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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE CITY AND COUNTY OF SAN FRANCISCO
12 UNLIMITED CIVIL JURISDICTION
13

14 RUSSELL BRIMER,
15 Plaintiff,
16 v.
17 ACCO BRANDS CORPORATION, *et al.*,
18 Defendants.

Case No. CGC-09-485784

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT OFFICEMATE
INTERNATIONAL CORPORATION**

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1 **1. INTRODUCTION**

2 **1.1 The Parties**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (“Brimer”
4 or “Plaintiff”) and defendant Officemate International Corporation (“Officemate” or
5 “Defendant”), with Brimer and Officemate collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Officemate employs 10 or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &
13 Safety Code §§ 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that Officemate manufactured, distributed and/or sold, in the State of
16 California, vinyl coated paper fasteners that expose users to lead, without first providing “clear
17 and reasonable warning” under Proposition 65. Lead is listed as a reproductive and
18 developmental toxicant pursuant to Proposition 65 and is referred to hereinafter as the “Listed
19 Chemical.”

20 **1.5 Notice of Violation**

21 On March 5, 2009, Brimer served Officemate and various public enforcement agencies
22 with a document entitled “60-Day Notice of Violation” (“Notice”) that provided public enforcers
23 and these entities with notice of alleged violations of Health & Safety Code § 25249.6 for failing
24 to warn consumers that vinyl coated paper fasteners that Officemate manufactured, distributed
25 and/or sold exposed users in California to lead. To the best of the Parties’ knowledge, no public
26 enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

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1 **1.6 Complaint/Amended Complaints**

2 On March 5, 2009, Brimer, acting, in the interest of the general public in California, filed
3 a complaint in the Superior Court in and for the City and County of San Francisco, alleging
4 violations by various defendants of Health & Safety Code § 25249.6 based, *inter alia*, on the
5 alleged exposures to lead contained in vinyl coated paper fasteners (the “Action”). Officemate
6 was not then named among the defendants in the Action, which was subsequently amended by a
7 First Amended Complaint (“FAC”) in which Officemate also was not originally named; however,
8 on or about October 14, 2009, Brimer identified Officemate as one of the “Doe” defendants in the
9 FAC. Brimer also intends to seek leave to file a Second Amended Complaint (“SAC”) in the
10 Action in which Officemate will, if this Consent Judgment has not yet been entered, be directly
11 named as a defendant.¹

12 **1.7 No Admission**

13 This Consent Judgment resolves claims that are denied and disputed by Officemate. The
14 Parties enter into this Consent Judgment pursuant to a full and final settlement of any and all
15 claims between the Parties for the purpose of avoiding prolonged litigation. Officemate denies
16 the material factual and legal allegations contained in the Notice and SAC and maintains that all
17 Covered Products it has manufactured, distributed and/or sold in California have been and are in
18 compliance with all applicable laws. Nothing in this Consent Judgment shall be construed as an
19 admission by Officemate of any fact, finding, issue of law, or violation of law; nor shall
20 compliance with this Consent Judgment constitute or be construed as an admission by Officemate
21 of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied
22 by Officemate. However, notwithstanding the foregoing, this section shall not diminish or
23 otherwise affect Officemate’s obligations, responsibilities, and duties under this Consent
24 Judgment.

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28 ¹ In addition to Officemate, Brimer intends to name various retailers of vinyl coated paper fasteners in the SAC; however, in light of this Consent Judgment, Brimer’s claims against them will not extend to Officemate’s Covered Products.

1 Officemate shall issue two separate checks for this penalty payment: (a) one check made
2 payable to Hirst & Chanler LLP in Trust for the State of California's Office of Environmental
3 Health Hazard Assessment (“Hirst & Chanler LLP in Trust for OEHHA”) for 75% of the total
4 penalty required and (b) one check to “Hirst & Chanler LLP in Trust for A. Brimer” for the
5 remaining 25% of the total penalty required. Two separate 1099s shall be issued for the above
6 payments: The first 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95814
7 (EIN: 68-0284486). The second 1099 shall be issued to Brimer, whose address and tax
8 identification number shall be furnished, upon request, at least five calendar days before payment
9 is due. The payments shall be delivered on or before thirty days after the Effective Date, at the
10 following address:

11 Hirst & Chanler LLP
12 Attn: Proposition 65 Controller
13 2560 Ninth Street
14 Parker Plaza, Suite 214
15 Berkeley, CA 94710-2565

16 Upon receipt of Officemate’s required payments, Brimer’s counsel shall hold the funds in
17 Hirst & Chanler LLP’s client trust account until such time as this Consent Judgment is reviewed
18 and approved by the Court. If this Consent Judgment is not approved by the Court within nine
19 months of its execution, Brimer’s counsel shall issue a refund of the funds to Officemate unless
20 Officemate directs otherwise.

21 **4.2** Officemate may reduce the total penalty payment due pursuant to section 4.1
22 above by means of notifying Brimer’s counsel in writing, within fifteen days following the
23 Effective Date, of its election to exercise any or all of the following penalty offset options (in
24 which event the division of remaining total penalties due shall be proportioned between OEHHA
25 and Brimer in the same ratio as set forth in section 4.1 above):

26 (a) a 33.33% reduction in the total penalty amount due under section 4.1 above
27 shall be realized if Officemate agrees, as of October 31, 2009, that the term “300 parts per million
28 (“ppm”)” in section 3.2 above shall be deemed to mean less than or equal to 100 ppm of the

1 Listed Chemical effective as of one year following the Effective Date;²

2 (b) another 16.67% reduction in the total penalty amount due under section 4.1
3 above shall be realized if Officemate agrees that, as of October 31, 2009, the term “in California”
4 in section 3.2 above shall be deemed to have been replaced by the term “within the United
5 States”;

6 (c) another 33.33% reduction in the total penalty amount due under section 4.1 above
7 shall be realized if Officemate agrees that, as to any Covered Products it shipped to California within
8 one year prior to the date of its receipt of Brimer’s Notice with a vinyl coating containing 300 ppm
9 of the Listed Chemical or greater, it will, by no later than October 31, 2009, request that any such
10 retailer or distributor in California remove any remaining inventory of them from sale and return
11 them for replacements meeting the Formulation Commitment set forth in section 3.2 above at
12 Officemate’s expense, including with respect to any associated transportation costs. The
13 aforementioned request shall be made by means of sending relevant retailers or distributors a letter
14 by certified mail with a copy to counsel for Brimer. To the extent applicable, Officemate will
15 specify the product name, product number, and/or SKU number, for each product covered by the
16 letter.³

17 **5. REIMBURSEMENT OF FEES AND COSTS**

18 **5.1 Attorney Fees and Costs**

19 5.1.1 The Parties reached an accord on the compensation due to Brimer and his
20 counsel under general contract principles and the private attorney general doctrine codified at
21 California Code of Civil Procedure (CCP) §1021.5, for all work performed through the mutual
22 execution of this agreement and approval of the Consent Judgment by the trial court, excluding
23 any fees on appeal. Officemate shall pay Brimer and his counsel a total of \$58,700 for fees and
24

25 _____
26 ² In the event Officemate provides Brimer with timely notification that it is exercising this option, Officemate shall
also provide Brimer, within one year following the Effective Date, with written certification that it has reduced the
Listed Chemical in Covered Products to less than 100 ppm.

27 ³ In the event that Officemate elects to qualify for all three of the penalty reductions specified in sections 4.2(a), (b),
28 and (c) above, the net amount of the penalty payments to be issued by Officemate pursuant to section 4.1 above will
be \$22,500 to OEHHA and \$7,500 to Brimer.

1 costs incurred as a result of investigating, bringing this matter to Officemate's attention, and
2 litigating, negotiating and proposing the entry of a consent judgment in the public interest.

3 5.1.2 Payment of the amount due pursuant to section 5.1.1 shall be delivered to
4 Brimer's counsel on or before thirty days after the Effective Date, at the following address:

5 Hirst & Chanler LLP
6 Attn: Proposition 65 Controller
7 2560 Ninth Street
8 Parker Plaza, Suite 214
9 Berkeley, CA 94710-2565

10 Upon receipt of Officemate's required payment, Brimer's counsel shall hold the funds in
11 Hirst & Chanler LLP's firm account until such time as this Consent Judgment is reviewed and
12 approved by the Court. If this Consent Judgment is not approved by the Court within nine
13 months of its execution, Brimer's counsel shall issue a refund of the funds to Officemate unless
14 Officemate directs otherwise.

13 **6. CLAIMS COVERED AND RELEASE**

14 **6.1 Brimer's Releases of Officemate and Related Entities**

15 6.1.1 This Consent Judgment is a full, final, and binding resolution between
16 Brimer and Officemate, and Officemate's owners, subsidiaries, affiliates, sister and related
17 companies (including those overseas entities held by its owners which manufactured or supplied
18 the Covered Products to Officemate), employees, shareholders, directors, insurers, attorneys,
19 successors, and assigns ("Defendant Releasees"), and all entities to whom Officemate directly or
20 indirectly distributes or sells Covered Products, including but not limited to distributors,
21 wholesalers, customers, retailers, franchisees, cooperative members, and licensees ("Downstream
22 Defendant Releasees") of any violation of Proposition 65 that has been or could have been
23 asserted against Defendant Releasees and Downstream Defendant Releasees regarding the failure
24 to warn about exposure to the Listed Chemical arising in connection with Covered Products
25 manufactured, sourced, distributed, or sold by Defendant Releasees prior to the Effective Date.
26 Officemate's compliance with this Consent Judgment shall constitute compliance with
27 Proposition 65 with respect to the Listed Chemical in the Covered Products after the Effective
28 Date.

1 6.1.2 Brimer on behalf of himself, his past and current agents, representatives,
2 attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives
3 with respect to Covered Products all rights to institute or participate in, directly or indirectly, any
4 form of legal action and releases all claims, including, without limitation, all actions, and causes
5 of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
6 penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and
7 attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent
8 (collectively "claims"), against Defendant Releasees and Downstream Defendant Releasees that
9 arise under Proposition 65 or any other statutory or common law claims that were or could have
10 been asserted in the public interest, as such claims relate to Defendant Releasees' and
11 Downstream Defendant Releasees' alleged failure to warn about exposures to the Listed Chemical
12 contained in the Covered Products.

13 6.1.3 Brimer also, in his individual capacity only and *not* in his representative
14 capacity, provides a general release herein which shall be effective as a full and final accord and
15 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
16 damages, losses, claims, liabilities and demands of Brimer of any nature, character or kind,
17 known or unknown, suspected or unsuspected, arising out of the subject matter of the Complaint
18 as to Covered Products manufactured, distributed or sold by Defendant Releasees. Brimer
19 acknowledges that he is familiar with Section 1542 of the California Civil Code, which provides
20 as follows:

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

24 Brimer, in his individual capacity only and *not* in his representative capacity, expressly waives
25 and relinquishes any and all rights and benefits which he may have under, or which may be
26 conferred on him by the provisions of Section 1542 of the California Civil Code as well as under
27 any other state or federal statute or common law principle of similar effect, to the fullest extent
28 that he may lawfully waive such rights or benefits pertaining to the released matters. In

1 furtherance of such intention, the release hereby given shall be and remain in effect as a full and
2 complete release notwithstanding the discovery or existence of any such additional or different
3 claims or facts arising out of the released matters.

4 6.1.4 Upon court approval of the Consent Judgment, the Parties waive their
5 respective rights to a hearing or trial on the allegations of the Complaint.

6 **6.2 Officemate's Release of Brimer**

7 6.2.1 Officemate waives any and all claims against Brimer, his attorneys, and
8 other representatives for any and all actions taken or statements made (or those that could have
9 been taken or made) by Brimer and his attorneys and other representatives, whether in the course
10 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this
11 matter, and/or with respect to the Covered Products.

12 6.2.2 Officemate also provides a general release herein which shall be effective
13 as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations,
14 costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Officemate of
15 any nature, character or kind, known or unknown, suspected or unsuspected, arising out of the
16 subject matter of the Action. Officemate acknowledges that it 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 CREDITOR DOES
19 NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
20 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE
21 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

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

1 **7. SEVERABILITY**

2 If, subsequent to court approval 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
4 provisions remaining shall not be adversely affected, unless the Court finds that any
5 unenforceable provision is not severable from the remainder of the Consent Judgment.

6 **8. COURT APPROVAL**

7 This Consent Judgment is not effective until it is approved and entered by the Court and
8 shall be null and void if, for any reason, it is not approved and entered by the Court within nine
9 months after it has been fully executed by all Parties.

10 **9. GOVERNING LAW**

11 The terms of this Consent Judgment shall be governed by the laws of the State of
12 California.

13 **10. NOTICES**

14 When any Party is entitled to receive any notice under this Consent Judgment, the notice
15 shall be sent by certified mail and electronic mail to the following:

16 For Officemate to:

17 Roger Ko
18 Corporate Comptroller
19 Officemate International Corporation
90 Newfield Avenue
Edison, NJ 08837
E-mail: RKo@Officemate.com

20 With a copy to:

21 Robert Falk, Esq.
22 Morrison & Foerster LLP
425 Market Street
San Francisco, California 94105
23 E-mail: Rfalk@MoFo.com

24 and

25 For Brimer to:

26 Proposition 65 Coordinator
27 Hirst & Chanler, LLP
2560 Ninth Street
Parker Plaza, Suite 214
28 Berkeley, CA 94710-2565

1 Any Party may modify the person and address to whom the notice is to be sent by sending each
2 other Party notice by certified mail and/or other verifiable form of written communication.

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

4 Brimer agrees to comply with the reporting form requirements referenced, in California
5 Health & Safety Code §25249.7(f) and to file a motion for approval of this Consent Judgment.

6 **12. MODIFICATION**

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

10 **13. ADDITIONAL POST-EXECUTION ACTIVITIES**

11 The Parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed
12 motion is required to obtain judicial approval of this Consent Judgment. In furtherance of
13 obtaining such approval, Brimer and Officemate and their respective counsel agree to mutually
14 employ their best efforts to support the entry of this agreement as a Consent Judgment and obtain
15 approval of the Consent Judgment by the Court in a timely manner.

16 **14. ENTIRE AGREEMENT**

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

23 **15. ATTORNEY'S FEES**

24 **15.1** A Party who unsuccessfully brings or contests an action arising out of this Consent
25 Judgment shall be required to pay the prevailing Party's reasonable attorney's fees and costs
26 unless the unsuccessful Party has acted with substantial justification. For purposes of this
27 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
28 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016, *et seq.*

1 15.2 Except as specifically provided in the above paragraph and in Section 5.1, each
2 Party shall bear its own costs and attorney's fees in connection with this action.

3 15.3 Nothing in this Section 15 shall preclude a Party from seeking an award of
4 sanctions pursuant to law.

5 **16. COUNTERPARTS, FACSIMILE SIGNATURES**

6 This Consent Judgment may be executed in counterparts and by facsimile or portable
7 document format (PDF), each of which shall be deemed an original, and all of which, when taken
8 together, shall constitute one and the same documents.

9 **17. AUTHORIZATION**

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

13 **AGREED TO:**

AGREED TO:

14 Dated: October __, 2009

Dated: October 14, 2009

17 By: _____
18 Plaintiff Russell Brimer

17 By:  _____
18 Defendant Officemate International
19 Corporation

21 **IT IS SO ORDERED**

22 Dated: _____

23 By: _____
24 Judge of the Superior Court