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9 Attorneys for Plaintiff  
10 RUSSELL BRIMER

11  
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 COUNTY OF SAN FRANCISCO  
14 UNLIMITED CIVIL JURISDICTION  
15

16 RUSSELL BRIMER,

17 Plaintiff,

18 v.

19 SKULLCANDY, INC.; and DOES 1-150,  
20 inclusive,

21 Defendants.

Case No. CGC-12-526256

**[PROPOSED] CONSENT JUDGMENT  
AS TO DEFENDANT SKULLCANDY,  
INC.**

1       **1.     INTRODUCTION**

2               **1.1     Russell Brimer and Skullcandy, Inc.**

3               This Consent Judgment is entered into by and between plaintiff Russell Brimer (“Brimer”  
4               or “Plaintiff”) and defendant Skullcandy, Inc. (“Skullcandy” or “Defendant”), with Brimer and  
5               Skullcandy referred to individually as “Party” and collectively 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 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous  
9               substances contained in consumer products.

10              **1.3     Defendant**

11              Skullcandy 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              and Safety Code section 25249.5 et seq. (“Proposition 65”).

14              **1.4     General Allegations**

15              Brimer alleges that Skullcandy has manufactured, distributed and/or sold headphones with  
16              vinyl/PVC ear cushions containing di(2-ethylhexyl)phthalate (“DEHP”) in California without the  
17              health hazard warnings required by Proposition 65 including, but not limited to, the *Skullcandy*  
18              *Lowrider, Model #S5LWCY-033 (#8 78615 02664 3)*. DEHP is listed pursuant to Proposition 65  
19              as a chemical known to the State of California to cause birth defects and other reproductive harm.

20              **1.5     Notice of Violation**

21              On July 11, 2012, Brimer served Skullcandy and various public enforcement agencies  
22              with a document entitled “60-Day Notice of Violation” (“Notice”), alleging that Skullcandy  
23              violated Proposition 65 by failing to warn consumers in California that its headphones with  
24              vinyl/PVC ear cushions expose users to DEHP.

25              **1.6     Complaint**

26              On November 20, 2012, Brimer filed a complaint in this action, naming Skullcandy as a  
27              defendant, and alleging violations of Health and Safety Code section 25249.6 based on the

1 alleged exposures to DEHP contained in headphones with vinyl/PVC ear cushions manufactured,  
2 distributed and/or sold by Skullcandy.

3 **1.7 No Admission**

4 The Parties enter into this Consent Judgment as a full and final settlement of all claims  
5 that were raised in the Complaint or that could have been raised in the Complaint, arising out of  
6 the facts or conduct alleged in the Notice. By execution of this Consent Judgment and agreeing  
7 to comply with its terms, Skullcandy does not admit any facts or conclusions of law, including,  
8 but not limited to, any facts or conclusions of law suggesting or demonstrating any violations of  
9 Proposition 65 or any other statutory, common law or equitable requirements relating to DEHP in  
10 Covered Products as defined in Section 2.2. Nothing in this Consent Judgment shall be construed  
11 as an admission by Skullcandy of any fact, conclusion of law, issue of law or violation of law, nor  
12 shall compliance with the Consent Judgment constitute or be construed as an admission by  
13 Skullcandy of any fact, conclusion of law, issue of law, or violation of law. Nothing in this  
14 Consent Judgment shall prejudice, waive or impair any right, remedy, argument or defense  
15 Skullcandy may have in this or any other or future legal proceedings. This Consent Judgment is  
16 the product of negotiation and compromise and is accepted by Skullcandy for purposes of  
17 settling, compromising, and resolving issues disputed in this action. However, this Section shall  
18 not diminish or otherwise affect the obligations, responsibilities and duties of Skullcandy under  
19 this Consent Judgment.

20 **1.8 Consent to Jurisdiction**

21 For purposes of this Consent Judgment only, Skullcandy stipulates that this Court has  
22 jurisdiction over Skullcandy as to the allegations contained in the Complaint, that venue is proper  
23 in the County of San Francisco, and that this Court has jurisdiction to enter and enforce the  
24 provisions of this Consent Judgment.

25 **2. DEFINITIONS**

26 **2.1** “Accessible Component” means a vinyl component of a Covered Product that  
27 could be touched by a person during reasonably foreseeable use.

1           **2.2**    “Covered Product” means headphones with vinyl/PVC ear cushions containing  
2 DEHP.

3           **2.3**    “Effective Date” means the date this Consent Judgment is approved by the Court.

4           **3.     INJUNCTIVE RELIEF: REFORMULATION**

5           **3.1**    Commencing on September 1, 2013, Skullcandy shall not sell or offer for sale in  
6 California any Covered Product unless each Accessible Component in such Covered Product  
7 contains a maximum DEHP concentration of 1,000 parts per million by weight (“ppm”) when  
8 analyzed pursuant to any methodology utilized by federal or state agencies for the purpose of  
9 determining DEHP content in a solid substance.

10          **4.     ENFORCEMENT OF CONSENT JUDGMENT**

11           Any Party may, by motion or application for an order to show cause before the Superior  
12 Court for the County of San Francisco, enforce the terms and conditions contained in this Consent  
13 Judgment. A Party may file such a motion or application only after that Party first provides 30  
14 days’ notice to the Party allegedly failing to comply with the terms and conditions of this Consent  
15 Judgment and attempts to resolve such Party’s failure to comply in an open and good faith  
16 manner for a period of no less than 30 days. The Parties agree and understand that the meet and  
17 confer requirements of this Section shall not apply to an application or motion to enforce the  
18 monetary settlement terms specified in Section 5.

19          **5.     MONETARY PAYMENTS**

20           **5.1     Payments Made Pursuant to Health & Safety Code § 25249.7(b)**

21           Skullcandy shall pay a civil penalty of \$42,000 in two installments. Each payment shall  
22 be allocated according to Health and Safety Code section 25249.12 (c)(1) and (d) with seventy-  
23 five percent of the penalty payment earmarked for the California Office of Environmental Health  
24 Hazard Assessment (“OEHHA”) and the remaining twenty-five percent of the penalty payment  
25 earmarked for Brimer.

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**5.1.1 Initial Civil Penalty**

Skullcandy shall pay an initial civil penalty of \$12,000 within 15 days of the Effective Date of this Consent Judgment.

**5.1.2 Final Civil Penalty; Waiver on Certification**

On October 15, 2013, Skullcandy shall pay a final civil penalty of \$30,000. The final civil penalty shall be waived in its entirety, however, if on or before October 1, 2013, an officer of Skullcandy certifies to Brimer’s counsel in writing that, as of September 1, 2013, all Covered Products received by Skullcandy that are sold or distributed in California contain a maximum DEHP concentration of 1,000 ppm.

**5.2 Payment in Lieu of Further Civil Penalties**

Skullcandy shall make an additional payment of \$8,000 to Silent Spring Institute (“Silent Spring”), a not-for-profit institution dedicated to science that serves the public interest. This payment in lieu of further civil penalties is made in accordance with California Code of Regulations title 11, section 3203(b). Silent Spring will use the funds in one or more of the following ways: (a) to continue its work identifying the links between exposures to potentially harmful chemicals, including lead, DEHP, di-n-butyl phthalate (“DBP”) and butyl benzyl phthalate (“BBP”), and the associated risks of cancer or reproductive and developmental harm, as well as to educate the public about such exposures; (b) to conduct exposure- and risk-based prioritization of Proposition 65-listed chemicals, and those chemicals OEHHA identifies as candidates for listing, in order to identify exposures of public health significance; (c) to monitor compliance with the reformulation requirements of this and similar settlements addressing Proposition 65-listed chemical exposures; or (d) to conduct exposure assessments to evaluate the risks associated with exposures to lead, DEHP, DBP, BBP and other Proposition 65-listed chemicals.

**5.3 Reimbursement of Fees and Costs**

The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving

1 the issue to be resolved after the material terms of the agreement had been settled. Shortly after  
2 all other settlement terms had been finalized, Skullcandy expressed a desire to resolve the fees  
3 and costs. The Parties then attempted to (and did) reach an accord on the compensation due  
4 Brimer and his counsel under general contract principles and the private attorney general doctrine  
5 codified at Code of Civil Procedure section 1021.5 for all work performed in this matter exclusive  
6 of fees and costs incurred on appeal, if any. Under these legal principles, Skullcandy shall pay  
7 \$40,000 for the fees and costs incurred investigating, litigating, and enforcing this matter,  
8 including the fees and costs incurred (and to be incurred) drafting, negotiating, and obtaining the  
9 Court's approval of this Consent Judgment in the public interest.

#### 10 **5.4 Payment Procedure**

##### 11 **5.4.1 Civil Penalties; Payment in Lieu of Penalties; Fees and Costs**

12 All payments required by Sections 5.1.1, 5.2 and 5.3 shall be delivered within 15 days of  
13 the Effective Date of this Consent Judgment. Funds shall be provided in three checks made  
14 payable to: (a) "The Chanler Group in Trust for Silent Spring Institute" in the amount of \$8,000;  
15 (b) "The Chanler Group in Trust for Russell Brimer" in the amount of \$3,000; and (c) "The  
16 Chanler Group" in the amount of \$40,000.

##### 17 **5.4.2 Final Civil Penalty**

18 If the final civil penalty payment referenced in Section 5.1.2 above is not waived,  
19 Skullcandy shall, on or before October 15, 2013, deliver two checks made payable to: (a)  
20 "OEHHA" in the amount of \$22,500; and (b) "The Chanler Group in Trust for Russell Brimer" in  
21 the amount of \$7,500.

##### 22 **5.4.3 Issuance of 1099 Forms**

23 After the Consent Judgment has been approved, Skullcandy shall issue a 1099 form to  
24 each of the following entities: (a) OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-  
25 0284486); (b) Russell Brimer, whose address and tax identification number shall be furnished  
26 upon request; (c) The Chanler Group (EIN: 94-3171522) for fees and costs reimbursed pursuant  
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1 to Section 5.2 above; and (d) Silent Spring Institute, whose address and tax identification number  
2 shall be provided after this Consent Judgment has been fully executed by the Parties.

3 **5.4.4 Payment Addresses**

4 All payments and tax documentation required by this settlement agreement shall be  
5 delivered to the following addresses:

6 (a) All payments owed to the Silent Spring Institute, Brimer and Brimer's  
7 counsel, pursuant to Sections 5.1 5.2, and 5.3, shall be delivered to the following address:

8 The Chanler Group  
9 Attn: Proposition 65 Controller  
10 2560 Ninth Street  
11 Parker Plaza, Suite 214  
12 Berkeley, CA 94710

11 (b) All payments to OEHHA pursuant to Sections 5.1.1 and 5.1.2 shall be  
12 delivered directly to OEHHA (Memo line "Prop 65 Penalties") at the following address:

13 Mike Gyrics  
14 Fiscal Operations Branch Chief  
15 Office of Environmental Health Hazard Assessment  
16 P.O. Box 4010  
17 Sacramento, CA 95812-4010

16 A copy of the checks payable to OEHHA shall be mailed to The Chanler Group at the address set  
17 forth above in Section 5.4.4(a).

18 **6. CLAIMS COVERED AND RELEASED**

19 **6.1** This Consent Judgment is a full, final, and binding resolution between Brimer and  
20 Skullcandy and its parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates,  
21 and sister companies and their successors and assigns ("Defendant Releasees"), and their  
22 downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members,  
23 licensors, and licensees, and any other person or entity to whom they directly or indirectly  
24 distribute or sell Covered Products ("Downstream Defendant Releasees") of any violation of  
25 Proposition 65 that has been or could have been asserted in the public interest against Skullcandy,  
26 Defendant Releasees, and Downstream Defendant Releasees in California regarding the failure to  
27 warn about exposures to DEHP in Covered Products sold by Skullcandy before the Effective  
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1 Date, as alleged in the Notice. Compliance with this Consent Judgment constitutes compliance  
2 with Proposition 65 with regard to DEHP in Covered Products.

3 **6.2** Brimer on his own behalf, and on behalf of his past and current agents,  
4 representatives, attorneys, successors, and/or assignees, and in the interest of the general public,  
5 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal  
6 action and releases all claims including, without limitation, all actions and causes of action in law  
7 or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or  
8 expenses including, but not limited to, investigation fees, expert fees, and attorneys' fees of any  
9 nature whatsoever ("Claims"), against Skullcandy, Defendant Releasees, and Downstream  
10 Defendant Releasees arising from any violation of Proposition 65 regarding the failure to warn  
11 about exposures to DEHP in Covered Products sold by Skullcandy before the Effective Date.

12 **6.3** Brimer, in California, in his individual capacity only and *not* in his representative  
13 capacity, also provides a release herein which shall be effective as a full and final accord and  
14 satisfaction, as a bar to all Claims, liabilities and demands of Brimer of any nature, character or  
15 kind, known or unknown, suspected or unsuspected, arising out of unwarned exposures to DEHP  
16 from the Covered Product as alleged in the Notice. Brimer acknowledges that he is familiar with  
17 Section 1542 of the 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 OR  
22 HER SETTLEMENT WITH THE DEBTOR.

21 Brimer, 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. In furtherance of such intention, the release  
26 hereby given shall be and remain in effect as a full and complete release notwithstanding the  
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1 discovery or existence of any such additional or different claims or facts arising out of unwarned  
2 exposures to DEHP from Covered Products, as alleged in the Notice.

3 **6.4** Skullcandy waives any and all Claims against Brimer and his attorneys and other  
4 representatives for any and all actions taken or statements made (or those that could have been  
5 taken or made) by Brimer and his attorneys and other representatives, whether in the course of  
6 investigating claims, or otherwise seeking to enforce Proposition 65 against them in this matter,  
7 or with respect to the Covered Products.

8 **6.5** Skullcandy also provides a general release herein which shall be effective as a full  
9 and final accord and satisfaction, as a bar to all Claims, liabilities and demands of Skullcandy of  
10 any nature, character or kind, known or unknown, suspected or unsuspected, arising out of the  
11 subject matter of the action. Skullcandy acknowledges that it is familiar with Section 1542 of the  
12 California Civil Code, which provides as follows:

13 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE  
14 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER  
15 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.

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

24 **7. COURT APPROVAL**

25 **7.1** Brimer agrees to comply with the reporting form requirements referenced in  
26 Health and Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to  
27 Health and Safety Code section 25249.7(f)(4), a noticed motion is required to obtain judicial  
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1 approval of the settlement. Brimer agrees to draft and file the necessary moving papers, and  
2 Skullcandy shall support the motion for approval of the Consent Judgment, and appear at the  
3 hearing of the motion if requested.

4 **7.2** If this Consent Judgment is not approved by the Court, (a) this Consent Judgment  
5 and any and all prior agreements between the parties merged herein shall terminate and become  
6 null and void, and the action shall revert to the status that existed prior to the execution date of  
7 this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the  
8 negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall  
9 have any effect, nor shall any such matter be admissible in evidence for any purpose in this  
10 action, or in any other proceeding; and (c) the parties agree to meet and confer to determine  
11 whether to modify the terms of the Consent Judgment and to resubmit it for approval.

12 **8. ATTORNEYS' FEES**

13 Each Party shall bear its own costs and attorney's fees in connection with this action  
14 except as specifically provided in Section 5.3.

15 **9. GOVERNING LAW**

16 **9.1** The terms of this Consent Judgment shall be governed by the laws of the State of  
17 California, and shall apply only to Covered Products, sold or offered for sale in the State of  
18 California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by  
19 reason of law generally, or as to Covered Products, then Skullcandy may provide written notice to  
20 Brimer of any asserted change in the law, and shall have no further obligations pursuant to this  
21 Consent Judgment, with respect to, and to the extent that, the Covered Products are so affected.

22 **9.2** The Parties, including their counsel, have participated in the preparation of this  
23 Consent Judgment, and this Consent Judgment is the result of the joint efforts of the Parties. This  
24 Consent Judgment was subject to revision and modification by the Parties and has been accepted  
25 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or  
26 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result  
27 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment  
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1 agrees that any statute or rule of construction providing that ambiguities are to be resolved against  
2 the drafting Party should not be employed in the interpretation of this Consent Judgment, and in  
3 this regard, the Parties hereby waive California Civil Code section 1654.

4 **10. NOTICES**

5 Unless specified herein, all correspondence and notices required to be provided pursuant  
6 to this Consent Judgment shall be in writing and sent by: (i) personal delivery; (ii) first-class,  
7 registered or certified mail, return receipt requested; or (iii) overnight courier on any Party by the  
8 other Party at the following addresses:

9 To Skullcandy:

10 Tom Burton  
11 Associate General Counsel  
12 Skullcandy, Inc.  
13 1441 Ute Blvd, Suite 250  
14 Park City, UT 84098

13 With a copy to:

14 Jeffrey B. Margulies, Esq.  
15 Fulbright & Jaworski LLP  
16 555 South Flower Street  
17 41st Floor  
18 Los Angeles, California 90071

17 To Brimer:

18 Proposition 65 Coordinator  
19 The Chanler Group  
20 2560 Ninth Street  
21 Parker Plaza, Suite 214  
22 Berkeley, CA 94710-2565

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

23 **11. MODIFICATION**

24 **11.1 Modification**

25 This Consent Judgment may be modified by a written agreement of the Parties and upon  
26 entry of a modified Consent Judgment by the Court, or by motion or application of any Party, and  
27 entry of a modified Consent Judgment by the Court.

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**11.2 Subsequent Legislation**

If, subsequent to the Effective Date, legislation or regulation is adopted that addresses the DEHP content of Covered Products sold in California, any Party shall be entitled to request that the Court modify the reformulation standard of Section 3 of this Consent Judgment for good cause shown.

**11.3 Notice; Meet and Confer**

Any Party seeking to modify this Consent Judgment shall notify the other Party of their intent and shall meet and confer in good faith with the other party for a period of 30 days prior to filing any application or motion to modify the Consent Judgment.

**12. ENTIRE AGREEMENT**

This Consent Judgment contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and therein. No supplementation, modification, waiver, or termination of this Consent Judgment shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

**13. RETENTION OF JURISDICTION**

This Court shall retain jurisdiction of this matter to implement or modify the Consent Judgment pursuant to Code of Civil Procedure section 664.6.

**14. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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**15. AUTHORIZATION**

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

<b>AGREED TO:</b>	<b>AGREED TO:</b>
Date: <u>March 28, 2013</u>  By:  Plaintiff RUSSELL BRIMER	Date: _____  By: _____ Defendant SKULLCANDY, INC.

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**15. AUTHORIZATION**

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

AGREED TO:	AGREED TO:
Date: _____	Date: <u>4/15/13</u>
By: _____ Plaintiff RUSSELL BRIMER	By:  Defendant SKULLCANDY, INC. <u>Geo Salimi, Grenada Counsel</u>