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6 JOHN MOORE

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11 Attorney For Defendant  
12 OFFICEMAX INCORPORATED

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
14 FOR THE CITY AND COUNTY OF SAN FRANCISCO  
15 UNLIMITED CIVIL JURISDICTION  
16

17 JOHN MOORE,

18 Plaintiff,

19 v.

20 OFFICEMAX INCORPORATED  
21 and DOES 1-600, inclusive,

22 Defendants.

Case No. CGC 10-501870

**CONSENT TO JUDGMENT AS TO  
DEFENDANT OFFICEMAX  
INCORPORATED**

*(Cal. Health & Safety Code § 25249.6 et seq.)*

Action Filed : July 23, 2010

1 **1. INTRODUCTION**

2 **1.1 The Parties**

3 This Consent To Judgment is entered into by and between John Moore ("Moore" or  
4 "Plaintiff") and Defendant OfficeMax Incorporated ("OfficeMax" or "Defendant"), with Moore  
5 and OfficeMax collectively referred to as the "Parties."

6 **1.2 Plaintiff**

7 Moore 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 OfficeMax 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 Moore alleges that OfficeMax manufactured, distributed and/or sold, in the State of  
16 California, certain types of jumbo paperclips with vinyl components containing Di(2-ethylhexyl)  
17 phthalate (DEHP), such as paperclips including, but not limited to, Kritter Krew Jumbo  
18 Paperclips (made with various animal image accessories including monkey, bear, cat, elephant  
19 and dog animal tops - SKU #21781074/ MFG#OM02561). Di(2-ethylhexyl) phthalate (DEHP) is  
20 listed pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health  
21 & Safety Code §§25249.5 *et seq.* ("Proposition 65"), as a chemical known to the State of  
22 California to cause cancer, birth defects and other reproductive harm. Di (2-ethylhexyl) phthalate  
23 shall be referred to herein as the "Listed Chemical."  
24

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27 ///

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1           **1.5     Notice of Violation**

2           On December 15, 2009, Moore served OfficeMax and various public enforcement  
3 agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that provided public  
4 enforcers and these entities with notice of alleged violations of Health & Safety Code § 25249.6  
5 for failing to warn consumers of the presence and their possible exposure to DEHP in and from  
6 jumbo paperclips manufactured of vinyl components (such as the Kritter Krew Jumbo Paperclips  
7 with animal tops). To the best of the Parties’ knowledge, no public enforcer has commenced and  
8 is diligently prosecuting the allegations set forth in the Notice.

9           **1.6     Complaint/Amended Complaints**

10          On July 23, 2010, Moore, acting in the public interest, filed a Complaint in the Superior  
11 Court in and for the City and County of San Francisco, alleging that OfficeMax violated the  
12 warning provisions of Proposition 65 by exposing consumers who use or otherwise handle the  
13 Kritter Krew Jumbo Paperclips to DEHP without first providing clear and reasonable warning to  
14 such persons (the “Action”).

15          **1.7     No Admission**

16          This Consent To Judgment resolves claims that are denied and disputed by OfficeMax.  
17 The Parties enter into this Consent To Judgment pursuant to a full and final settlement of any and  
18 all claims arising out of the Complaint in this action between the Parties for the purpose of  
19 avoiding prolonged litigation. OfficeMax denies the material factual and legal allegations  
20 contained in the Notice and Action, maintains that it did not knowingly or intentionally expose  
21 California consumers to DEHP through the reasonably foreseeable use of Products or otherwise  
22 contends that all products it has manufactured, distributed and/or sold in California have been and  
23 are in compliance with all applicable laws. Nothing in this Consent To Judgment shall be  
24 construed as an admission by OfficeMax of any fact, finding, issue of law, or violation of law; nor  
25 shall compliance with this Consent To Judgment constitute or be construed as an admission by  
26 OfficeMax of any fact, finding, conclusion, issue of law, or violation of law, such being  
27 specifically denied by OfficeMax. However, notwithstanding the foregoing, this section shall not  
28

1 diminish or otherwise affect OfficeMax's obligations, responsibilities, and duties under this  
2 Consent To Judgment.

3 **1.8 Consent to Jurisdiction**

4 For purposes of this Consent To Judgment only, the Parties stipulate that this Court has  
5 jurisdiction over OfficeMax as to the allegations contained in the Complaint, that venue is proper  
6 in the City and County of San Francisco, and that this Court has jurisdiction to enter and enforce  
7 the provisions of this Consent To Judgment. As an express part of this Agreement, pursuant to  
8 C.C.P. §664.6 the Court in which this action was filed shall retain jurisdiction over the parties to  
9 enforce the settlement until performance in full of the terms of the settlement.

10 **2. DEFINITIONS**

11 **2.1** The term "Complaint" shall mean the Complaint.

12 **2.2** "Products" or "Covered Products" shall mean all Kritter Krew jumbo paperclip  
13 product, SKU #21781074/MFG#OM02561, made with vinyl components containing DEHP.

14 **2.3** The term "Effective Date" shall mean November 8, 2010.

15 **3. INJUNCTIVE RELIEF**

16 **3.1 Formulation Commitment**

17 3.1.1 As of the Effective Date, Defendant shall only order, cause to be ordered,  
18 manufacture or cause to be manufactured Products for distribution or sale in California that are  
19 DEHP FREE.

20 3.1.2 For purposes of this Consent To Judgment, "DEHP FREE" jumbo fastener  
21 products are defined as those with each component part containing less than or equal to 1,000  
22 parts per million ("ppm") of DEHP as determined by a minimum of duplicate quality controlled  
23 test results using Environmental Protection Agency ("EPA") testing methodologies 3580A and  
24 8270C.

25 3.1.3 For every Product ordered, caused to be ordered, manufactured or caused to  
26 be manufactured for distribution or sale in California after the Effective Date, Defendant shall  
27 maintain copies of all testing of such products demonstrating compliance with this section.  
28

1           **3.2   Previously Obtained or Distributed Products.**

2           3.2.1   Within twenty (20) days of the Effective Date, OfficeMax shall provide to  
3 Plaintiff, care of his attorneys, a letter certification, signed by a director or officer of OfficeMax,  
4 confirming that the Covered Product was sold only by OfficeMax through its retail stores, and not  
5 through any other distribution channel.

6           3.2.2   Within twenty (20) days of the Effective Date, OfficeMax shall provide to  
7 Plaintiff, care of his attorneys, a letter certification, signed by a director or officer of OfficeMax,  
8 confirming that on March 2, 2010, OfficeMax issued a notice to each retail store to pull the  
9 Covered Products from its display shelves.

10          3.2.3   Within twenty (20) days of the Effective Date, OfficeMax shall provide to  
11 Plaintiff, care of his attorneys, a letter certification, signed by a director or officer of OfficeMax,  
12 confirming that on March 22, 2010, OfficeMax issued a Destroy In Field Notice to each  
13 OfficeMax retail store.

14          3.2.4   Within twenty (20) days of the Effective Date, OfficeMax shall provide to  
15 Plaintiff, care of his attorneys, a letter certification, signed by a director or officer of OfficeMax,  
16 confirming that, as of the Effective Date, inventory reports demonstrate there are no Covered  
17 Products in the possession of or on order by any retail store.

18          3.2.5   If, within twenty (20) days of the Effective Date, OfficeMax discovers that  
19 any inventory of Covered Product remains in the possession, custody or control of any retail store  
20 in California, OfficeMax shall require the destruction of all such Products in a manner that will  
21 not offend any laws regulating the disposal of hazardous material and shall provide to Plaintiff,  
22 care of his attorneys, a letter certification, signed by a manager of any store effecting the  
23 destruction of the Products, confirming that, as of thirty (30) days after the Effective Date, all  
24 Covered Products have been destroyed.

25          3.2.6   OfficeMax shall maintain records of all compliance correspondence  
26 generated pursuant to §3.2 for three (3) years from the Effective Date and shall produce additional  
27 copies of such records upon written request by Moore.  
28

1 **4. MONETARY PAYMENTS**

2 **4.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

3 Subject to the potential offsets described in Section 4.2 below, OfficeMax shall pay a total  
4 of \$10,000.00 in civil penalties to be apportioned in accordance with California Health & Safety  
5 Code §25192, with 75% of these funds remitted to the State of California's Office of  
6 Environmental Health Hazard Assessment and the remaining 25% of these penalty monies  
7 remitted to Moore as provided by California Health & Safety Code §25249.12(d).

8 OfficeMax shall issue two separate checks for this penalty payment: (a) one check made  
9 payable to The Chanler Group in Trust for the State of California's Office of Environmental  
10 Health Hazard Assessment ("The Chanler Group in Trust for OEHHA") in the amount of  
11 \$7,500.00 for 75% of the total penalty required and (b) one check to "The Chanler Group in Trust  
12 for J. Moore" in the amount of \$2,500.00 for the remaining 25% of the total penalty required.

13 Two separate 1099s shall be issued for the above payments: The first 1099 shall be issued  
14 to OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486). The second 1099 shall  
15 be issued to Moore, whose address and tax identification number shall be furnished, upon request,  
16 at least ten (10) business days before payment is due. The payments shall be delivered on or  
17 before 45 days after the Effective Date, or within 10 business days of Moore's execution of the  
18 settlement agreement and provision of requested W-9s, whichever date is later, at the following  
19 address:

20 The Chanler Group  
21 Attn: Proposition 65 Controller  
22 2560 Ninth Street  
23 Parker Plaza, Suite 214  
24 Berkeley, CA 94710-2565

23 **4.2 Reduction in Penalty Payments**

24 OfficeMax may reduce the total penalty payment due pursuant to section 4.1 above by  
25 means of notifying Moore's counsel in writing, within ten (10) days following the Effective Date,  
26 of its election to exercise any or all of the following penalty offset options (in which event the  
27 division of remaining total penalties due shall be proportioned between OEHHA and Moore in the  
28 same ratio as set forth in section 4.1 above):

1 (a) a 20% reduction in the total penalty amount (\$2,000) due under section 4.1  
2 above shall be realized if OfficeMax, within thirty (30) days of the Effective Date, provides to  
3 Plaintiff, care of his attorneys, copies of letters of certification from each California OfficeMax  
4 retail store, signed by a manager, confirming that, as of the Effective Date, such store has no  
5 Covered Products in its possession or on order and that all Product was pulled and destroyed as  
6 requested by corporate management in the March 2, 2010, and March 22, 2010, directives  
7 referenced in §§3.2.2 and 3.2.3 hereinabove.

8 (b) another 20% reduction in the total penalty amount (\$2,000.00) due under  
9 section 4.1 above shall be realized if OfficeMax agrees that, no later than thirty (30) days after the  
10 Effective Date, the term "in California" in section 3.1 above shall be deemed to have been  
11 replaced by the term "within the United States."

## 12 **5. REIMBURSEMENT OF FEES AND COSTS**

### 13 **5.1 Attorney Fees and Costs**

14 5.1.1 The Parties reached an accord on the compensation due to Moore and his  
15 counsel under general contract principles and the private attorney general doctrine codified at  
16 California Code of Civil Procedure (CCP) §1021.5, for all work performed through the mutual  
17 execution of this agreement and approval of the Consent To Judgment by the trial court,  
18 excluding any fees on appeal. OfficeMax shall pay Moore and his counsel a total of \$35,000.00 as  
19 compromise reimbursement of a portion of the fees and costs incurred by Moore and his counsel  
20 as a result of investigating, bringing this matter to OfficeMax's attention, litigating, negotiating  
21 and proposing the entry of a consent judgment in the public interest. OfficeMax shall further pay  
22 Moore and his counsel a reimbursement of their additional attorney fees and costs, not to exceed  
23 an amount of \$6,500, expended in drafting, filing and appearing for hearing(s) on a motion for  
24 Court approval of this Consent to Judgment.

25 5.1.2 Payment of the amount due pursuant to section 5.1.1 shall be delivered to  
26 Moore's counsel on or before 45 days after the Effective Date, or within 10 business days of  
27 Moore's execution of the settlement agreement, whichever date is later, at the following address:  
28

1 The Chanler Group  
2 Attn: Proposition 65 Controller  
3 2560 Ninth Street  
4 Parker Plaza, Suite 214  
5 Berkeley, CA 94710-2565

6 All payments under Sections 4.1 and 5.1 shall be held in trust by The Chanler Group pending  
7 court approval of the settlement and entry of Judgment. If for any reason this settlement is not  
8 approved by the court or Judgment is not entered upon this agreement, The Chanler Group will  
9 return such payment to the defendant, care of counsel identified herein, within thirty (30) days of  
10 such determination that this settlement is not approved or Judgment is not entered upon this  
11 agreement.

## 12 **6. CLAIMS COVERED AND RELEASE**

### 13 **6.1 Moore's Releases of OfficeMax and Related Entities**

14 6.1.1 This Consent To Judgment is a full, final, and binding resolution between  
15 Moore and OfficeMax, and OfficeMax's owners, subsidiaries, affiliates, sister and related  
16 companies (including those overseas entities held by its owners which manufactured or supplied  
17 the Covered Products to OfficeMax), employees, shareholders, directors, insurers, attorneys,  
18 successors, and assigns ("Defendant Releasees"), and all entities to whom OfficeMax directly or  
19 indirectly distributes or sells Covered Products, including but not limited to distributors,  
20 wholesalers, customers, retailers, franchisees, cooperative members, and licensees ("Downstream  
21 Defendant Releasees") of any violation of Proposition 65 that has been or could have been  
22 asserted against Defendant Releasees and Downstream Defendant Releasees regarding the failure  
23 to warn about exposure to the Listed Chemical arising in connection with Covered Products  
24 manufactured, sourced, distributed, or sold by Defendant Releasees prior to the Effective Date.  
25 OfficeMax's compliance with this Consent To Judgment shall constitute compliance with  
26 Proposition 65 with respect to the Listed Chemical in the Covered Products after the Effective  
27 Date.

28 6.1.2 Except as to the provisions of Section 5, Moore on behalf of himself, his  
past and current agents, representatives, attorneys, successors, and/or assignees, and in the interest  
of the general public, hereby waives with respect to Covered Products all rights to institute or



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

10           6.1.3 Except as to the provisions of Section 5, Moore also, in his individual  
11 capacity only and *not* in his representative capacity, provides a general release herein which shall  
12 be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,  
13 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of  
14 Moore of any nature, character or kind, known or unknown, suspected or unsuspected, arising out  
15 of the subject matter of the Complaint as to Covered Products manufactured, distributed or sold  
16 by Defendant Releasees. Moore 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 KNOWN  
              BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER  
              SETTLEMENT WITH THE DEBTOR.

21 Moore, in his individual capacity only and *not* in his representative capacity, expressly waives  
22 and relinquishes any and all rights and benefits which he may have under, or which may be  
23 conferred on him by the provisions of Section 1542 of the California Civil Code as well as under  
24 any other state or federal statute or common law principle of similar effect, to the fullest extent  
25 that he may lawfully waive such rights or benefits pertaining to the released matters. In  
26 furtherance of such intention, the release hereby given shall be and remain in effect as a full and  
27 complete release notwithstanding the discovery or existence of any such additional or different  
28 claims or facts arising out of the released matters.

1           6.1.4 Upon court approval of the Consent To Judgment, the Parties waive their  
2 respective rights to a hearing or trial on the allegations of the Complaint.

3           **6.2 OfficeMax's Release of Moore**

4           6.2.1 OfficeMax waives any and all claims against Moore, his attorneys, and  
5 other representatives for any and all actions taken or statements made (or those that could have  
6 been taken or made) by Moore and his attorneys and other representatives, whether in the course  
7 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this  
8 matter, and/or with respect to the Covered Products.

9           6.2.2 OfficeMax also provides a general release herein which shall be effective  
10 as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations,  
11 costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of OfficeMax of  
12 any nature, character or kind, known or unknown, suspected or unsuspected, arising out of the  
13 subject matter of the Action. OfficeMax acknowledges that it is familiar with Section 1542 of the  
14 California Civil Code, which provides as follows:

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

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

1 **7. SEVERABILITY**

2 If, subsequent to court approval of this Consent To Judgment, any of the provisions of this  
3 Consent To 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 To Judgment.

6 **8. COURT APPROVAL**

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

10 **9. GOVERNING LAW**

11 The terms of this Consent To 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 To Judgment, the  
15 notice shall be sent by certified mail and electronic mail to the following:

16 For OfficeMax to:

17 Tracy Oneale  
18 OfficeMax Incorporated  
1111 West Jefferson St, Suite 510  
19 Boise, ID 83702

20 With copy to:

21 Mark E. Elliott  
22 Caroline L. Plant  
Pillsbury Winthrop Shaw Pittman LLP  
725 South Figueroa Street, Suite 2800  
Los Angeles, CA 90017-5406

23 For Moore to:

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

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

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

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

4 **12. MODIFICATION**

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

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

9 The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed  
10 motion is required to obtain judicial approval of this Consent To Judgment. In furtherance of  
11 obtaining such approval, Moore and OfficeMax and their respective counsel agree to mutually  
12 employ their best efforts to support the entry of this agreement as a Consent To Judgment and  
13 obtain approval of the Consent To Judgment - sufficient to render a formal judgment approving  
14 this agreement - by the Court in a timely manner. Any effort by either of the Parties to impede  
15 judicial approval of this Consent To Judgment shall subject such impeding Party to liability for  
16 attorney fees and costs incurred by the non-impeding Party, and their respective counsel, in their  
17 efforts to meet or oppose such Party's impeding conduct.

18 **14. ENTIRE AGREEMENT**

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

25 **15. ATTORNEY'S FEES**

26 **15.1** A Party who unsuccessfully brings or contests an action arising out of this Consent  
27 To Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs  
28 unless the unsuccessful Party has acted with substantial justification. For purposes of this

1 Consent To Judgment, the term substantial justification shall carry the same meaning as used in  
2 the Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016, et seq.

3 **15.2** Except as specifically provided in the above paragraph and in Sections 5.1 and 13,  
4 each Party shall bear its own costs and attorney's fees in connection with this action.

5 **15.3** Nothing in this Section 15 shall preclude a Party from seeking an award of  
6 sanctions pursuant to law.

7 **16. COUNTERPARTS, FACSIMILE SIGNATURES**

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

11 **17. AUTHORIZATION**

12 The undersigned parties and their counsel are authorized to execute this Consent To  
13 Judgment on behalf of their respective Parties and have read, understood, and agree to all of the  
14 terms and conditions of this Consent To Judgment.

15 **IT IS SO AGREED**

16 Dated: November __, 2010 17 18 _____ 19 Plaintiff John Moore	Dated: November __, 2010 _____ The Chanler Group Attorneys for Plaintiff John Moore
20 21 Dated: November __, 2010 22 23 By _____ 24 Title _____ OfficeMax Incorporated	Dated: November __, 2010 _____ Mark E. Elliott Pillsbury Winthrop Shaw Pittman LLP Defendant OfficeMax Incorporated