

1 Clifford A. Chanler, State Bar No. 135534
2 Josh Voorhees, State Bar No. 241436
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
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE CITY AND COUNTY OF MARIN
14 UNLIMITED CIVIL JURISDICTION

15 JOHN MOORE,

16 Plaintiff,

17 v.

18 CRYNTEL ENTERPRISES LTD., INC.; and
19 DOES 1-150, inclusive,

) Case No. CIV- _____
)
)

) UNLIMITED JURISDICTION
)
)

) **[PROPOSED] CONSENT JUDGMENT**
) **AS TO CRYNTEL ENTERPRISES**
) **LTD., INC.**
)

) Dept:
)

) Judge:
)

) Date: None set
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Complaint Filed: December 6, 2010

1 **1. INTRODUCTION**

2 **1.1 John Moore and Cryntel Enterprises Ltd., Inc.**

3 This Consent Judgment is entered into by and between plaintiff John Moore (“Moore” or
4 “Plaintiff”) and defendant Cryntel Enterprises Ltd., Inc. (“Cryntel”), with Plaintiff and Cryntel
5 collectively referred to as the “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 - Cryntel Enterprises Ltd., Inc.**

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

14 **1.4 General Allegations**

15 Moore alleges that Cryntel has manufactured, imported, distributed and/or sold vinyl
16 flooring that contains phthalates, including di(2-ethylhexyl)phthalate (“DEHP”), without the
17 requisite Proposition 65 warnings. DEHP is on the Proposition 65 list as known to cause cancer as
18 well as birth defects and other reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are defined as follows: all vinyl
21 flooring containing DEHP including, but not limited to, *Cryntel Mirage Canyon Vinyl Tile, Model*
22 *01631/Item 1055 (#0 94611 01342 9) and Items 9543, 28323, 45598, 124827, 166221, 166231,*
23 *185391, 185397, and 326767.* All such vinyl flooring containing DEHP shall be referred to
24 hereinafter as the “Products.”

25 **1.6 Notice of Violation**

26 On June 17, 2010, Moore served Cryntel Enterprises Ltd., Inc. 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 for failing to warn consumers that the Products sold by Cryntel exposed users in
3 California to DEHP. To the best of the parties' knowledge, no public enforcer has prosecuted the
4 allegations set forth in the Notice.

5 **1.7 Complaint**

6 On December 10, 2010, Moore filed a complaint in the Superior Court in and for the County
7 of Marin against Cryntel and Does 1 through 150, *Moore v. Cryntel Enterprises Ltd., Inc.*, Case
8 No. CIV-_____ (the "Action"), alleging violations of California Health & Safety Code
9 § 25249.6, based on the alleged exposures to DEHP contained in certain vinyl flooring products
10 sold by Cryntel.

11 **1.8 No Admission**

12 Cryntel denies the material, factual and legal allegations contained in Moore's Notice and
13 Complaint and maintains that all products that it has sold, manufactured, imported and/or
14 distributed in California, including the Products, have been and are in compliance with all laws.
15 Nothing in this Consent Judgment shall be construed as an admission by Cryntel of any fact,
16 finding, issue of law, or violation of law, nor shall compliance with this Consent Judgment
17 constitute or be construed as an admission by Cryntel of any fact, finding, conclusion, issue of law,
18 or violation of law. However, this section shall not diminish or otherwise affect Cryntel's
19 obligations, responsibilities, and duties under this Consent Judgment.

20 **1.9 Consent to Jurisdiction**

21 For purposes of this Consent Judgment only, the parties stipulate that this Court has
22 jurisdiction over Cryntel as to the allegations contained in the Complaint, that venue is proper in the
23 County of Marin and that this Court has jurisdiction to enter and enforce the provisions of this
24 Consent Judgment.

25 **1.10 Effective Date**

26 For purposes of this Consent Judgment, the term "Effective Date" shall mean December 15,
27 2010.

1 **2. INJUNCTIVE RELIEF: REFORMULATION**

2 **2.1 Reformulation Standards**

3 Reformulated Products are defined as those Products containing DEHP in concentrations
4 less than 0.1 percent (1,000 parts per million) in each accessible component when analyzed
5 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or any
6 other methodology utilized by federal or state agencies for the purpose of determining DEHP
7 content in a solid substance.

8 **2.2 Reformulation Commitment**

9 Commencing on the Effective Date, Cryntel shall ship, sell, or offer to be shipped for sale in
10 California, only Reformulated Products.

11 **2.3 Reformulated Products are Deemed to Comply**

12 Reformulated Products shall be deemed to comply with Proposition 65 as it relates to the
13 presence of DEHP in the Products and shall be exempt from any Proposition 65 warning
14 requirements regarding exposure to DEHP.

15 **3. PAYMENT OF PENALTIES**

16 **3.1 Civil Penalty**

17 In settlement of all the claims referred to in this Consent Judgment, Cryntel shall pay
18 \$10,000 in civil penalties, to be apportioned in accordance with California Health & Safety Code §
19 25249.12(c) & (d), with 75% of these funds remitted to the State of California's Office of
20 Environmental Health Hazard Assessment Assessment ("OEHHA") and the remaining 25% of the
21 penalty remitted to John Moore. This civil penalty reflects a credit of \$33,000 based on Cryntel's
22 commitment to reformulate. Cryntel shall issue two separate checks for the penalty payment: (a)
23 one check made payable to "The Chanler Group in Trust For OEHHA" in the amount of \$7,500,
24 representing 75% of the total penalty; and (b) one check to "The Chanler Group in Trust for John
25 Moore" in the amount of \$2,500, representing 25% of the total penalty. Two separate 1099s shall
26 be issued for the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-
27 0284486); and (b) John Moore, whose information shall be provided five calendar days before the
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1 payment is due.

2 Payment shall be delivered to Moore's counsel on or before December 15, 2010, at the
3 following address:

4 The Chanler Group
5 Attn: Proposition 65 Controller
6 2560 Ninth Street
7 Parker Plaza, Suite 214
8 Berkeley, CA 94710

9 **4. REIMBURSEMENT OF ATTORNEY'S FEES AND COSTS**

10 The parties reached an accord on the compensation due to Moore and his counsel under
11 general contract principles and the private attorney general doctrine codified at California Code of
12 Civil Procedure (CCP) § 1021.5. Crytel shall reimburse Moore and his counsel \$40,000 for fees
13 and costs incurred as a result of investigating, bringing this matter to its attention, and negotiating a
14 settlement in the public interest. This figure includes Moore's future fees and costs including
15 attorney's fees to be incurred in seeking judicial approval of this Consent Judgment as well as any
16 other legal work performed after the execution of this Consent Judgment incurred in an effort to
17 obtain finality of the case. However, in the event a third party were to appeal entry of this
18 Consent Judgment, Plaintiff and his counsel shall be entitled to seek their reasonable attorney's fees
19 and costs associated with all appellate work defending the entry of judgment pursuant to CCP §
20 1021.5.

21 The check for reimbursement of fees and costs shall be made payable to "The Chanler
22 Group" and shall be delivered on or before December 15, 2010, to the following address:

23 The Chanler Group
24 Attn: Proposition 65 Controller
25 2560 Ninth Street
26 Parker Plaza, Suite 214
27 Berkeley, CA 94710

28 A separate 1099 shall be issued to "The Chanler Group" (EIN: 94-3171522) for the amount
of the reimbursement of Plaintiff's fees and costs.

1 **5. RELEASE OF ALL CLAIMS**

2 **5.1 Moore's Release of Cryntel**

3 In further consideration of the promises and agreements herein contained, and for the
4 payments to be made pursuant to Sections 3 and 4, Moore, on behalf of himself, his past and current
5 agents, representatives, attorneys, successors, and/or assignees, and in the interest of the general
6 public pursuant to Health & Safety Code § 25249.7(d), hereby waives all rights to institute or
7 participate in, directly or indirectly, any form of legal action and releases all claims, including,
8 without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands,
9 obligations, agreements, promises, royalties, accountings, damages, costs, fines, penalties, losses, or
10 expenses (including, but not limited to, investigation fees, expert fees, and attorney's fees) of any
11 nature whatsoever, whether known or unknown, fixed or contingent (collectively "claims"), against
12 Cryntel and each of its downstream wholesalers, licensors, licensees, auctioneers, retailers –
13 including, but not limited to, Lowe's HIW, Inc., distributors, franchisees, dealers, customers,
14 owners, purchasers, users, parent companies, corporate affiliates, subsidiaries, and their respective
15 officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and
16 parent entities, (collectively "Releasees") that arise under Proposition 65, as such claims relate to
17 Cryntel's alleged failure to warn about exposures to DEHP contained in the Products.

18 Moore also, on behalf of himself and his agents, attorneys, representatives, successors and
19 assigns, in his individual capacity only and *not* in his representative capacity, provides a general
20 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
21 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
22 liabilities and demands of Moore of any nature, character or kind, known or unknown, suspected or
23 unsuspected, arising out of the subject matter of this dispute. Moore acknowledges that he is
24 familiar with Section 1542 of the California Civil Code, which provides as follows:

25 **A general release does not extend to claims which the creditor does not**
26 **know or suspect to exist in his or her favor at the time of executing the**
27 **release, which if known by him or her must have materially affected his or**
28 **her settlement with the debtor.**

1 Moore, in his individual capacity only and *not* in his representative capacity, on behalf of
2 himself and his agents, attorneys, representatives, successors and assigns, expressly waives and
3 relinquishes any and all rights and benefits which he may have under, or which may be conferred on
4 him by the provisions of Section 1542 of the California Civil Code as well as under any other state
5 or federal statute or common law principle of similar effect, to the fullest extent that he may
6 lawfully waive such rights or benefits pertaining to the released matters. In furtherance of such
7 intention, the release hereby given shall be and remain in effect as a full and complete release
8 notwithstanding the discovery or existence of any such additional or different claims or facts arising
9 out of the released matters.

10 The parties further understand and agree that this release shall not extend upstream to any
11 entities that manufactured the Products for Cryntel or any component parts thereof or to any
12 distributors or suppliers who sold the Products or any component parts thereof to Cryntel.

13 **5.2 Cryntel's Release of Moore**

14 Cryntel, on behalf of itself and its Releasees, waives any and all claims against
15 Moore, his attorneys, and other representatives for any and all actions taken by Moore and his
16 attorneys and other representatives, whether in the course of investigating claims or otherwise
17 seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the Products.

18 **6. COURT APPROVAL**

19 The parties hereby request that the Court promptly enter this Consent Judgment. Upon entry
20 of the Consent Judgment, the parties waive their respective rights to a hearing or trial on the
21 allegations of the Complaint.

22 This Consent Judgment is not effective until it is approved and entered by the Court and
23 shall be null and void if, for any reason: (a) the Superior Court does not approve the motion to
24 approve this Consent Judgment, and if the parties choose not to pursue a modified Consent
25 Judgment within 30 days after the Court's denial of the motion to approve (and, upon remittitur, all
26 payments made pursuant to this Consent Judgment being returned to counsel for Cryntel); and/or,
27 (b) this Consent Judgment is not approved and entered by the Court within one year after it has been
28 fully executed by all parties.

1 **7. SEVERABILITY**

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

5 **8. GOVERNING LAW**

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

13 **9. ENTIRE AGREEMENT**

14 This Consent Judgment contains the sole and entire agreement and understanding of the
15 parties with respect to the entire subject matter hereof, and any and all prior discussions,
16 negotiations, commitments and understandings related hereto. No representations, oral or
17 otherwise, express or implied, other than those contained herein have been made by any party
18 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
19 to exist or to bind any of the parties.

20 **10. NOTICES**

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

25 To Cryntel:

26 Steven Dryer
27 President
28 Cryntel Enterprises Ltd., Inc.
 2450 Hollywood Blvd., Ste. 401
 Hollywood, FL 33020

 To Moore:

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

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

3 **11. 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 **12. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

8 Moore and his attorneys agree to comply with the reporting form requirements referenced in
9 California Health & Safety Code § 25249.7(f).

10 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

11 Moore and Cryntel agree to mutually employ their, and their counsel's, best efforts to
12 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent
13 Judgment by the Court in a timely manner. The parties acknowledge that, pursuant to California
14 Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this
15 Consent Judgment, which Moore shall prepare and file, and Cryntel shall not oppose. Cryntel
16 understands and agrees that it shall provide Moore and his counsel with initial drafts of all required
17 approval documents within 14 days of the filing of this Consent Judgment. If any third party
18 objection to the noticed motion is filed, Moore and Cryntel shall work together to file a joint reply
19 and appear at any hearing before the Court. This provision is a material component of the Consent
20 Judgment and shall be treated as such in the event of a breach. If the Superior Court does not
21 approve the motion to approve this Consent Judgment, and if the parties choose not to pursue a
22 modified Consent Judgment within 30 days after the Court's denial of the motion to approve, then,
23 upon remittitur, all payments made pursuant to this Consent Judgment will be returned to counsel
24 for Cryntel.

25 **14. MODIFICATION**

26 This Consent Judgment may be modified only: (1) by written agreement of the parties and
27 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
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of any party, as provided by law, and entry of a modified Consent Judgment by the Court.

15. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date: DECEMBER 14, 2010

Date: Dec 13, 2010

By: *John E. Moore*
Plaintiff, John Moore

By: *Stuart Dreyer* President
Defendant, Cryntel Enterprises Ltd., Inc.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: _____

Judge of the Superior Court