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

15 RUSSELL BRIMER,

16 Plaintiff,

17 v.

18 ACCO BRANDS CORPORATION, et al.,

19 Defendants.

Case No. CGC-09-485784

**STIPULATION AND [PROPOSED]
ORDER RE: CONSENT JUDGMENT**

1 **1. INTRODUCTION**

2 **1.1 Plaintiff and A & W Products, Co., Inc.** This Consent Judgment is entered into by
3 and between plaintiff Russell Brimer (hereafter “Brimer” or “Plaintiff”) and defendant A & W
4 Products Co., Inc., (hereinafter “A & W Products” or “Defendant”), with Plaintiff and Defendant
5 collectively referred to as the “Parties” and Brimer and Defendant each being a “Party.”

6 **1.2 Plaintiff.** Brimer is an individual residing in California who seeks to promote
7 awareness of exposures to toxic chemicals and improve human health by reducing or eliminating
8 hazardous substances contained in consumer products.

9 **1.3 Defendant.** Defendant employs ten or more persons and is a person in the course of
10 doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
11 California Health & Safety Code §25249.6 *et seq.* (“Proposition 65”).

12 **1.4 General Allegations.** Plaintiff alleges that Defendant has manufactured, distributed
13 and/or sold in the State of California vinyl-coated paper fastener products that expose users to lead ,
14 without first providing "clear and reasonable warning" under Proposition 65. Lead is listed pursuant
15 to the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code
16 §§25249.5 *et seq.* (“Proposition 65”) and is known to be a carcinogen and reproductive and
17 developmental toxicant. Lead (and/or lead compounds) shall be referred to herein as the “Listed
18 Chemical.” A&W denies Plaintiff’s allegations.

19 **1.5 Product Description.** The products that are covered by this Consent Judgment are
20 defined as follows: vinyl-coated paper fasteners, imported, distributed and/or otherwise sold by
21 Defendant in California. Such products collectively are referred to herein as the “Products.”

22 **1.6 Notices of Violation.** On November 28, 2008, Brimer served Defendant and various
23 public enforcement agencies with documents entitled “60-Day Notice of Violation” (“Notice”), that
24 provided Defendant and such public enforcers with notice that alleged that Defendant was in violation
25 of Health & Safety Code §25249.6 for failing to warn purchasers that certain Products that they sold
26 expose users in California to the Listed Chemical. No public enforcer has diligently prosecuted the
27 allegations set forth in the Notice.

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1 **1.7 Complaint.** On March 5, 2009, Brimer, who was and is acting in the interest of the
2 general public in California, filed a complaint in the Superior Court for the County of San Francisco
3 against Defendant and Does 1 through 600, alleging violations of Health & Safety Code §25249.6
4 based on the alleged exposures to lead contained in certain Products sold by Defendant without the
5 requisite health hazard warnings. On March 12, 2009, Brimer filed an Amended Complaint in the
6 Superior Court for the County of San Francisco. (The Complaint and First Amended Complaint are
7 referred to herein collectively as the "Complaint" or the "Action")

8 **1.8 No Admission.** Defendant denies the material factual and legal allegations contained
9 in Plaintiff's Notice and Complaint and maintains that all products that it has sold and distributed in
10 California including the Products have been and are in compliance with all laws. Nothing in this
11 Consent Judgment shall be construed as an admission by Defendant of any fact, finding, issue of law,
12 or violation of law, nor shall compliance with this Agreement constitute or be construed as an
13 admission by Defendant of any fact, finding, conclusion, issue of law, or violation of law. However,
14 this section shall not diminish or otherwise affect the obligations, responsibilities and duties of
15 Defendant under this Consent Judgment.

16 **1.9 Consent to Jurisdiction.** For purposes of this Consent Judgment only, the Parties
17 stipulate that this Court has jurisdiction over the Parties and concerning the alleged violations at issue
18 and personal jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper
19 in the County of San Francisco, and that this Court has jurisdiction to enter and enforce the provisions
20 of this Consent Judgment.

21 **1.10 Effective Date.** For purposes of this Consent Judgment, the "Effective Date" shall be
22 October 1, 2009.

23 **2. INJUNCTIVE RELIEF: PROPOSITION 65 WARNINGS AND REFORMULATION**

24 **2.1 Reformulation Commitment.** Commencing on the Effective Date, Defendant shall
25 not sell, ship or offer to be shipped for sale in California any vinyl coated paper fastener with a vinyl
26 coating that contains more than 300 parts per million ("ppm") of lead.

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2.2 Requirements for Products Remaining in Inventory in California.

Within 30 days of the entry of this Consent Judgment, Defendant shall send a letter to each customer in California to whom it supplied, on or after July 1, 2008, Products that did not meet the reformulation standard of Section 2.1, requesting that the customer either provide Proposition 65 warnings for such Products remaining in its inventory or return such Products to Defendant. A copy of the letter shall be provided to counsel for Plaintiff and shall state that Defendant will pay for shipping of the returned product.

If Defendant elects to instruct its customer to provide a Proposition 65 warning, it shall include a sufficient number of warning stickers containing the following language:

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

with instructions that the stickers be placed on the product packaging for those Products in such customer's inventory, and shall be prominently placed with such conspicuousness as compared with other words, statements, designs or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. As part of the instructions under either option, Defendant must specify the product name, product number, an SKU number if available, for each Product covered by the instruction letter.

3. MONETARY PAYMENTS

3.1 Payments Pursuant to Health & Safety Code §25249.7(b). Pursuant to Health & Safety Code §25249.7(b), the total civil penalty assessed shall be \$12,500. Civil penalties are to be apportioned in accordance with California Health & Safety Code §25192, with 75% of these funds remitted to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Brimer as provided by California Health & Safety Code §25249.12(d).

Defendant shall issue two separate checks for each of the penalty payments: (a) one check made payable to Hirst & Chanler LLP in Trust for the State of California's Office of Environmental Health Hazard Assessment (OEHHA) in the amount of \$9,375, representing 75% of the total

1 penalty; and (b) one check to Hirst & Chanler LLP in Trust for Brimer in the amount of \$3,125,
2 representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments:
3 The first 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-
4 0284486) in the amount of \$9,375. The second 1099 shall be issued to Brimer in the amount of
5 \$3,125, whose address and tax identification number shall be furnished, upon request, five calendar
6 days before payment is due. The payment shall be made payable to Hirst & Chanler LLP and shall
7 be delivered within ten (10) days of the Effective Date, to the following address:

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9 Hirst & Chanler LLP
Attn: Proposition 65 Controller
2560 Ninth Street
10 Parker Plaza, Suite 214
11 Berkeley, CA 94710-2565

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

13 **4.1 Attorney Fees and Costs.** The parties acknowledge that Brimer and his counsel
14 offered to resolve this dispute without reaching terms on the amount of fees and costs to be
15 reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the
16 agreement had been settled. Defendant then expressed a desire to resolve the fee and cost issue. The
17 parties then attempted to (and did) reach an accord on the compensation due to Brimer and his counsel
18 under general contract principles and the private attorney general doctrine codified at California Code
19 of Civil Procedure (CCP) §1021.5. Defendant shall reimburse Brimer and his counsel the total of
20 \$42,500 for fees and costs incurred through the mutual execution of this agreement and approval by
21 the trial court. Defendant shall issue a separate 1099 for fees and costs (EIN: 20-3929984) and shall
22 make the check payable to "Hirst & Chanler LLP" and shall be delivered to the following address:

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24 Hirst & Chanler LLP
Attn: Proposition 65 Controller
2560 Ninth Street
25 Parker Plaza, Suite 214
26 Berkeley, CA 94710-2565
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1 **5. RELEASE OF ALL CLAIMS**

2 **5.1. Brimer's Release of Defendant and Its Chain of Distribution.**

3 **5.1.1** This Consent Judgment is a full, final, and binding resolution between Brimer and
4 Defendant, and its parents, subsidiaries, affiliates, sister companies, owners, employees, shareholders,
5 directors, insurers, attorneys, successors, and assigns ("Defendant Releasees"), and all entities to
6 whom it directly or indirectly distributes or sells Products, including but not limited to distributors,
7 wholesalers, customers, retailers, franchisees, cooperative members, and licensees ("Downstream
8 Defendant Releasees") of any violation of Proposition 65, or any other statutory or other law, that has
9 been or could have been asserted against Defendant Releasees and Downstream Defendant Releasees
10 regarding the failure to warn about exposure to the Listed Chemical arising in connection with
11 Products manufactured, sourced, distributed, or sold by Defendant Releasees prior to the Effective
12 Date. Defendant Releasees' compliance with this Consent Judgment shall constitute compliance with
13 Proposition 65 with respect to the Listed Chemical in Products after the Effective Date.

14 **5.1.2** Brimer on behalf of himself, his past and current agents, representatives, attorneys,
15 successors, and/or assignees, and the general public, hereby waives all rights to institute or participate
16 in, directly or indirectly, any form of legal action and releases all claims including, without limitation,
17 all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages,
18 costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees,
19 and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent
20 (collectively "Claims"), that were brought or could have been brought against Defendant Releasees
21 and Downstream Defendant Releasees that arise under Proposition 65 or any other statutory or
22 common law claims, that were or could have been asserted in the public interest, as such claims relate
23 to Defendant Releasees' and Downstream Defendant Releasees' alleged failure to warn about
24 exposures to the Listed Chemical contained in the Products.

25 **5.1.3** Brimer also, in his individual capacity only and *not* in his representative capacity,
26 provides a general release herein which shall be effective as a full and final accord and satisfaction, as
27 a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses,
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1 claims, liabilities and demands of Brimer of any nature, character or kind, known or unknown,
2 suspected or unsuspected, arising out of the subject matter of this action. Brimer acknowledges that
3 he is familiar with Section 1542 of the California Civil Code, which provides as follows:

4 A general release does not extend to claims which the creditor does not
5 know or suspect to exist in his or her favor at the time of executing the
6 release, which if known by him or her must have materially affected his
7 or her settlement with the debtor.

8 **5.1.4** Brimer, in his individual capacity only and *not* in his representative capacity, expressly
9 waives and relinquishes any and all rights and benefits which he may have under, or which may be
10 conferred on him by the provisions of Section 1542 of the California Civil Code as well as under any
11 other state or federal statute or common law principle of similar effect, to the fullest extent that he
12 may lawfully waive such rights or benefits pertaining to the released matters. In furtherance of such
13 intention, the release hereby given shall be and remain in effect as a full and complete release
14 notwithstanding the discovery or existence of any such additional or different claims or facts arising
15 out of the released matters.

16 **5.1.5** The Parties further understand and agree that this release shall not extend upstream to
17 any entities that manufactured the Products for Defendant or any component parts thereof or to any
18 distributors or suppliers who sold the Products or any component parts thereof to Defendant.

19 **5.2 Defendant's Release of Brimer.**

20 Defendant waives any and all claims against Brimer, his attorneys, and other representatives
21 for any and all actions taken or statements made (or those that could have been taken or made) by
22 Brimer and his attorneys and other representatives, whether in the course of investigating claims or
23 otherwise seeking enforcement of Proposition 65 against them in this matter, and/or with respect to
24 the Products.

25 Defendant also provides a general release herein which shall be effective as a full and final
26 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys'
27 fees, damages, losses, claims, liabilities and demands of Defendant of any nature, character or kind,
28 known or unknown, suspected or unsuspected, arising out of the subject matter of the Action.

1 Defendant acknowledges that it is familiar with Section 1542 of the California Civil Code, which
2 provides as follows:

3 A general release does not extend to claims which the creditor does not
4 know or suspect to exist in his or her favor at the time of executing the
5 release, which if known by him or her must have materially affected his
6 or her settlement with the debtor.

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

13 **6. COURT APPROVAL**

14 This Consent Judgment is not effective until it is approved and entered by the Court and shall
15 be null and void if, for any reason, it is not approved and entered by the Court within one year after
16 it has been fully executed by all Parties, in which event any monies that have been provided to
17 Plaintiff or his counsel pursuant to section 3 and section 4 above, shall be refunded within fifteen
18 (15) days.

19 **7. SEVERABILITY**

20 If, subsequent to court approval of this Consent Judgment, any of the provisions of this
21 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
22 provisions remaining shall not be adversely affected.

23 **8. GOVERNING LAW**

24 The terms of this Consent Judgment shall be governed by the laws of the State of California
25 and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise
26 rendered inapplicable by reason of law generally, or as to the Products specifically, then Defendant
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1 shall have no further injunctive obligations pursuant to this Consent Judgment with respect to, and
2 to the extent that, those Products are so affected.

3 **9. NOTICES**

4 All correspondence and notices required to be provided to the Parties pursuant to this
5 Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class, registered,
6 certified mail, return receipt requested, or (ii) overnight courier on either Party by the other at the
7 addresses listed below. Either Party, from time to time, may specify a change of address to which
8 all notices and other communications shall be sent.

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10 For Plaintiff:

11 Russell Brimer
12 c/o Hirst & Chanler LLP
13 Attn: Proposition 65 Controller
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

For Defendant:

Shelley Hurwitz
Holland & Knight
633 W. Fifth Street
21st Floor
Los Angeles, CA 90071

14 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

21 **12. ADDITIONAL POST-EXECUTION ACTIVITIES**

22 The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed motion
23 is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such
24 approval, Brimer and Defendant and their respective counsel agree to mutually employ their best
25 efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the
26 Consent Judgment by the Court in a timely manner.

1 **13. MODIFICATION**

2 This Consent Judgment may be modified only by: (1) written agreement of the Parties, or
3 (2) motion of any Party as provided by law and upon entry of a modified Consent Judgment by the
4 Court.

5 **14. AUTHORIZATION**

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

9 **15. ATTORNEY'S FEES**

10 **15.1** A Party who unsuccessfully brings or contests an action arising out of this Consent
11 Judgment shall be required to pay the prevailing Party's reasonable attorney's fees and costs unless
12 the unsuccessful Party has acted with substantial justification. For purposes of this Consent
13 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
14 Discovery Act of 1986, Code of Civil Procedure §§ 2016, et seq.

15 **15.2** Except as specifically provided in the above paragraph and in Section 4, each Party
16 shall bear its own costs and attorney's fees in connection with this action.

17 **15.3** Nothing in this Section 15 shall preclude a Party from seeking an award of sanctions
18 pursuant to law.

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AGREED TO:

AGREED TO:

Date: 01-09-09

Date: _____

By: 
Plaintiff RUSSELL BRIMER

By: _____
Defendant A & W PRODUCTS CO.,
INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

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AGREED TO:

AGREED TO:

Date: _____

Date: Oct. 1-09

By: _____
Plaintiff RUSSELL BRIMER

By: Paul Ruzickin
Defendant A & W PRODUCTS CO.,
INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

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