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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SANTA CLARA
12 UNLIMITED CIVIL JURISDICTION

13 RUSSELL BRIMER,
14 Plaintiff,
15 v.
16 SUREFIRE, LLC, *et al.*,
17 Defendants.

Case No. 115CV281917
[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 plaintiff Russell Brimer (“Brimer”),
4 and SureFire, LLC (“SureFire”), with Brimer and SureFire each individually referred to as a “Party”
5 and collectively 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 to improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

11 SureFire employs ten or more individuals 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 SureFire manufactures, imports, sells, and distributes for sale in
16 California, earplugs with vinyl/PVC cords that contain di(2-ethylhexyl)phthalate (“DEHP”), and that
17 it does so without first providing the exposure warning required by Proposition 65. DEHP is listed
18 pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects or
19 other reproductive harm.

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are earplugs with vinyl/PVC cords
22 containing DEHP that are manufactured, imported, sold, or distributed for sale in California by
23 SureFire, including, but not limited to, the *EarPro EP5 Sonic Defenders Max Full-Block Earplugs*,
24 *UPC #0 84871 31793 1*, hereinafter the “Products.”

25 **1.6 Notice of Violation**

26 On or about March 31, 2015, Brimer served SureFire, and the requisite public enforcement
27 agencies with a “60-Day Notice of Violation” (“Notice”), alleging that the SureFire violated
28 Proposition 65 when it failed to warn its customers and consumers in California that the Products

1 expose users to DEHP. To the best of the Parties' knowledge, no public enforcer has commenced
2 and is diligently prosecuting an action to enforce the violations alleged in the Notice.

3 **1.7 Complaint**

4 On June 16, 2015, Brimer commenced the instant action ("Complaint"), naming SureFire as a
5 defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of
6 the Notice.

7 **1.8 No Admission**

8 SureFire denies the material, factual, and legal allegations contained in the Notice and
9 Complaint, and maintains that all of the products it has 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, the same being
14 denied by SureFire. This Section shall not, however, diminish or otherwise affect SureFire's
15 obligations, responsibilities, and duties under this Consent Judgment.

16 **1.9 Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over SureFire as to the allegations in the Complaint, that venue is proper in the County of
19 Santa Clara, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
20 Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term "Effective Date" means the date on which
23 the Court grants the motion for approval of the Parties settlement contemplated by Section 5.

24 **2. INJUNCTIVE RELIEF: REFORMULATION**

25 **2.1 Reformulated Products**

26 Commencing on the Effective Date and continuing thereafter, SureFire shall only import for
27 sale, purchase for sale or manufacture for sale in California, "Reformulated Products." For purposes
28 of this Consent Judgment, "Reformulated Products" are defined as Products containing a maximum

1 DEHP concentration of 0.1 percent (1,000 parts per million) as measured by gas chromatography-
2 mass spectrometry using testing method CPSC-CH-C1001-09.3 according to the Standard Operating
3 Procedure for Determination of Phthalates, dated April 1, 2010, of the US Consumer Product Safety
4 Commission, or equivalent methodologies used by state or federal agencies for measuring DEHP
5 content in a solid substance.

6 **3. MONETARY SETTLEMENT TERMS**

7 **3.1 Civil Penalty Payments**

8 Pursuant to Health and Safety Code section 25249.7(b), and in settlement of all claims
9 referred to in the Notice, Complaint, or this Consent Judgment, SureFire will pay \$18,000 in civil
10 penalties in accordance with this Section 3.1. Each civil penalty payment shall be allocated
11 according to Health and Safety Code section 25249.12(c)(1) and (d) with seventy-five percent (75%)
12 of the payment amount remitted to the California Office of Environmental Health Hazard Assessment
13 (“OEHHA”) and the remaining twenty-five percent (25%) of the penalty retained by Brimer.
14 Brimer’s counsel shall be responsible for delivering OEHHA’s portion of any penalty payment(s)
15 made under this Consent Judgment to OEHHA.

16 **3.1.1 Initial Civil Penalty**

17 SureFire shall make an initial civil penalty payment of \$6,000. It shall deliver its
18 payment in a single check made payable to “Russell Brimer, Client Trust Account.”

19 **3.1.2 Final Civil Penalty**

20 On December 31, 2016, SureFire shall make a final civil penalty payment of \$12,000.
21 Pursuant to title 11 California Code of Regulations, section 3203(c), Brimer agrees that the final civil
22 penalty payment shall be waived in its entirety if, no later than December 15, 2016, an officer of
23 SureFire provides Brimer with a written signed declaration certifying that all of the Products it is
24 selling or distributing for sale in California as of the date of its declaration are Reformulated Products
25 as defined by Section 2.1, and that SureFire will continue to only offer Reformulated Products in
26 California in the future. The option to provide a signed declaration certifying completed
27 reformulation in lieu of making the final civil penalty payment required by this Section is a material
28 term, and time is of the essence.

1 **3.2 Adjudication of Brimer’s Attorney’s Fees and Costs**

2 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
3 reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the issue to be
4 resolved after the material terms of this Consent Judgment had been settled, or through an ancillary
5 proceeding including, but not exclusively, mediation. However, upon reaching an agreement on all
6 other terms essential to their settlement, the Parties negotiated SureFire’s reimbursement of the
7 compensation to be paid to Brimer and his counsel under general contract principles and the private
8 attorney general doctrine codified at California Code of Civil Procedure section 1021.5. For all work
9 performed through the mutual execution of this Consent Judgment, including obtaining court
10 approval of the same, SureFire shall pay Brimer \$30,500 as reimbursement for all fees and costs
11 incurred investigating, bringing this matter to SureFire’s attention, litigating, and negotiating a
12 settlement in the public interest.

13 **3.3 Payment Timing; Payments Held in Trust**

14 The initial civil penalty and fee reimbursement payments required by Sections 3.1.1 and 3.2
15 of this Consent Judgment shall be tendered within fifteen (15) days of the date that this Consent
16 Judgment is fully executed by the Parties, and held in trust by SureFire’s counsel until, and
17 disbursed to Brimer’s counsel within five (5) business days after, the Effective Date. SureFire’s
18 counsel shall provide written confirmation to Brimer’s counsel upon its receipt of the settlement
19 funds. In the event the final civil penalty required by Section 3.1.2 is not waived and becomes due
20 to prior to the Effective Date, SureFire shall deliver the payment to its counsel to hold in trust until,
21 and disburse within five (5) business days after the Effective Date.

22 **3.4 Payment Address**

23 All payments required by this Consent Judgment shall be delivered to:

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

1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 Brimer's Public Release of Proposition 65 Claims**

3 Brimer, acting on his own behalf and in the public interest, releases SureFire and its parents,
4 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
5 attorneys ("Releasees") and each entity to whom it directly or indirectly distributes or sells the
6 Products including, but not limited to, it's downstream distributors, wholesalers, customers,
7 retailers, franchisees, cooperative members, licensors and licensees ("Downstream Releasees") for
8 any violation arising under Proposition 65 regarding the failure to warn about exposures to DEHP
9 from Products sold by SureFire prior to the Effective Date, as set forth in the Notice. Compliance
10 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
11 the failure to warn about the health hazards associated with exposures to DEHP in Products sold by
12 SureFire after the Effective Date.

13 **4.2 Brimer's Individual Release of Claims**

14 Brimer, in his individual capacity only and *not* in any representative capacity, also provides a
15 release to SureFire, Releasees, and Downstream Releasees which shall be effective as a full and final
16 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
17 attorneys' fees, damages, losses, claims, liabilities, and demands of Brimer of any nature, character,
18 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
19 exposures to DEHP in Products sold or distributed for sale by SureFire before the Effective Date.

20 **4.3 SureFire's Release of Brimer**

21 SureFire, on its own behalf, and on behalf of its past and current agents, representatives,
22 attorneys, successors, and assignees, hereby waives any and all claims against Brimer and his
23 attorneys and other representatives, for any and all actions taken or statements made by Brimer and
24 his attorneys and other representatives, whether in the course of investigating claims, seeking to
25 enforce Proposition 65 against it in this matter, or with respect to the Products.

26 **4.4 Reservation of all Defenses**

27 This Consent Judgment shall be deemed cumulative to any and all affirmative defenses
28 available to SureFire for any future violation or alleged violation of Proposition 65 relative to the

1 Products. With respect to any alleged violation of this Consent Judgment, SureFire shall be deemed
2 to have complied with all terms of this Consent Judgment if SureFire can prove by a preponderance
3 of the evidence that within the 12 months preceding the violation or alleged violation of this Consent
4 Judgment SureFire tested the Products in accordance with Section 2.1 *supra*.

5 **5. COURT APPROVAL**

6 This Consent Judgment is not effective until it is approved and entered by the Court and shall
7 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
8 has been fully executed by the Parties, or by such later date to which the Parties mutually agree to in
9 writing.

10 **6. SEVERABILITY**

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

14 **7. GOVERNING LAW**

15 The terms of this Consent Judgment shall be governed by the laws of the state of California
16 and apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise
17 rendered inapplicable by reason of law generally, or as to the Products, then SureFire may provide
18 written notice to Brimer of any asserted change in the law, and shall have no further injunctive
19 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
20 so affected.

21 **8. NOTICE**

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

25 For SureFire:

26 John Matthews, Chief Executive Officer
27 SureFire, LLC
28 18300 Mount Baldy Circle
Fountain Valley, CA 92708

1 with a copy to:

2 George Moschopoulos, Esq.
3 The Law Offices of George Moschopoulos, APC
4 34197 Pacific Coast Highway, Suite 100
5 Dana Point, CA 92629

6 Kurt Summers, Esq.
7 Callari & Summers
8 600 Anton Boulevard, 11th Floor
9 Costa Mesa, CA 92626

10 For Brimer:

11 Proposition 65 Coordinator
12 The Chanler Group
13 2560 Ninth Street
14 Parker Plaza, Suite 214
15 Berkeley, CA 94710-2565

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

18 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

22 **10. POST EXECUTION ACTIVITIES**

23 Brimer agrees to comply with the reporting form requirements referenced in Health and
24 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
25 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement,
26 which motion Brimer shall draft and file. In furtherance of obtaining such approval, the Parties agree
27 to mutually employ their best efforts, and those of their counsel, to support the entry of this
28 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
29 purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion,
30 responding to any objection or opposition to the settlement made by any third-party, and appearing at
31 the hearing before the Court, if so requested.

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11. MODIFICATION

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

12. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date: 5/12/2016

Date: MAY 10, 2016

By: 
RUSSELL BRIMER

By: 
Joel Smith, Chief Administration Officer
SUREFIRE, LLC