

**ENDORSED
FILED**
San Francisco County Superior Court

OCT 20 2010

CLERK OF THE COURT
BY: MELINKA JONES
Deputy Clerk

1 Clifford A. Chanler, State Bar No. 135534
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RUSSELL BRIMER
7
8

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE ~~CITY AND~~ COUNTY OF SAN FRANCISCO
11 UNLIMITED CIVIL JURISDICTION
12

13 RUSSELL BRIMER,

14 Plaintiff,

15 v.

16 WHO'S THERE INC, INC.; OFFICEMAX
INCORPORATED; and DOES 1-150, inclusive,

17 Defendants.
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Case No. CGC-10-499594

**[PROPOSED] JUDGMENT
PURSUANT TO TERMS OF
PROPOSITION 65 SETTLEMENT
AGREEMENT**

Date: September 24, 2010

Time: 9:00 a.m.

Dept.: 302

Judge: Hon. Charlotte Woolard

Action Filed: May 6, 2010

1 In the above-entitled action, Plaintiff, RUSSELL BRIMER, and Defendant, WHO'S THERE,
2 INC., having agreed through their respective counsel that a judgment be entered pursuant to the terms
3 of the Consent Judgment entered into by the parties in resolution of this Proposition 65 action, and
4 following the issuance of an order approving the Parties' settlement agreement on September 24,
5 2010.

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Health & Safety
7 Code § 25249.7(f)(4) and Code of Civil Procedure § 664.6, judgment is hereby entered in accordance
8 with the terms of the Consent Judgment attached hereto as Exhibit 1. By stipulation of the parties,
9 the Court will retain jurisdiction to enforce the settlement under Code of Civil Procedure § 664.6.

10
11 **IT IS SO ORDERED.**

12
13 Dated: 10-20-10

Charlotte W. Worland
14 JUDGE OF THE SUPERIOR COURT

15 CHARLOTTE WALTER WOODLAND

Exhibit 1

1 Clifford A. Chanler, State Bar No. 135534
2 Laurence D. Haveson, State Bar No. 152631
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 RUSSELL BRIMER

11 Sean Sherlock, Esq., State Bar No. 161627
12 SNELL & WILMER, LLP
13 600 Anton Blvd., Suite 1600
14 Costa Mesa, CA 92626
15 Telephone: (714) 427-7036
16 Facsimile: (714) 427-7799

17 Attorneys for Defendants
18 WHO'S THERE, INC. and
19 OFFICEMAX INCORPORATED

20 SUPERIOR COURT OF THE STATE OF CALIFORNIA
21 FOR THE CITY AND COUNTY OF SAN FRANCISCO
22 UNLIMITED CIVIL JURISDICTION

23 RUSSELL BRIMER,
24 Plaintiff,

25 v.

26 WHO'S THERE, INC.; OFFICEMAX
27 INCORPORATED; and DOES, 1-150,
28 inclusive,
29 Defendants.

Case No. CGC-10-499594

CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Who's There, Inc.**

3 This Consent Judgment is entered into by and between Plaintiff, Russell Brimer (hereinafter
4 "Brimer" or "Plaintiff") and Defendants, Who's There, Inc. ("Who's There") and OfficeMax
5 Incorporated ("OfficeMax"), with Brimer, Who's There, and OfficeMax collectively referred to as the
6 "Parties."

7 **1.2 Plaintiff**

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

11 **1.3 Defendants**

12 Who's There and OfficeMax employ ten or more persons and are persons in the course of
13 doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
14 California Health & Safety Code § 25249.6 *et seq.* ("Proposition 65").

15 **1.4 General Allegations**

16 Brimer alleges that Who's There and OfficeMax have manufactured, distributed and/or sold in
17 the State of California color coated metal fasteners containing lead. Lead is listed pursuant to
18 Proposition 65 as a chemical known to the State of California to cause birth defects and other
19 reproductive harm. Lead is referred to herein as the "Listed Chemical."

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as follows: color coated
22 metal fasteners containing the Listed Chemical including, but not limited to, *Ding Dong Oh-So-Useful*
23 *Clips (#25703 60161 9)*. All such items shall be referred to herein as the "Products."

24 **1.6 Notice of Violation**

25 On or about September 30, 2009, Brimer served Who's There, OfficeMax, and various public
26 enforcement agencies with a document entitled "60-Day Notice of Violation" (the "Notice") that
27 provided defendants and such public enforcers with notice that Who's There and OfficeMax were in
28 violation of California Health & Safety Code §25249.6 for failing to warn consumers and customers

1 that the Products exposed users in California to lead. No public enforcer has diligently prosecuted the
2 allegations set forth in the Notice.

3 **1.7 Complaint**

4 On May 6, 2010, Brimer, acting in the interest of the general public in California, filed a
5 complaint in the Superior Court in and for the City and County of San Francisco, alleging violations
6 by various defendants of Health & Safety Code § 25249.6 based, *inter alia*, on the alleged exposures
7 to lead contained in color coated metal fasteners manufactured, distributed and/or sold by Who's
8 There and OfficeMax (the "Complaint").

9 **1.8 No Admission**

10 Who's There and OfficeMax deny the material, factual, and legal allegations contained in
11 Brimer's Notice, and expressly deny any wrongdoing whatsoever. Who's There and OfficeMax
12 further maintain that all products manufactured, distributed and/or sold by them in California,
13 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
14 Judgment shall be construed as an admission by Who's There or OfficeMax of any fact, finding, issue
15 of law, or violation of law; nor shall compliance with this Consent Judgment constitute or be
16 construed as an admission by Who's There or OfficeMax of any fact, finding, conclusion, issue of
17 law, or violation of law, such being specifically denied by Who's There and OfficeMax. However,
18 this section shall not diminish or otherwise affect the obligations, responsibilities and duties of Who's
19 There 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 Who's There and OfficeMax as to the allegations contained in the Complaint, that
23 venue is proper in the City and County of San Francisco, and that this Court has jurisdiction to enter
24 and enforce the provisions of this Consent Judgment pursuant to Code of Civil Procedure § 664.6.

25 **1.10 Effective Date**

26 For purposes of this Consent Judgment, the term "Effective Date" shall mean August 31,
27 2010.

1 **2. INJUNCTIVE RELIEF: REFORMULATION**

2 **2.1 Reformulation Commitment**

3 Commencing on the Effective Date, Who's There shall ship, sell or offer to be shipped for sale
4 in California only those Products that are "Lead Free." For purposes of this Settlement Agreement,
5 "Lead Free" Products shall mean Products containing components that may be handled, touched or
6 mouthed by a consumer, which components yield less than or equal to 90 parts per million ("ppm") of
7 lead when analyzed pursuant to Environmental Protection Agency ("EPA") testing methodologies
8 3050B and/or 6010B, or another method of detection and analysis for lead authorized under Title 27
9 California Code of Regulations ("CCR") § 25900 ("Digest Test"). After June 15, 2011, however,
10 "Lead Free" shall be amended to mean Products containing components that may be handled, touched
11 or mouthed by a consumer, which components yield less than 1.0 microgram of lead when using a
12 wipe test pursuant to NIOSH Test Method 9100 ("Wipe Test"), in addition to the 90 ppm standard
13 above. Therefore, as of June 15, 2011, Who's There shall ship, sell or offer to be shipped for sale in
14 California only those Products that meet both the Digest Test and Wipe Test.

15 **2.2 Exceptions; Current Inventory.** Who's There shall have the option, instead

16 of meeting the reformulation commitment in Section 2.1 above, to provide Proposition 65 warnings
17 for Products that are in its inventory as of July 1, 2010, as follows:

18 **(a) Retail Store Sales.**

19 **(i) Product Labeling.** Who's There may affix a warning to the packaging,
20 labeling, or directly on each Product sold to be in retail outlets in California by Who's There or its
21 agents, containing the following language:

22 **WARNING:** This product contains lead, a chemical known to
23 the State of California to cause birth defects and
24 other reproductive harm.

25 **(b) Mail Order Catalog and Internet Sales.** In the event that Who's There sells

26 Products currently in its inventory as of July 1, 2010, via mail order catalog or internet to customers
27 located in California, Who's There shall provide a warning for such Products sold via mail order
28 catalog or the Internet to California residents: (1) in the mail order catalog; or (2) on the website.

1 Warnings given in the mail order catalog or on the website shall identify the *specific* Product to which
2 the warning applies as further specified in Sections 2.2(b)(i) and (ii).

3 (i) **Mail Order Catalog Warning.** Any warning provided in a mail order
4 catalog must be in the same type size or larger than the Product description text within the catalog.
5 The following warning shall be provided on the same page and in the same location as the display
6 and/or description of the Product:

7 **WARNING:** This product contains lead, a chemical known to
8 the State of California to cause birth defects and
other reproductive harm.

9 Where it is impracticable to provide the warning on the same page and in the same location as
10 the display and/or description of the Product, Who's There may utilize a designated symbol to cross
11 reference the applicable warning and shall define the term "designated symbol" with the following
12 language on the inside of the front cover of the catalog or on the same page as any order form for the
13 Product(s):

14 **WARNING:** Certain products identified with this symbol ▼
15 and offered for sale in this catalog contain lead,
16 a chemical known to the State of California to
cause birth defects and other reproductive
harm.

17 The designated symbol must appear on the same page and in close proximity to the display
18 and/or description of the Product. On each page where the designated symbol appears, Who's There
19 must provide a header or footer directing the consumer to the warning language and definition of the
20 designated symbol.

21 If Who's There elects to provide warnings in the mail order catalog, then the warnings must be
22 included in all catalogs offering to sell one or more Products printed after the Effective Date.

23 (ii) **Internet Website Warning.** A warning may be given in conjunction
24 with the sale of the Product via the Internet, provided it appears either: (a) on the same web page on
25 which the Product is displayed; (b) on the same web page as the order form for the Product; (c) on the
26 same page as the price for any Product; or (d) on one or more web pages displayed to a purchaser
27 during the checkout process. The following warning statement shall be used and shall appear in any

1 **4. REIMBURSEMENT OF FEES AND COSTS**

2 **4.1 Attorney Fees and Costs**

3 The parties acknowledge that Brimer and his counsel offered to resolve this dispute without
4 reaching terms on the amount of attorney fees and costs to be reimbursed to them, thereby leaving the
5 fee issue to be resolved after the material terms of the agreement had been settled. Who's There then
6 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
7 finalized. The parties then attempted to (and did) reach an accord on the compensation due to Brimer
8 and his counsel under general contract principles and the private attorney general doctrine codified at
9 California Code of Civil Procedure (CCP) § 1021.5, for all work performed through the mutual
10 execution of this agreement. Who's There shall reimburse Brimer and his counsel the total of
11 \$47,000 for fees and costs incurred as a result of investigating, bringing this matter to Who's There's
12 attention, and litigating and negotiating a settlement in the public interest. Who's There shall issue a
13 separate 1099 for fees and costs (EIN: 94-3171522) and shall make the checks payable to "The
14 Chanler Group." Payment shall be made as follows: \$10,000 due no later than August 13, 2010; and
15 the balance of \$37,000 due within five calendar days of notice to Who's There of the Court's approval
16 of this settlement under Section 6, below. Payment shall be delivered to the following address:

17 The Chanler Group
18 Attn: Proposition 65 Controller
19 2560 Ninth Street
20 Parker Plaza, Suite 214
21 Berkeley, CA 94710-2565

22 **5. RELEASE OF ALL CLAIMS**

23 **5.1 Brimer's Release of Who's There**

24 In further consideration of the promises and agreements herein contained, and for the
25 payments to be made pursuant to Sections 3 and 4 above, Brimer, on behalf of himself, his past and
26 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
27 general 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 action, in
29 law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or
30 expenses (including, but not limited to, investigation fees, expert fees and attorney fees) of any nature

1 whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against Who's
2 There and each of its downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers
3 (including, but not limited to, OfficeMax and its affiliates, subsidiaries, officers, directors, and
4 employees), franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate
5 affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders,
6 agents, and employees, and sister and parent entities (collectively "Releasees"). This release is
7 limited to those claims that arise under Proposition 65, as such claims relate to Who's There's alleged
8 failure to warn about exposures to, or identification of, lead contained in the Products.

9 Brimer also, on behalf of himself and his agents, attorneys, representatives, successors and
10 assigns, in his individual capacity only and *not* in his representative capacity, provides a general
11 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
12 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
13 liabilities and demands of Brimer of any nature, character or kind, known or unknown, suspected or
14 unsuspected, and agrees not to initiate, participate in or maintain any further legal action in any
15 judicial or administrative forum, including any Claim, against Who's There arising from any alleged
16 violations of Proposition 65. Brimer acknowledges that he is familiar with Section 1542 of the
17 California Civil Code, which provides as follows:

18 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
19 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER**
20 **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF**
21 **KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS**
22 **OR HER SETTLEMENT WITH THE DEBTOR.**

23 Brimer, in his individual capacity only and *not* in his representative capacity, on behalf of
24 himself and his agents, attorneys, representatives, successors and assigns, expressly waives and
25 relinquishes any and all rights and benefits that he may have under, or that may be conferred on him
26 by, the provisions of Section 1542 of the California Civil Code as well as under any other state or
27 federal statute or common law principle of similar effect, to the fullest extent that he may lawfully
28 waive such rights or benefits pertaining to the released matters. In furtherance of such intention, the
29 release hereby given shall be and remain in effect as a full and complete release notwithstanding the

1 discovery or existence of any such additional or different claims or facts arising out of the released
2 matters.

3 5.2 Who's There's Release of Brimer

4 Who's There waives any and all claims against Brimer, his attorneys, and other representatives
5 for any and all actions taken or statements made (or those alleged to have been taken or made) by
6 Brimer and his attorneys and other representatives in the course of investigating claims or otherwise
7 seeking enforcement of Proposition 65 against them in this matter with respect to the Products.

8 Who's There also provides a general release herein which shall be effective as a full and final
9 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorney
10 fees, damages, losses, claims, liabilities and demands of Who's There of any nature, character or kind,
11 known or unknown, suspected or unsuspected, arising out of the subject matter of the Action. Who's
12 There acknowledges that it is familiar with Section 1542 of the California Civil Code, which provides
13 as follows:

14 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
15 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER**
16 **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF**
17 **KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS**
18 **OR HER SETTLEMENT WITH THE DEBTOR.**

19 Who's There expressly waives and relinquishes any and all rights and benefits that it may have
20 under, or that may be conferred on it by, the provisions of Section 1542 of the California Civil Code
21 as well as under any other state or federal statute or common law principle of similar effect, to the
22 fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters. In
23 furtherance of such intention, the release hereby given shall be, and remain, in effect as a full and
24 complete release notwithstanding the discovery or existence of any such additional or different claims
25 or facts arising out of the released matters.

26 6. COURT APPROVAL

27 This Consent Judgment is not effective until it is approved and entered by the Court and shall
28 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
29 has been fully executed by all parties, in which event any monies that have been provided to Brimer,
30 or his counsel pursuant to Section 3 and Section 4 above, shall be refunded within fifteen (15) days

1 after receiving written notice from Who's There that the one-year period has expired. This Consent
2 Judgment constitutes a full and final adjudication on the merits of all claims raised in this action, and
3 shall operate as a bar to any further claims or causes of action against Releasees that arise under
4 Proposition 65, as such claims relate to Products manufactured, distributed, or sold by Who's There.

5 **7. SEVERABILITY**

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

9 **8. GOVERNING LAW**

10 The terms of this Consent Judgment shall be governed by the laws of the State of California
11 and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise
12 rendered inapplicable by reason of law generally, or as to the Products, then Who's There shall
13 provide written notice to Brimer of any asserted change in the law, and shall have no further
14 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
15 so affected.

16 **9. NOTICES**

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

21 For Who's There:

22 Jennifer Bilik, President
23 Who's There, Inc.
24 1633 Electric Avenue
25 Venice, CA 90291

26 With a copy to:

27 Sean Sherlock, Esq.
28 Snell & Wilmer, LLP
29 600 Anton Blvd., Suite 1600
30 Costa Mesa, CA 92626

1 For OfficeMax:

2 Tracy R. O'Neale, Esq.
3 Associate General Counsel
4 OfficeMax, Incorporated
1111 West Jefferson Street, Suite 510
Boise, ID 83702

5 For Brimer:

6 Proposition 65 Coordinator
7 The Chanler Group
2560 Ninth Street
8 Parker Plaza, Suite 214
Berkeley, CA 94710

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

11 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

12 This Consent Judgment may be executed in counterparts and by facsimile, each of which shall
13 be deemed an original, and all of which, when taken together, shall constitute one and the same
14 document.

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

16 Brimer agrees to comply with the reporting form requirements referenced in California Health
17 & Safety Code § 25249.7(f).

18 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

19 The parties acknowledge that, pursuant to Health & Safety Code § 25249.7(f)(4), Brimer must
20 submit the settlement to the Court for approval upon noticed motion to obtain judicial approval of this
21 Consent Judgment. In furtherance of obtaining such approval, Brimer and his counsel shall promptly
22 prepare and file a noticed motion seeking the Court's approval of this Consent Judgment. Who's
23 There and its counsel agree to support the entry of this agreement as a Consent Judgment.

24 **13. 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 of
27 any party and entry of a modified consent judgment by the Court. The Attorney General shall be

1 served with notice of any proposed modification to this Consent Judgment at least fifteen days in
2 advance of its consideration by the Court.

3 **14. AUTHORIZATION**

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

6
7 **15. DISMISSAL OF OFFICE MAX**

8 Within five calendar days of delivery of all payments required under Sections 3 and 4, Brimer
9 shall file with the Court a Request for Dismissal, without prejudice, of this action as against Office
10 Max, and shall cause this action to be dismissed as against Office Max.

11 **AGREED TO:**

12 Date: 7.25.10

13
14 By: 
15 RUSSELL BRIMER

AGREED TO:

Date: _____

By: _____
JENNIFER BILIK, President
WHO'S THERE, INC.

16 **AGREED TO:**

17 Date: _____

18
19 By: _____

20 OFFICE MAX INCORPORATED
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1 served with notice of any proposed modification to this Consent Judgment at least fifteen days in
2 advance of its consideration by the Court.

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5 parties and have read, understood, and agree to all of the terms and conditions hereof.

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9 shall file with the Court a Request for Dismissal, without prejudice, of this action as against Office
10 Max, and shall cause this action to be dismissed as against Office Max.

11 **AGREED TO:**

12 Date: _____

13
14 By: _____
15 RUSSELL BRIMER


16 **AGREED TO:**

17 Date: _____

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19 By: _____
20 OFFICE MAX INCORPORATED
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AGREED TO:

Date: 7/29/2010

By: 
JENNIFER BILIK, President
WHO'S THERE, INC.
Jim Papscoe, COO

1 served with notice of any proposed modification to this Consent Judgment at least fifteen days in
2 advance of its consideration by the Court.

3 **14. AUTHORIZATION**

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

6
7 **15. DISMISSAL OF OFFICE MAX**

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9 shall file with the Court a Request for Dismissal, without prejudice, of this action as against Office
10 Max, and shall cause this action to be dismissed as against Office Max.

11
12 **AGREED TO:**
13 Date: _____

AGREED TO:
Date: _____

14
15 By: _____
RUSSELL BRIMER

By: _____
JENNIFER BILIK, President
WHO'S THERE, INC.

16
17 **AGREED TO:**
18 Date: 7/30/10

19 ~~By:~~ *Pat Puller*
20

OFFICE MAX INCORPORATED

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