

1 Josh Voorhees, State Bar No. 241436
Warren M. Klein, State Bar No. 303958
2 THE CHANLER GROUP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, CA 94710-2565
4 Telephone: (510) 848-8880
Facsimile: (510) 848-8118
5 E-mail: Josh@Chanler.com
E-mail: Warren@Chanler.com

6 Attorneys for Plaintiff
7 RUSSELL BRIMER

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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA
12 UNLIMITED CIVIL JURISDICTION
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16 RUSSELL BRIMER,
17 Plaintiff,
18 v.
19 SKF USA, INC.; *et al.*,
20 Defendants.

Case No. RG15776233

[PROPOSED] CONSENT JUDGMENT

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

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Russell Brimer (“Brimer”) and SKF
4 USA, Inc. (“SKF”), with Brimer and SKF each individually referred to as a “Party” and collectively
5 as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 SKF employs ten 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, Health and Safety Code
13 section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that SKF manufactures, imports, sells, or distributes for sale in California,
16 vinyl/PVC tubing containing di(2-ethylhexyl)phthalate (“DEHP”), without first providing the
17 exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a
18 chemical known to the State of California to cause birth defects and other reproductive harm.

19 **1.5 Product Description**

20 SKF’s product that is covered by this Consent Judgment is defined as vinyl/PVC tubing
21 containing DEHP including, without limitation, the *Mityvac Fluid Transfer Pump, MV7241,*
22 *#823341, UPC #6 46541 00399 7,* which is manufactured, imported, distributed, sold and/or offered
23 for sale by SKF in the State of California, hereinafter the “Product[s].”

24 **1.6 Notice of Violation**

25 On March 31, 2015, Brimer served SKF and certain requisite public enforcement agencies
26 with a “60-Day Notice of Violation” (“Notice”) alleging that SKF violated Proposition 65 when they
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1 failed to warn their customers and consumers in California that the *Mityvac Fluid Transfer Pump*,
2 *MV7241*, #823341, UPC #6 46541 00399 7 exposes users to DEHP.

3 **1.7 Complaint**

4 On or about July 1, 2015, Brimer filed the instant action (“Complaint”), naming SKF as
5 defendant for its alleged violations of Health and Safety Code section 25249.6 that are the subject of
6 the Notice.

7 **1.8 No Admission**

8 SKF denies the material, factual, and legal allegations contained in the Notice and Complaint,
9 and maintain that all of the products that they have sold and distributed for sale in California,
10 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
11 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or
12 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
13 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
14 not, however, diminish or otherwise affect SKF’s obligations, responsibilities, and duties under this
15 Consent Judgment.

16 **1.9 Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over SKF as to the allegations in the Complaint, that venue is proper in the County of
19 Alameda, and that this Court has jurisdiction to enter and enforce the provisions of this Consent
20 Judgment.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” means April 15, 2016.

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

24 **2.1 Reformulated Products**

25 Commencing on the Effective Date, and continuing thereafter, SKF shall only purchase for
26 sale, manufacture for sale, import, sell, or distribute for sale in California “Reformulated Products,”
27 or Products that are sold with a clear and reasonable warning pursuant to Section 2.2 below. For
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1 purposes of this Consent Judgment, “Reformulated Products” are products that contain DEHP in
2 concentrations of less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S.
3 Environmental Protection Agency testing methodologies 3580A and 8270C, or any other
4 methodology utilized by federal or state agencies for the purpose of determining the DEHP content in
5 a solid substance.

6 **2.2 Product Warnings**

7 Commencing on the Effective Date, SKF shall provide clear and reasonable warnings for all
8 Products as set forth in subsections 2.2(a) and (b) for all products that do not currently have warnings
9 and that do not qualify as Reformulated Products. Each warning shall be prominently placed with
10 such conspicuousness as compared with other words, statements, designs, or devices as to render it
11 likely to be read and understood by an ordinary individual under customary conditions before
12 purchase or use. Each warning shall be provided in a manner such that the consumer or user
13 understands to which *specific* Product the warning applies, so as to minimize the risk of consumer
14 confusion.

15 **(a) Retail Store Sales.**

16 **(i) Product Labeling.** SKF shall affix a warning to the packaging, labeling, or
17 directly on each Product packaging provided for sale in retail outlets in California that states:

18 **WARNING:** This product contains DEHP, a chemical known
19 to the State of California to cause birth defects and
other reproductive harms.

20 **(ii) Point-of-Sale Warnings.** Alternatively, SKF may provide warning signs in
21 the form below to its customers in California with instructions to post the warnings in close proximity
22 to the point of display of the Products. Such instruction sent to SKF customers shall be sent by
23 certified mail, return receipt requested.

24 **WARNING:** This product contains DEHP, a chemical known
25 to the State of California to cause birth defects
26 and other reproductive harms.
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1 Where more than one Product is sold in proximity to other like items or to those that do not
2 require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement
3 shall be used:¹

4 **WARNING:** The following products contain DEHP, a chemical known
5 to the State of California to cause birth defects and other
6 reproductive harms:

7 [*list products for which warning is required*]

8 **(b) Mail Order Catalog and Internet Sales.** In the event that SKF sells Products via
9 mail order catalog and/or the internet, to customers located in California, after the Effective Date, that
10 are not Reformulated Products, SKF shall provide warnings for such Products sold via mail order
11 catalog or the internet to California residents. Warnings given in the mail order catalog or on the
12 internet shall identify the *specific* Product to which the warning applies as further specified in
13 Sections 2.2(b)(i) and (ii).

14 **(i) Mail Order Catalog Warning.** Any warning provided in a mail order catalog
15 shall be in the same type size or larger than the Product description text within the catalog. The
16 following warning shall be provided on the same page and in the same location as the display and/or
17 description of the Product:

18 **WARNING:** This product contains DEHP, a chemical known
19 to the State of California to cause birth defects and
20 other reproductive harms.

21 Where it is impracticable to provide the warning on the same page and in the same location as
22 the display and/or description of the Product, SKF may utilize a designated symbol to cross reference
23 the applicable warning and shall define the term “designated symbol” with the following language on
24 the inside of the front cover of the catalog or on the same page as any order form for the Product(s):
25

26 _____

27 ¹For purposes of the Settlement Agreement, “sold in proximity” shall mean that the Product and another similar product
28 are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not
reasonably determine which of the two products is subject to the warning sign.

1
2 **WARNING:** Certain products identified with this symbol ▼
3 and offered for sale in this catalog contain DEHP,
4 a chemical known to the State of California to
 cause birth defects and other reproductive harms.

5 The designated symbol must appear on the same page and in close proximity to the display
6 and/or description of the Product. On each page where the designated symbol appears, SKF must
7 provide a header or footer directing the consumer to the warning language and definition of the
8 designated symbol.

9 (ii) **Internet Website Warning.** A warning shall be given in conjunction with the
10 sale of the Products via the internet, which warning shall appear either: (a) on the same web page on
11 which a Product is displayed; (b) on the same web page as the order form for a Product; (c) on the
12 same page as the price for any Product; or (d) on one or more web pages displayed to a purchaser
13 during the checkout process. The following warning statement shall be used and shall appear in any
14 of the above instances adjacent to or immediately following the display, description, or price of the
15 Product for which it is given in the same type size or larger than the Product description text:

16 **WARNING:** This product contains DEHP, a chemical known
17 to the State of California to cause birth defects
18 and other reproductive harms.

19 Alternatively, the designated symbol may appear adjacent to or immediately following the
20 display, description, or price of the Product for which a warning is being given, provided that the
21 following warning statement also appears elsewhere on the same web page, as follows:

22 **WARNING:** This product contains DEHP, a chemical known
23 to the State of California to cause birth defects and
24 other reproductive harms.

25 **3. MONETARY SETTLEMENT TERMS**

26 **3.1 Civil Penalty Payments**

27 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred
28 to in this Consent Judgment, SKF shall pay \$42,000 in civil penalties. Each civil penalty payment

1 shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d) with seventy-
2 five percent (75%) of the funds paid to the California Office of Environmental Health Hazard
3 Assessment (“OEHHA”) and twenty-five percent (25%) of the funds allocated to Brimer.

4 **3.1.1 Initial Civil Penalty**

5 Within ten (10) days of the mutual execution of this Consent Judgement, SKF shall
6 issue a check for its initial civil penalty payment in the amount of \$12,000 to “Adams, Nye, Becht
7 LLP, c/o Barbara R. Adams, Esq.” Adams, Nye, Becht LLP shall provide The Chanler Group with
8 written confirmation within five days of receipt that the funds have been deposited in a trust account.
9 Within five (5) days of the date the Court approves this Consent Judgment, including any unopposed
10 tentative rulings, Adams, Nye, Becht LLP shall issue a check for the initial civil penalty payment to
11 “Russell Brimer, Client Trust Account.” Brimer subsequently will direct 75% of the initial civil
12 penalty to OEHHA.

13 **3.1.2 Final Civil Penalty**

14 On or before December 30, 2016, SKF shall make a final civil penalty payment of
15 \$30,000. Brimer agrees that the final civil penalty payment shall be waived in its entirety if, no later
16 than December 15, 2016, an officer of SKF provides Brimer with written certification that it is no
17 longer offering or distributing for sale in California the Products, or is only offering for sale and
18 distributing for sale in California, Reformulated Products as defined in section 2.1, above. The
19 option to certify reformulation in lieu of making the final civil penalty payment required by this
20 Section is a material term and time is of the essence.

21 **3.2 Reimbursement of Fees and Costs**

22 The parties acknowledge that Brimer and his counsel offered to resolve this dispute without
23 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
24 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
25 other settlement terms had been finalized, SKF expressed a desire to resolve Brimer’s fees and costs.
26 The Parties then attempted to (and did) reach an accord on the compensation due to Brimer and his
27 counsel under general contract principles and the private attorney general doctrine codified at
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1 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
2 execution of this Consent Judgment. SKF shall, within ten (10) days of the mutual execution of this
3 Consent Judgment, issue a check payable to “Adams, Nye, Becht LLP, c/o Barbara R. Adams” in the
4 amount of fees and costs of \$35,600 to be held in trust by Adams, Nye, Becht LLP for The Chanler
5 Group. Adams, Nye, Becht LLP shall provide The Chanler Group with written confirmation within
6 five days of receipt that the funds have been deposited in a trust account. Within five (5) days of the
7 date the Court approves this Consent Judgment, including any unopposed tentative rulings, Adams,
8 Nye, Becht LLP shall issue a check payable to “The Chanler Group” to the address found in Section
9 3.3.1 below.

10 **3.3 Payment Procedures**

11 Except for the final civil penalty payment required by Section 3.1.2, all payments due under
12 this Consent Judgment are to be delivered within ten (10) days of the mutual execution of this
13 Consent Judgment, to Adams, Nye, Becht LLP, and released to The Chanler Group and Brimer
14 within five (5) days of the date the Court approves this Consent Judgment, including any unopposed
15 tentative rulings, according to the following subsections.

16 **3.3.1 Payment Address**

17 All payments and tax documentation for OEHHA, Brimer, and his counsel shall be
18 delivered to:

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

24 **4. CLAIMS COVERED AND RELEASED**

25 **4.1 Brimer’s Public Release of Proposition 65 Claims**

26 Brimer, acting on his own behalf and in the public interest, releases SKF and its parents,
27 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
28 attorneys (“Releasees”) and each entity to whom it directly or indirectly distributes or sells the
Products, including but not limited to its downstream distributors, wholesalers, customers, retailers,

1 franchisers, cooperative members, licensors, and licensees (“Downstream Releasees”) for violations
2 arising under Proposition 65 for unwarned exposures to DEHP from the Products sold by SKF prior
3 to the Effective Date, as set forth in the Notice.

4 **4.2 Brimer’s Individual Release of Claims**

5 Brimer, in his individual capacity only and *not* in his representative capacity, also provides a
6 release to SKF, Releasees, and Downstream Releasees which shall be effective as a full and final
7 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
8 attorneys’ fees, damages, losses, claims, liabilities and demands of Brimer of any nature, character or
9 kind, arising out of alleged or actual exposures to DEHP from the Products sold or distributed for sale
10 by SKF before the Effective Date.

11 **4.3 SKF’s Release of Brimer**

12 SKF, on its own behalf, and on behalf of its past and current agents, representatives,
13 attorneys, successors, and assignees, hereby waives any and all claims against Brimer and his
14 attorneys and other representatives, for any and all actions taken or statements made by Brimer and
15 his attorneys and other representatives, whether in the course of investigating claims, otherwise
16 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

17 **5. COURT APPROVAL**

18 This Consent Judgment is not effective until it is approved and entered by the Court and shall
19 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
20 has been fully executed by the Parties.

21 **6. SEVERABILITY**

22 If, subsequent to the Court’s approval and entry of this Consent Judgment as a judgment, any
23 provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be
24 adversely affected.

25 **7. GOVERNING LAW**

26 The terms of this Consent Judgment shall be governed by the laws of the state of California
27 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
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1 otherwise rendered inapplicable by reason of law generally, or as to the Products, then SKF may
2 provide written notice to Brimer of any asserted change in the law, and shall have no further
3 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
4 so affected. Nothing in this Consent Judgment shall be interpreted to relieve SKF from any
5 obligation to comply with any pertinent state or federal toxics control laws.

6 **8. NOTICE**

7 Unless specified herein, all correspondence and notice required by this Consent Judgment
8 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
9 return receipt requested; or (iii) a recognized overnight courier to the following addresses:

10 For SKF:

11 Barbara R. Adams, Esq.
12 Adams, Nye, Becht, LLP
13 222 Kearny Street, 7th Floor
San Francisco, California 94108

14 For Brimer:

15 The Chanler Group
16 Attn: Proposition 65 Coordinator
17 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

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

20 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

24 **10. POST EXECUTION ACTIVITIES**

25 Brimer agrees to comply with the reporting form requirements referenced in Health and
26 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
27 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
28

1 furtherance of obtaining such approval, Brimer and SKF agree to mutually employ their best efforts,
2 and that of their counsel, to support the entry of this agreement as judgment, and to obtain judicial
3 approval of their settlement in a timely manner. For purposes of this Section, "best efforts" shall
4 include, at a minimum, cooperating with the drafting and filing of the necessary moving papers, and
5 supporting the motion for judicial approval.

6 **11. MODIFICATION**

7 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
8 entry of a modified consent judgment by the Court; or (ii) a successful motion or application of any
9 Party, and the entry of a modified consent judgment by the Court.

10 **12. AUTHORIZATION**

11 The undersigned are authorized to execute this Consent Judgment and have read, understood,
12 and agree to all of the terms and conditions contained herein.

13
14 **AGREED TO:**

AGREED TO:

15 Date: 2/12/2016

Date: _____

16
17 By:  _____

By: _____

18 RUSSELL BRIMER

Poul Jeppesen, President
SKF USA, Inc.

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17
18 **AGREED TO:**

AGREED TO:

19 Date: _____

Date: FEBRUARY 12, 2016

20
21 By: _____
22 RUSSELL BRIMER

By: Theodore P. Barry
Theodore P. Barry, Secretary
SKF USA Inc.

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