



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 180,000 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  
28

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 2014, 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.  
26  
27  
28



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  
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 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  
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 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

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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:

15  
16 AGREED TO:

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

17 Date: 7-24-13 \_\_\_\_\_

18  
19 By: \_\_\_\_\_  
20 Plaintiff, John Moore

18  
19 By: Frank J. Ready \_\_\_\_\_  
20 Defendant, Armstrong World Industries, Inc.

21 AGREED TO:

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

23  
24 By: \_\_\_\_\_  
25 Defendant, Congoleum Corporation