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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 DEFENDANTS ARMSTRONG WORLD**
) **INDUSTRIES, INC. AND CONGOLEUM**
) **CORPORATION**
)
)
)
)

1 **1. INTRODUCTION**

2 1.1 **John Moore, Armstrong World Industries, Inc., and Congoleum Corporation**

3 This Consent Judgment is entered into by and between plaintiff John Moore (“Moore” or
4 “Plaintiff”), Armstrong World Industries, Inc. (“Armstrong”), and Congoleum Corporation
5 (“Congoleum”) (with Armstrong and Congoleum referred to collectively as “Defendants”), each a
6 “Party” and collectively “Parties.”

7 1.2 **John Moore**

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

11 1.3 **Defendants**

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

15 1.4 **General Allegations**

16 1.4.1 Moore alleges that Armstrong has manufactured, imported, distributed,
17 and/or sold vinyl sheet flooring containing up to 48,000 part per million (“ppm”) butyl benzyl
18 phthalate (“BBP”) including, but not limited to, *Armstrong StrataMax Better, Limestone – Oyster*
19 *White, #X2527*, without the requisite Proposition 65 warnings. BBP is on the Proposition 65 list as
20 a chemical known to cause birth defects and other reproductive harm.

21 1.4.2 Moore alleges that Congoleum has manufactured, imported, distributed,
22 and/or sold vinyl sheet flooring containing up to 100,000 ppm butyl benzyl phthalate (“BBP”)
23 including, but not limited to, Congoleum *Airstep Plus, 58000 – Muslin, Item 299472 (#4 00001*
24 *46109 9)*, without the requisite Proposition 65 warnings.

25 1.5 **Notices of Violation**

26 1.5.1 On February 24, 2011, Moore served Armstrong and various public
27 enforcement agencies, with a document entitled “60-Day Notice of Violation” (the “Notice”) that
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1 provided the recipients with notice of alleged violations of California Health & Safety Code
2 § 25249.6 based on Armstrong's alleged failure to warn consumers that its vinyl sheet flooring
3 exposed users in California to BBP. To the best of the Parties' knowledge, no public enforcer has
4 prosecuted the allegations set forth in the Notice.

5 1.5.2 On February 24, 2011, Moore served Congoleum and various public
6 enforcement agencies, with a document entitled "60-Day Notice of Violation" (the "Notice") that
7 provided the recipients with notice of alleged violations of California Health & Safety Code
8 § 25249.6 based on Congoleum's alleged failure to warn consumers that its vinyl sheet flooring
9 exposed users in California to BBP. To the best of the Parties' knowledge, no public enforcer has
10 prosecuted the allegations set forth in the Notice.

11 1.6 **Complaint**

12 On May 12, 2011, Moore filed a Complaint in the Superior Court in and for the County of
13 Marin, *Moore v. American Biltrite, Inc. et al.*, Case No. CIV-1102414 (the "Action" or
14 "Complaint"), which named Congoleum and Armstrong, among others, as defendants and alleged
15 violations of California Health & Safety Code § 25249.6, based on, among other things, the alleged
16 exposures to BBP contained in vinyl sheet flooring sold by Defendants.

17 1.7 **No Admission**

18 Defendants deny the material, factual, and legal allegations contained in Moore's Notice and
19 Complaint and maintain that all products that they or their affiliates have sold, manufactured,
20 imported, distributed, and/or offered for sale in California have been and are in compliance with all
21 laws. Nothing in this Consent Judgment shall be construed as an admission by Defendants of any
22 fact, finding, issue of law, or violation of law, nor shall compliance with this Consent Judgment
23 constitute or be construed as an admission by Defendants of any fact, finding, conclusion, issue of
24 law, or violation of law. However, this section shall not diminish or otherwise affect Defendants'
25 obligations, responsibilities, and duties under this Consent Judgment.

1 1.8 **Consent to Jurisdiction**

2 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
3 jurisdiction over Defendants as to the allegations contained in the Complaint, that venue is proper in
4 the County of Marin and that this Court has jurisdiction to enter and enforce the provisions of this
5 Consent Judgment pursuant to Code of Civil Procedure § 664.6.

6 **2. DEFINITIONS**

7 2.1 The term “Covered Product” means vinyl sheet flooring manufactured, distributed
8 and/or sold in California by Defendants.

9 2.2 The term “Effective Date” means the date on which a judgment based on this
10 Consent Judgment is entered by the Court.

11 2.3 The term “Reformulated Products” shall mean Covered Products that meet the
12 reformulation standard in Section 3.1.

13 **3. INJUNCTIVE RELIEF**

14 3.1 **Reformulation**

15 Subject to Section 3.2, commencing on December 31, 2013, all Covered Products
16 manufactured by, or on behalf of, Defendants, for sale in the State of California, shall contain BBP
17 in concentrations of less than 0.1 percent (1,000 ppm) when analyzed pursuant to U.S.
18 Environmental Protection Agency testing methodologies 3580A and 8270C or any other
19 methodology utilized by federal or state agencies for the purpose of determining the BBP content in
20 a solid substance.

21 3.2 **Extension of Reformulation Deadline**

22 A Defendant may extend the date required for compliance in Section 3.1 until March 31,
23 2013, if, despite reasonable commercial efforts, it is unable to manufacture only Reformulated
24 Products for sale in the State of California by December 31, 2013. For purposes of this Section 3.1,
25 reasonable commercial efforts shall include consideration of the following factors: capital
26 expenditures as well as product performance, manufacturing, processing, and testing requirements.
27 If a Defendant elects to extend the compliance deadline, it shall provide written notice to Moore,
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1 indicating the pertinent factors that led to the inability to meet the December 31, 2013, deadline, no
2 later than December 15, 2013, and shall pay the additional civil penalty required by Section 4.2.

3 **4. MONETARY PAYMENTS**

4 In settlement of all the claims referred to in this Consent Judgment, each Defendant shall
5 pay total civil penalties of \$100,000 in accordance with this Section. Each penalty payment will be
6 allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of
7 the funds remitted to the California Office of Environmental Health Hazard Assessment
8 (“OEHHA”) and the remaining 25% of the penalty remitted to Moore, as follows:

9 **4.1 Initial Civil Penalty**

10 Each Defendant shall pay an initial civil penalty in the amount of \$15,000 within five days
11 of the Effective Date. Each Defendant shall issue two separate checks to: (a) “OEHHA” in the
12 amount of \$11,250; and (b) “The Chanler Group in Trust for John Moore” in the amount of \$3,750.
13 All penalty payments shall be delivered to the addresses listed in Section 4.6 below.

14 **4.2 Extended Compliance Deadline Civil Penalty**

15 A Defendant electing to extend the compliance deadline under Section 3.2 shall pay an
16 additional civil penalty of \$15,000 no later than December 31, 2013. Each Defendant shall issue
17 two separate checks to: (a) “OEHHA” in the amount of \$11,250; and (b) “The Chanler Group in
18 Trust for John Moore” in the amount of \$3,750. All penalty payments shall be delivered to the
19 addresses listed in Section 4.6 below.

20 **4.3 Final Civil Penalty**

21 Each Defendant shall pay a final civil penalty of \$70,000 on or before October 31, 2014.
22 The final civil penalty shall be waived in its entirety, however, if, no later than October 15, 2014, an
23 officer of the respective Defendants provides Moore with written certification that, as of the date of
24 such certification and continuing into the future, Defendant has met the reformulation standard
25 specified in Section 3.1 above and that all Covered Products manufactured, imported, distributed,
26 sold and offered for sale in California by its respective Defendant are Reformulated Products. The
27 certification in lieu of a final civil penalty payment provided by this Section is a material term, and
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1 time is of the essence. Each Defendant shall issue two separate checks for its final civil penalty
2 payments to: (a) “OEHHA” in the amount of \$52,500; and (b) “The Chanler Group in Trust for
3 John Moore” in the amount of \$17,500.

4 **4.4 Payment in Lieu of Further Civil Penalty**

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

18 **4.5 Reimbursement of Fees and Costs**

19 The Parties acknowledge that Moore and his counsel offered to resolve this dispute without
20 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
21 issue to be resolved after the material terms of the agreement had been settled. Defendants then
22 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
23 finalized. The Parties then attempted to (and did) reach an accord on the compensation due to
24 Moore and his counsel under general contract principles and the private attorney general doctrine
25 codified at California Code of Civil Procedure (CCP) §1021.5, for all of the work performed
26 through the mutual execution of this agreement. Each Defendant shall reimburse Moore and his
27 counsel \$92,500 for fees and costs incurred as a result of investigating, bringing this matter to its
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1 attention, and negotiating a settlement in the public interest. Defendant shall make the check
2 payable to “The Chanler Group” and shall deliver payment on or before August 1, 2013 to the
3 address listed in Section 4.6.1(a) below.

4 **4.6 Payment Procedures**

5 **4.6.1 Issuance of Payments.** Payments shall be delivered as follows:

6 (a) All Payments owed to Moore and his counsel, pursuant to Sections
7 4.1, 4.2, 4.3 and 4.5 shall be delivered to the following payment
8 address:

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

14 (b) All Payments owed to OEHHA (EIN: 68-0284486), pursuant to
15 Sections 4.1, 4.2 and 4.3 shall be delivered directly to OEHHA
16 (Memo line “Prop 65 Penalties”) at the following address:

17 For United States Postal Service Delivery:

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

23 For Non-United States Postal Service Delivery:

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

(c) The payment owed to Silent Spring, pursuant to Section 4.4, shall be
made payable to “The Chanler Group in Trust for Silent Spring
Institute” and shall be delivered to the payment address listed in
Section 4.6.1(a).

1 With a copy of the checks payable to OEHHA mailed to The Chanler Group
2 at the address set forth in 4.6.1(a), as proof of payment to OEHHA.

3 4.6.2 **Issuance of 1099 Forms.** After each penalty payment, Defendants shall issue
4 separate 1099 forms for each payment to Moore, whose address and tax identification number shall
5 be furnished upon request after this Consent Judgment has been fully executed by the parties, and
6 OEHHA at the address listed in Section 4.6.1(b) above.

7 **5. CLAIMS COVERED AND RELEASED**

8 5.1 **Moore’s Release of Proposition 65 Claims**

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

19 5.2 **Moore’s Individual Release of Claims**

20 Moore also, in his individual capacity only and *not* in his representative capacity, provides a
21 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
22 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,
23 liabilities and demands of plaintiff of any nature, character or kind, whether known or unknown,
24 suspected or unsuspected, limited to and arising out of alleged or actual exposures to BBP in the
25 Covered Products manufactured, imported, distributed, sold or offered for sale by Defendants.
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1 5.3 **Defendants’ Release of Moore**

2 Each Defendant 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
12 Defendants.

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 Defendants 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
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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 Defendants shall have no further obligations pursuant to this Consent Judgment with respect to, and
10 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
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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 Congoleum:

11 Dan Garson, Chief Operating Officer
12 Congoleum Corporation
13 3500 Quakerbridge Road
Mercerville, NJ 08619

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 To Armstrong:

19 Robert Sandkuhler
20 Armstrong World Industries, Inc.
21 2500 Columbia
P.O. Box 3001
22 Lancaster, PA 17604-3001

23 With a copy to:

24 Jeffrey Margulies, Esq.
25 Fulbright & Jaworski L.L.P.
26 555 South Flower Street
Forty-First Floor
Los Angeles, CA 90071

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

3 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

7 **11. MODIFICATION**

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

11 **12. AUTHORIZATION**

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

15
16 AGREED TO:

AGREED TO:

17 Date: July 19, 2013


Date: _____

18
19 By: 
20 Plaintiff, John Moore

By: _____
Defendant, Armstrong World Industries, Inc.

21 AGREED TO:

22 Date: JULY 22 2013

23
24 By: 
25 Defendant, Congoleum Corporation

26 Dan Garson
27 COO