relate to Defendant  
12          Mannington.

13          6.2    Plaintiff shall file a motion seeking approval of this Consent Judgment pursuant to  
14          California Health & Safety Code §25249.7(f), and Mannington shall support the entry of such  
15          motion.

16          6.3    If this Consent Judgment is not approved by the Court, (a) this Consent Judgment  
17          shall terminate and become null and void, and the action shall revert to the status that existed prior  
18          to the execution date of this Consent Judgment; (b) no term of this Consent Judgment or any draft  
19          thereof, or of the negotiation, documentation, or other part or aspect of the Parties’ settlement  
20          discussions, shall have any effect, nor shall any such matter be admissible in evidence for any  
21          purpose in this action, or in any other proceeding; and (c) the parties agree to meet and confer to  
22          determine whether to modify the terms of the Consent Judgment and to resubmit it for approval.

23          **7.    ENFORCEMENT OF CONSENT JUDGMENT**

24          Any Party may, by motion, application for an order to show cause before the Marin County  
25          Superior Court, or any other appropriate action, enforce the terms and conditions contained in this  
26          Consent Judgment. A Party may file such a motion, action or application only after that Party first  
27          provides 30 days notice to the Party allegedly failing to comply with the terms and conditions of  
28



1 this Consent Judgment and attempts to resolve such Party's failure to comply in an open and good  
2 faith manner for a period of no less than 30 days.

3 **8. GOVERNING LAW**

4 The terms of this Consent Judgment shall be governed by the laws of the State of California  
5 and apply within the State of California. In the event that Proposition 65 is repealed, preempted or  
6 is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this  
7 Consent Judgment are rendered inapplicable or no longer require as a result of any such repeal or  
8 preemption or rendered inapplicable by reason of law generally as to the Covered Products, then  
9 Mannington shall have no further obligations pursuant to this Consent Judgment with respect to,  
10 and to the extent that, the Covered Products are so affected.

11 8.1 This Consent Judgment contains the sole and entire agreement and understanding of  
12 the Parties with respect to the entire subject matter set forth in this Consent Judgment, and any and  
13 all prior discussions, negotiations, commitments, or understandings related thereto, if any, are  
14 deemed merged. There are no warranties, representations, or other agreements between the Parties  
15 except as expressly set forth in this Consent Judgment. No representations, oral or otherwise,  
16 express or implied, other than those specifically referred to in this Consent Judgment have been  
17 made by any party. No other agreements not specifically contained or referenced in this Consent  
18 Judgment, oral or otherwise, shall be deemed to exist or to bind any of the Parties. No  
19 supplementation, modification, waiver or termination of this Consent Judgment shall be binding  
20 unless executed in writing by the party to be bound. No waiver of any of the provisions of this  
21 Consent Judgment shall be deemed or shall constitute a waiver of any of the other provisions  
22 whether or not similar, nor shall such waiver constitute a continuing waiver.

23 8.2 The Parties, including their counsel, have participated in the preparation of this  
24 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This  
25 Consent Judgment was subject to revision and modification of the Parties and has been accepted  
26 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or  
27 ambiguity existing in this Consent Judgment shall not be interpreted against any party as a result of  
28

1 the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment  
2 agrees that any statute or rule of construction providing that ambiguities are to be resolved against  
3 the drafting party should not be employed in the interpretation of this Consent Judgment and, in this  
4 regard, the Parties hereby waive California Code Section 1654.

5 **9. NOTICES**

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

10 To Mannington:

11 Scott Salerni  
12 Corporate Counsel  
13 Mannington Mills, Inc.  
14 75 Mannington Mills Road  
15 Salem, NJ 08079

To Moore:

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

14 With a copy to:

15 Jeffrey Margulies, Esq.  
16 Fulbright & Jaworski L.L.P.  
17 555 South Flower Street  
Forty-First Floor  
Los Angeles, CA 90071

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

20 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

21 This Consent Judgment may be executed in counterparts and by facsimile or pdf signature,  
22 each of which shall be deemed an original, and all of which, when taken together, shall constitute  
23 one and the same document. A facsimile or pdf signature shall be as valid as the original.

24 **11. MODIFICATION**

25 This Consent Judgment may be modified only: (1) by written agreement of the Parties and  
26 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion  
27 of any Party and entry of a modified Consent Judgment by 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

**12. AUTHORIZATION**

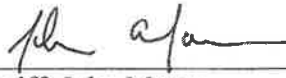
The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood, and agree to all of the terms and conditions of this Consent Judgment.

AGREED TO:

AGREED TO:

Date: JUNE 4, 2013

Date: \_\_\_\_\_

By:   
Plaintiff, John Moore

By: \_\_\_\_\_  
Defendant, Mannington Mills, 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

**12. AUTHORIZATION**

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

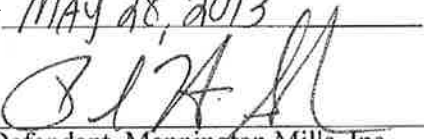

AGREED TO:

AGREED TO:

Date: \_\_\_\_\_

Date: May 28, 2013

By: \_\_\_\_\_  
Plaintiff, John Moore

By:  \_\_\_\_\_  
Defendant, Mannington Mills, Inc.   
PAUL H. SWYER  
SR. VICE PRESIDENT, CFO