

1 LEXINGTON LAW GROUP
Eric S. Somers, State Bar No. 139050
2 Mark N. Todzo, State Bar No. 168389
Howard Hirsch, State Bar No. 213209
3 1627 Irving Street
San Francisco, CA 94122
4 Telephone: (415) 759-4111
Facsimile: (415) 759-4112

5 Attorneys for Plaintiff
6 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
San Francisco County Superior Court

NOV 17 2010

CLERK OF THE COURT
BY: CYNTHIA S. HERBERT
Deputy Clerk

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

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11 CENTER FOR ENVIRONMENTAL,)
HEALTH, a non-profit corporation,)
12)
Plaintiff,)
13)
v.)
14)
A & W PRODUCTS CO., INC., OFFICE)
15 DEPOT, INC., and Defendant DOES 1)
through 200, inclusive;)
16)
Defendants.)
17)

CASE NO. CGC-10-496081

~~[PROPOSED]~~ CONSENT JUDGMENT AS
TO DEFENDANT OFFICE DEPOT, INC.

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1 **1. INTRODUCTION**

2 **1.1** On January 15, 2010, Plaintiff Center for Environmental Health ("CEH"),
3 a non-profit corporation acting in the public interest, filed a complaint in San Francisco County
4 Superior Court, entitled *Center for Environmental Health v. A&W Products, Inc. et al.*, San
5 Francisco County Superior Court Case Number CGC-10-496081 (the "Action"), for civil
6 penalties and injunctive relief pursuant to the provisions of California Health & Safety Code
7 §25249.5 et seq. ("Proposition 65").

8 **1.2** Defendant Office Depot, Inc. ("Office Depot") is a "person in the course
9 of doing business" under Proposition 65 and manufactures, distributes and/or sells vinyl pencil
10 pouches (the "Products") in the State of California. Office Depot and CEH are referred to
11 collectively herein as the Parties.

12 **1.3** On or about September 22, 2009, CEH served Office Depot and the
13 appropriate public enforcement agencies with the requisite 60-day notice that Office Depot is in
14 violation of Proposition 65. CEH's notice and the Complaint in this Action allege that Office
15 Depot exposes individuals who use or otherwise handle the Products to lead and/or lead
16 compounds (referred to interchangeably herein as "Lead"), chemicals known to the State of
17 California to cause cancer, birth defects and other reproductive harm, without first providing
18 clear and reasonable warning to such persons regarding the carcinogenicity and reproductive
19 toxicity of Lead. The notice and Complaint allege that Office Depot's conduct violates Health &
20 Safety Code §25249.6, the warning provision of Proposition 65.

21 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this
22 Court has jurisdiction over the subject matter of the violations alleged in CEH's Complaint and
23 personal jurisdiction over Office Depot as to the acts alleged in CEH's Complaint, that venue is
24 proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent
25 Judgment as a full and final resolution of all claims which were or could have been raised in the
26 Complaint based on the facts alleged therein.

27 **1.5** The Parties enter into this Consent Judgment effective on the date when
28 this Consent Judgment is approved by the Court by the signing of the Order below, and

1 conditional upon such approval, pursuant to a settlement of certain disputed claims between the
2 Parties as alleged in the Complaint. By executing this Consent Judgment, the Parties do not
3 admit any facts or conclusions of law. It is the Parties' intent that nothing in this Consent
4 Judgment shall be construed as an admission by the Parties of any fact, conclusion of law, issue
5 of law or violation of law, nor shall compliance with the Consent Judgment constitute or be
6 construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation
7 of law. Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy,
8 argument or defense the Parties may have in any other or future legal proceedings. This Consent
9 Judgment is the product of negotiation and compromise and is accepted by the parties, for
10 purposes of settling, compromising and resolving issues disputed in this action, including future
11 compliance by Office Depot with Section 2 of this Consent Judgment, and shall not be used for
12 any other purpose, or in any other matter.

13 **1.6** Office Depot denies the material factual and legal allegations contained in
14 CEH's Notices and maintains that all products that it has sold and distributed in California,
15 including the Products, have been and are in compliance with all laws. Nothing in this Consent
16 Judgment shall be construed as an admission by Office Depot of any fact, finding, issue of law,
17 or violation of law, nor shall compliance with this Consent Judgment constitute or be construed
18 as an admission by Office Depot of any fact, finding, conclusion, issue of law or violation of
19 law, such being specifically denied by Office Depot. However, this section shall not diminish or
20 otherwise affect the obligations, responsibilities and duties of Office Depot under this Consent
21 Judgment.

22 **2. COMPLIANCE - REFORMULATION**

23 **2.1 Lead Reformulation.** As of the date when the Court signs the Order
24 below approving this Consent Judgment, (the "Compliance Date"), Office Depot agrees as
25 follows:

26 (a) Office Depot shall not manufacture, ship, or sell or offer for sale, or cause to be
27 manufactured, distributed, shipped, or sold, any Product that contains any component, or is made
28

1 of any material, that contains more than 0.03 percent Lead by weight (300 parts per million
2 (“ppm”));

3 (b) On or after August 14, 2011, Office Depot shall not manufacture, distribute, ship,
4 or sell, or cause to be manufactured, distributed, shipped, or sold, any Product unless such
5 Product contains less than 0.01 percent Lead by weight (100 ppm), provided that, if the
6 Consumer Product Safety Commission (“CPSC”) determines prior to August 14, 2011 that it is
7 not technically feasible for manufacturers of Products to meet this 100 ppm limit, Office Depot
8 shall be required to comply with the provisions of 2.1(a) herein.

9 **2.2 Supplier Specifications, Certification, and Testing.** Office Depot shall
10 include in its specifications a requirement that suppliers provide Product that complies with the
11 Lead content requirements of Section 2.1 of this Consent Judgment. Office Depot shall request
12 from its suppliers written certification with corresponding test results of the Products certifying
13 that the Products meet the requirements of Section 2.1.

14 **2.3 Pre-market testing.** On or before the Compliance Date, Office Depot,
15 itself or through its agents, shall test a representative sample of the various designs of the
16 Product it is currently offering for sale to determine whether such Products comply with the
17 levels of lead as set forth in Section 2.1 of this Consent Judgment. Such testing shall be
18 conducted by an independent laboratory.

19 **2.4 Confirmatory testing by CEH.** CEH intends to conduct periodic testing
20 of the Products. Such testing shall be conducted by an independent laboratory. In the event that
21 CEH's testing demonstrates Lead levels in excess of the requirements of Section 2.1 for any
22 Product sold in California, CEH shall inform Office Depot of the alleged violation(s), including
23 information sufficient to permit Office Depot to identify the Product(s). Office Depot shall,
24 within twenty (20) days following such notice, provide CEH at the address listed in Section 11,
25 with: (a) information demonstrating its compliance with Sections 2.2 and 2.3 of this Consent
26 Judgment; and (b) a detailed description of corrective action that it has undertaken or proposes to
27 undertake to address the alleged violation. If there is a dispute over the sufficiency of the
28 proposed corrective action or its implementation, CEH shall promptly notify Office Depot and

1 the Parties shall meet and confer before CEH seeks the intervention of the Court to resolve the
2 dispute. This remedy is in addition to any other remedies available to enforce the terms of this
3 Consent Judgment.

4 **2.5 Documentation.** The certifications and results of all testing performed
5 and obtained from suppliers pursuant to this Consent Judgment shall be retained by Office Depot
6 for a period of three years from the date of the certification or testing and shall be made available
7 to CEH upon request.

8 **3. SETTLEMENT PAYMENTS**

9 **3.1** Within ten (10) days of entry of this Consent Judgment, Office Depot shall
10 pay a total of \$55,000 as a settlement payment. Any failure by Office Depot to comply with the
11 payment terms herein shall be subject to a stipulated late fee in the amount of \$100 for each day
12 after the delivery date the payment is received. The late fees required under this section shall be
13 recoverable, together with reasonable attorneys' fees, in an enforcement proceeding brought
14 pursuant to section 5 of this Consent Judgment. The total amount paid by Office Depot shall be
15 allocated by CEH as follows:

16 **3.1.1 Penalty:** The sum of \$2,000 in penalties pursuant to Health and
17 Safety Code § 25249.7(b). This payment shall be made by check payable to Center for
18 Environmental Health. CEH shall provide seventy-five percent (75%) of the civil penalty to the
19 Safe Drinking Water and Toxic Enforcement Fund in accordance with Health and Safety Code
20 § 25249.12.

21 **3.1.2 Monetary Payment in Lieu of Penalty:** \$17,500 shall be paid to
22 CEH in lieu of any penalty pursuant to Health and Safety Code § 25249.7(b). This payment
23 shall be made by check payable to Center for Environmental Health. CEH shall use such funds
24 to continue its work protecting people from exposures to toxic chemicals. As part of this work,
25 CEH intends to conduct periodic testing of the Products as set forth in Section 2.4. In addition,
26 as part of its Community Environmental Action and Justice Fund, CEH will use four percent of
27 such funds to award grants to grassroots environmental justice groups working to educate and
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1 protect people from exposures to toxic chemicals. The method of selection of such groups can
2 be found at the CEH web site at www.ceh.org/justicefund

3 **3.1.3 Attorneys' Fees and Costs:** \$35,500 shall be used to reimburse
4 CEH and its attorneys for a portion of their reasonable investigation fees and costs, attorneys'
5 fees, and any other costs incurred as a result of investigating, bringing this matter to Office
6 Depot's attention, litigating and negotiating a settlement in the public interest, and securing entry
7 of this Consent Judgment. This payment shall be made by check payable to Center for
8 Environmental Health.

9 **4. MODIFICATION OF CONSENT JUDGMENT**

10 **4.1** This Consent Judgment may be modified by written agreement of CEH
11 and Office Depot, or upon motion of CEH or Office Depot as provided by law.

12 **5. ENFORCEMENT OF CONSENT JUDGMENT**

13 **5.1** Either Party may, by motion or application for an order to show cause
14 before the Superior Court of the County of San Francisco, enforce the terms and conditions
15 contained in this Consent Judgment. Should the moving party prevail on any motion,
16 application for an order to show cause or other proceeding to enforce a violation of this Consent
17 Judgment, the moving party shall be entitled to its reasonable attorneys' fees and costs incurred
18 as a result of such motion or application.

19 **6. APPLICATION OF CONSENT JUDGMENT**

20 **6.1** This Consent Judgment shall apply to and be binding upon the Parties
21 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of
22 them.

23 **7. RELEASE**

24 **7.1** In further consideration of the promises and agreements herein contained,
25 and for the payments to be made pursuant to Section 3 above, CEH, on behalf of itself, its past
26 and current agents, representatives, successors and/or assignees, and in the interest of the general
27 public, hereby waives all rights to institute or participate in, directly or indirectly, any form of
28 legal action and releases all claims, including, without limitation, all actions, and causes of

1 action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
2 penalties, losses or expenses (including, but not limited to, investigation fees, expert fees and
3 attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent
4 (collectively "Claims"), that were brought or could have been brought against Office Depot and
5 its affiliates, subsidiaries, and their respective officers, directors, representatives, shareholders,
6 agents, employees, and sister and parent companies, licensors, licensees, retailers, franchisees,
7 dealers, customers, owners, subsidiaries, and their respective officers, and directors (collectively
8 "Releasees") that arise under Proposition 65 and that could have been asserted including such
9 Claims as relate to Office Depot's and each of its Releasees' alleged failure to warn about
10 exposures to or identification of Lead contained in any Products manufactured, distributed or
11 sold by Office Depot on or prior to the date of entry of this Consent Judgment.

12 **8. SEVERABILITY**

13 **8.1** In the event that any of the provisions of this Consent Judgment are held
14 by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely
15 affected.

16 **9. GOVERNING LAW**

17 **9.1** The terms of this Consent Judgment shall be governed by the laws of the
18 State of California.

19 **10. RETENTION OF JURISDICTION**

20 **10.1** This Court shall retain jurisdiction of this matter to implement and enforce
21 the terms this Consent Judgment.

22 **11. PROVISION OF NOTICE**

23 **11.1** All notices required pursuant to this Consent Judgment and
24 correspondence shall be sent to the following:

25 For CEH: Howard Hirsch
26 Lexington Law Group
27 1627 Irving Street
28 San Francisco, CA 94122

1 For Office Depot: Jonathon Herzog
Weston Herzog LLP
2 500 North Central Avenue, Suite 650
Glendale, CA 91203

3 **12. COURT APPROVAL**

4 **12.1** If this Consent Judgment is not approved by the Court, it shall be of no
5 further force or effect. CEH will prepare and file a Motion for Approval of this Consent
6 Judgment. The Parties agree to support a Motion for Approval of this Consent Judgment.

7 **13. EXECUTION AND COUNTERPARTS**

8 **13.1** The stipulations to this Consent Judgment maybe executed in counterparts
9 and by means of facsimile, which taken together shall be deemed to constitute one document.

10 **14. AUTHORIZATION**

11 **14.1** Each signatory to this Consent Judgment certifies that he or she is fully
12 authorized by the party he or she represents to stipulate to this Consent Judgment and to enter
13 into and execute the Consent Judgment on behalf of the party represented and legally bind that
14 party. The undersigned have read, understand and agree to all of the terms and conditions of this
15 Consent Judgment. Except as provided herein, each party is to bear its own fees and costs.

16 **AGREED TO:**

17 CENTER FOR ENVIRONMENTAL HEALTH

Dated: August 12, 2010

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19 _____
Signature

20 CHARLIE PIZZANO

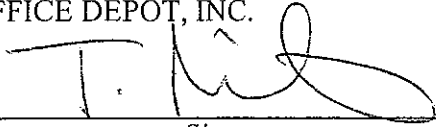
21 _____
Printed Name

22 ASSOCIATE DIRECTOR

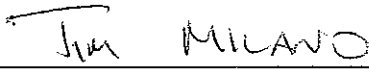
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Title

1 OFFICE DEPOT, INC.

Dated: August ____, 2010

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3 Signature

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5 Printed Name



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ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between the Parties, the settlement is approved and judgment is hereby entered according to the terms herein.

Dated: 11 / 16 / 10

PETER J. BUSCH

Judge, Superior Court of the State of California