

1 **1. INTRODUCTION**

2 **1.1 The Parties**

3 This Consent To Judgment is entered into by and between plaintiff Russell Brimer
4 (“Brimer” or “Plaintiff”) and defendant Office Depot, Inc. (“Office Depot” or “Defendant”), with
5 Brimer and Office Depot 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 Office Depot employs ten or more persons and is a person in the course of doing business
12 for 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 Office Depot manufactures, distributes, and/or sells in the State of
16 California colored, vinyl-coated paper fasteners that expose users to lead without first providing a
17 “clear and reasonable warning” under Proposition 65. Lead is listed as a reproductive and
18 developmental toxicant pursuant to Proposition 65. Office Depot denies Brimer’s allegations.

19 **1.5 Notice of Violation**

20 On August 14, 2009, Brimer served Office Depot and various public enforcement
21 agencies with a document entitled “60-Day Notice of Violation” that provided the recipients with
22 notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn individuals in
23 California of exposures to lead contained in colored, vinyl-coated paper fasteners sold by Office
24 Depot (“Notice”). No public enforcer has commenced or diligently prosecuted the allegations set
25 forth in the Notice.

1 **1.6 Complaint**

2 On January 15, 2010, Plaintiff filed an action against Office Depot entitled *Brimer v.*
3 *Office Depot Inc.*, Case No. CGC-10-496051, alleging Proposition 65 violations as to vinyl-
4 coated paper fasteners (“Complaint”).

5 **1.7 No Admission**

6 This Consent To Judgment resolves allegations and claims that are denied and disputed by
7 Office Depot. The Parties enter into this Consent To Judgment pursuant to a full and final
8 settlement of any and all claims between the Parties, as they relate to lead in Covered Products, as
9 defined in Section 2.2 below. Office Depot denies the material factual and legal allegations
10 contained in the Notice and Complaint and maintains that Covered Products it has distributed
11 and/or sold in California have been and are in compliance with all applicable laws. Nothing in
12 this Consent To Judgment shall be construed as an admission by Office Depot of any fact,
13 finding, issue of law, or violation of law; nor shall compliance with this Consent To Judgment
14 constitute or be construed as an admission by any party of any fact, finding, conclusion, issue of
15 law, or violation of law. However, notwithstanding the foregoing, this section shall not diminish
16 or otherwise affect Office Depot’s obligations, responsibilities, and duties under this Consent
17 Judgment.

18 **1.8 Consent to Jurisdiction**

19 For purposes of this Consent To Judgment only, the Parties stipulate that this Court has
20 jurisdiction over Office Depot as to the allegations contained in the Complaint, that venue is
21 proper in the City and County of San Francisco, and that this Court has, and will retain,
22 jurisdiction to enter and enforce the provisions of this Consent To Judgment pursuant to Code of
23 Civil Procedure § 664.6.

24 **2. Definitions**

25 2.1 “Lead Standard” means a maximum concentration of lead of 300 ppm in the vinyl
26 coating of a Covered Product when analyzed pursuant to any methodology utilized or approved
27

28

1 by federal or California state regulatory agencies for the purpose of determining specific lead
2 content in a solid substance.

3 2.2 “Covered Products” means vinyl-coated paper clips.

4 2.3 “Effective Date” means the date on which a judgment based on this Consent To
5 Judgment is entered by the Court.

6 **3. INJUNCTIVE RELIEF — REFORMULATION AND WARNINGS**

7 **3.1 Notification to Suppliers and Testers of Covered Products.**

8 No later than 30 days after the Effective Date, Office Depot shall provide the Lead
9 Standard to its then-current suppliers of Covered Products that will be sold or offered for sale in
10 California if it has not already done so within the past 12 months prior to the Effective Date.

11 Office Depot shall also implement its own testing protocol for purposes of performing, or
12 causing to be performed, analytical chemical analysis on Covered Products for compliance with
13 the Lead Standard. No later than 30 days after the Effective Date, Office Depot shall provide the
14 testing protocol to its then-current regulatory compliance testing laboratory for the Covered
15 Products if it has not already done so within the past 12 months prior to the Effective Date.

16 **3.2 Lead in Covered Products.**

17 Commencing on January 1, 2012, Office Depot shall not manufacture, purchase, or
18 import, or cause to be manufactured, purchased or imported, for sale in California, any Covered
19 Product that does not comply with the Lead Standard.

20 **4. ENFORCEMENT**

21 4.1 A Party may, by motion or application for an order to show cause before this
22 Court, enforce the terms and conditions contained in this Consent Judgment. A Party may file
23 such a motion or application or bring a new enforcement action over a Covered Product only
24 thirty (30) days after that Party first provides notice to the Party allegedly failing to comply with
25 the terms and conditions of this Consent To Judgment and attempts to resolve such Party’s failure
26 to comply in an open and good faith manner during this thirty (30) day period.

1 **5. MONETARY PAYMENTS**

2 **5.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

3 Office Depot shall make a payment of \$25,000.00 to be apportioned in accordance with
4 Health & Safety Code section 25249.12, subdivisions (c)(1) and (d), with 75% of these funds
5 earmarked for the State of California's Office of Environmental Health Hazard Assessment
6 ("OEHHA") and the remaining 25% of these penalty monies earmarked for Brimer.

7 **5.2 Reimbursement of Plaintiff's Fees and Costs**

8 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute
9 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
10 leaving this fee issue to be resolved after the material terms of the agreement had been settled.
11 Office Depot then expressed a desire to resolve the fee and cost issue shortly after the other
12 settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on
13 the compensation due to Brimer and his counsel under general contract principles and the private
14 attorney general doctrine codified at California Code of Civil Procedure section 1021.5, for all
15 work performed in this matter, except fees that may be incurred on appeal. Under these legal
16 principles, Office Depot shall pay the amount of \$212,500.00 for fees and costs incurred
17 investigating, litigating and enforcing this matter, including the fees and costs incurred (and yet
18 to be incurred) negotiating, drafting, and obtaining the Court's approval of this Consent To
19 Judgment in the public interest.

20 **5.3 Payment Procedures**

21 **5.3.1 Funds Held In Trust:** All payments required by Sections 5.1 and 5.2
22 shall delivered on or before March 1, 2012, to either The Chanler Group or the attorney of record
23 for Office Depot, and shall be held in trust pending the Court's approval of this Consent
24 Judgment. If Office Depot elects to deliver payments to its attorney of record, such attorney of
25 record shall: (a) confirm in writing within five days of receipt that the funds have been deposited
26 in a trust account; and (b) within two days of the date of the hearing on which the Court approves
27
28

1 the Consent Judgment, deliver the payment to The Chanler Group in three separate checks.
2 Payments delivered to The Chanler Group shall be made payable, as follows:

- 3 (a) One check made payable to "The Chanler Group in Trust for
4 OEHHA" in the amount of \$18,750.00;
- 5 (b) One check made payable to "The Chanler Group in Trust for
6 Brimer" in the amount of \$6,250.00; and
- 7 (c) One check made payable to "The Chanler Group" in the amount of
8 \$212,500.00.

9 5.3.2 **Issuance of 1099 Forms.** After the Consent To Judgment has been
10 approved and the settlement funds have been transmitted to plaintiff's counsel, Office Depot shall
11 issue three separate 1099 forms, as follows:

- 12 (a) The first 1099 shall be issued to the Office of Environmental Health
13 Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-
14 0284486) in the amount of \$18,750.00;
- 15 (b) The second 1099 shall be issued to Brimer in the amount of
16 \$6,250.00, whose address and tax identification number shall be furnished
17 upon request; and
- 18 (c) The third 1099 shall be issued to The Chanler Group (EIN: 94-
19 3171522) in the amount of \$212,500.00.

20 5.3.3 **Payment Address:** All payments to the Chanler Group shall be delivered
21 to the following payment address:

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

27 **6. CLAIMS COVERED AND RELEASE**

28 6.1 This Consent To Judgment is a full, final, and binding resolution between Brimer
and Office Depot and its subsidiaries, affiliates, sister and related companies, employees,

1 shareholders, directors, insurers, attorneys, successors, assigns, licensees, and licensors
2 (collectively "Defendant Releasees") of any violation of Proposition 65 that has been or could
3 have been asserted against Office Depot and Defendant Releasees regarding the failure to warn
4 about exposure to lead in Covered Products manufactured, sourced, distributed, or sold by Office
5 Depot prior to the Effective Date.

6 6.2 In further consideration of the promises and agreements herein contained, the
7 injunctive relief commitments set forth in Section 3, and for the payments to be made pursuant to
8 Section 5, Brimer, on behalf of himself, his past and current agents, representatives, attorneys,
9 successors, and/or assignees, and in the interest of the general public, hereby waives all rights to
10 institute or participate in, directly or indirectly, any form of legal action and releases all claims,
11 including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities,
12 demands, obligations, damages, costs, fines, penalties, losses, or expenses (including, but not
13 limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, fixed or
14 contingent (collectively "Claims"), against Office Depot and Defendant Releasees. This release
15 is limited to those Claims that arise under Proposition 65 with respect to lead in Covered
16 Products.

17 6.3 Plaintiff also, in his individual capacity *only* and *not* in his representative capacity,
18 provides a release herein which shall be effective as a full and final accord and satisfaction, as a
19 bar to all Claims, known or unknown, suspected or unsuspected, arising out of alleged or actual
20 exposure of California consumers to lead in Covered Products manufactured, distributed or sold
21 by Office Depot and Defendant Releasees.

22 6.4 Office Depot waives any and all claims against Plaintiff, his attorneys, and other
23 representatives for any and all actions taken or statements made (or those that could have been
24 taken or made) by Plaintiff and his attorneys and other representatives, whether in the course of
25 investigating claims or otherwise seeking enforcement of Proposition 65 against them in this
26 matter with respect to the Claims resolved and released in Sections 6.1 through 6.3.

1 6.5 Compliance with the terms of this Consent To Judgment by Office Depot
2 constitutes compliance with Proposition 65 with respect to lead in Office Depot's Covered
3 Products with respect to the Claims resolved and released in Sections 6.1 through 6.3.

4 6.6 Nothing in this Section 6 affects Plaintiff's rights to commence or prosecute an
5 action under Proposition 65 against any person other than Office Depot and Defendant Releasees.

6 6.7 The Parties further understand and agree that this release shall not extend upstream
7 to any entities, other than Defendant, that manufactured the Covered Products or any component
8 parts thereof, or any distributors or suppliers who sold the Covered Products or any component
9 parts thereof to Defendant.

10 **7. NOTICES**

11 When any Party is entitled to receive any notice under this Consent Judgment, the notice
12 shall be sent by certified mail or electronic mail to the following:

13 For Office Depot:

14 General Counsel
15 Office Depot, Inc.
16 6600 North Military Trail
16 Boca Raton, FL 33496

17 With a copy to:

18 Jeffrey B. Margulies
18 Fulbright & Jaworski LLP
19 555 South Flower Street, 41st Floor
19 Los Angeles, CA 90071
20 E-mail: jmargulies@fulbright.com

21 For Brimer:

22 Proposition 65 Coordinator
22 The Chanler Group
23 2560 Ninth Street
23 Parker Plaza, Suite 214
24 Berkeley, CA 94710-2565

25 A Party may modify the person and address to whom the notice is to be sent by sending the other
26 Party notice by certified mail and/or other verifiable form of written communication.

1 **8. COURT APPROVAL**

2 8.1 By this Consent To Judgment and upon its approval, the Parties waive their right
3 to trial on the merits, and waive rights to seek appellate review of any and all interim rulings,
4 including all pleading, procedural, and discovery orders.

5 8.2 Brimer shall file a motion seeking approval of this Consent To Judgment pursuant
6 to California Health & Safety Code §25249.7(f), and seeking entry of a judgment upon approval
7 of the Consent Judgment. Office Depot shall employ reasonable best efforts to support the entry
8 of such an order approving the Consent To Judgment and to support entry of Judgment.

9 8.3 If this Consent To Judgment is not approved by the Court, including a period of
10 reasonable opportunity to cure or correct actual, alleged or identified impediments to approval,
11 and any party to the Consent To Judgment provides thirty (30) days of express, written notice to
12 the other parties of its conclusion that this Section 8.3 is triggered, (a) this Consent To Judgment
13 and any and all prior agreements between the parties shall terminate and become null and void,
14 and the action shall revert to the status that existed prior to the execution date of this Consent
15 Judgment; (b) no term of this Consent To Judgment or any draft thereof, or of the negotiation,
16 documentation, or other part or aspect of the Parties' settlement discussions, shall have any effect,
17 nor shall any such matter be admissible in evidence for any purpose in this action, or in any other
18 proceeding; and (c) the parties agree to meet and confer to determine whether to modify the terms
19 of the Consent To Judgment and to resubmit it for approval.

20 **9. MODIFICATION OR AMENDMENT**

21 This Consent To Judgment may be modified or amended only: (1) by written agreement
22 of the Parties and upon entry of a Stipulation and Order by the court thereon; or (2) upon a
23 successful motion or application of any Party pursuant to Code of Civil Procedure § 1005 or
24 California Rule of Court, Rule 3.1200, which motion or application shall not be unreasonably
25 opposed unless a material term affecting the opposing Party is at issue.

1 **10. OTHER TERMS**

2 10.1 The terms of this Consent To Judgment shall be governed by the laws of the State
3 of California.

4 10.2 This Consent To Judgment shall apply to and be binding upon Brimer and Office
5 Depot and its divisions, subdivisions, and subsidiaries, and the Parties' successors or assigns.

6 10.3 This Consent To Judgment contains the sole and entire agreement and
7 understanding of the Parties with respect to the entire subject matter set forth in this Consent
8 Judgment, and any and all prior discussions, negotiations, commitments, or understandings
9 related thereto, if any, are deemed merged. There are no warranties, representations, or other
10 agreements between the Parties except as expressly set forth in this Consent Judgment. No
11 representations, oral or otherwise, express or implied, other than those specifically referred to in
12 this Consent To Judgment have been made by any Party. No other agreements not specifically
13 contained or referenced in this Consent Judgment, oral or otherwise, shall be deemed to exist or
14 to bind any of the Parties. No supplementation, modification, waiver, or termination of this
15 Consent To Judgment shall be binding unless executed in writing by the Party to be bound. No
16 waiver of any of the provisions of this Consent To Judgment shall be deemed or shall constitute a
17 waiver of any of the other provisions whether or not similar, nor shall such waiver constitute a
18 continuing waiver.

19 10.4 Nothing in this Consent To Judgment shall release, or in any way affect any rights
20 that Office Depot might have against any other party.

21 10.5 The stipulations to this Consent To Judgment may be executed in counterparts and
22 by means of facsimile or portable document format (.pdf), which taken together shall be deemed
23 to constitute one document.

24 10.6 Each signatory to this Consent To Judgment certifies that he or she is fully
25 authorized by the Party he or she represents to stipulate to this Consent To Judgment and to enter
26 into and execute the Consent To Judgment on behalf of the Party represented and to legally bind
27 that Party.

10.7 The Parties, including their counsel, have participated in the preparation of this Consent To Judgment and this Consent To Judgment is the result of the joint efforts of the Parties. This Consent To Judgment was subject to revision and modification by the Parties and has been accepted and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent To Judgment shall not be interpreted against any Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this Consent To Judgment agrees that any statute or rule of construction providing that ambiguities are to be resolved against the drafting Party should not be employed in the interpretation of this Consent To Judgment and, in this regard, the Parties hereby waive California Civil Code Section 1654.

11. ATTORNEYS' FEES

11.1 Should Brimer prevail on any motion, application for an order to show cause or other proceeding to enforce a violation of this Consent Judgment, or successfully oppose any motion, application for an order to show cause or other proceeding to modify this Consent Judgment, he shall be entitled to his reasonable attorneys' fees and costs incurred as a result of such motion or application. Should Office Depot prevail on any motion, application for an order to show cause or other proceeding, it may be awarded its reasonable attorneys' fees and costs as a result of such motion or application upon a finding by the court that Brimer's defense of the motion or application lacked substantial justification. For purposes of this Consent Judgment, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, *et seq.*

11.2 Except as provided in Sections 5 and 11.1 of this Consent Judgment, or with regard to an appeal brought by a third party, each Party shall bear its own attorneys' fees and costs in connection with the Notices and Complaint through entry of final judgment.

11.3 Nothing in this Section 11 shall preclude a Party from seeking an award of sanctions pursuant to law.

1 IT IS SO STIPULATED AND AGREED:

2 AGREED TO:

AGREED TO:

3
4 Date: 1-30-12

Date: 2/13/12

5
6 By: 
7 Plaintiff Russell Brimer

By: 
Defendant Office Depot, Inc.