

1 Brian C. Johnson, State Bar No. 235965
Kimberly Gates, State Bar No. 282369
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 Email: brian@chanler.com
Email: kimberly@chanler.com

6 Attorneys for Plaintiff
7 RUSSELL BRIMER

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO
11 UNLIMITED CIVIL JURISDICTION
12

13 RUSSELL BRIMER,
14 Plaintiff,
15 v.
16 SPECTRUM BRANDS, INC.; *et al.*
17 Defendants.

Case No. CGC-16-552530

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

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

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Spectrum employs ten or more individuals and is a “person in the course of doing
12 business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health
13 and Safety Code § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that Spectrum imports, sells, or distributes for sale in California lanterns
16 and other light products, including but not limited to, flashlights and headlamps, with handles
17 and/or other components that contain di(2-ethylhexyl)phthalate (“DEHP”), without first providing
18 the exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a
19 chemical known to the State of California to cause birth defects or other reproductive harm.

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are lanterns, flashlights, and headlamps,
22 with handles and/or other components containing DEHP, that are manufactured, imported, sold,
23 and/or distributed for sale, in California, by Spectrum, including, but not limited to: (a) the
24 *Rayovac Sportsman LED Lantern, SE3DLNA, UPC #0 12800 51706 0*; (b) the *Rayovac Value*
25 *Bright 15-Lumen 2AA LED Flashlight, 2AA-B RBC, UPC #0 12800 50124 3*; and (c) the *Rayovac*
26 *Indestructible 3AAA 100 Lumen Headlamp, DIYHPhL-B, UPC #0 12800 51561 5*. The categories
27 of products described in this Section 1.5 shall be referred to, hereinafter, collectively, as the
28 “Products.”

1 **1.6 Notices of Violation**

2 On January 29, 2016, Brimer served Spectrum and the requisite public enforcement
3 agencies with a “60-Day Notice of Violation” (“Notice”), alleging that Spectrum violated
4 Proposition 65 by failing to warn its customers and consumers in California of the health hazards
5 associated with exposures to DEHP from its lanterns with vinyl/PVC handles.

6 On March 30, 2017, Brimer served Spectrum and the requisite public enforcement
7 agencies with a Supplemental 60-Day Notice of Violation (“Supplemental Notice”), alleging that
8 Spectrum violated Proposition 65 by failing to warn its customers and consumers in California of
9 the health hazards associated with exposures to DEHP from its flashlights and headlamps.

10 Collectively, the Notice and Supplemental Notice shall be referred to, hereinafter, as the
11 “Notices.” No public enforcer has commenced and is diligently prosecuting an action to enforce
12 the violations alleged in the Notices.

13 **1.7 Complaint**

14 On June 13, 2016, Brimer filed the instant action (“Complaint”), naming Spectrum as a
15 defendant for the alleged violations of Health and Safety Code § 25249.6 that are the subject of the
16 Notices. At the time he filed the Complaint, however, Brimer did not have standing to bring an
17 action to enforce the alleged violations that are the subject of the Supplemental Notice. The
18 Parties specifically intend for this Consent Judgment to cover all of Spectrum’s Products. To this
19 end, they stipulate that, on the Effective Date, or the date that is sixty-one days after Brimer’s
20 service of the Supplemental Notice with no public enforcer having elected to enforce the
21 violations alleged therein, the Complaint shall be deemed amended *nunc pro tunc* to include those
22 additional Spectrum Products and alleged violations of Proposition 65 that are the subject of the
23 Supplemental Notice.

24 **1.8 No Admission**

25 Spectrum denies the material, factual, and legal allegations contained in the Notices and
26 Complaint and maintains that all of the products it sold and distributed for sale in California,
27 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
28 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law,

1 or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as
2 an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This
3 Section shall not, however, diminish or otherwise affect Spectrum’s obligations, responsibilities,
4 and duties under this Consent Judgment.

5 **1.9 Jurisdiction**

6 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
7 jurisdiction over Spectrum as to the allegations in the Complaint, that venue is proper in the
8 County of San Francisco, and that the Court has jurisdiction to enter and enforce the provisions of
9 this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure § 664.6.

10 **1.10 Effective Date**

11 For purposes of this Consent Judgment, the term “Effective Date” means the date this
12 Consent Judgment is approved by the Court.

13 **2. INJUNCTIVE RELIEF**

14 **2.1 Commitment to Reformulate Products or Provide Warnings**

15 Commencing on the Effective Date and continuing thereafter, Spectrum agrees to only
16 manufacture for sale, import for sale, or purchase for sale, in or into California, either: (a)
17 “Reformulated Products,” as described in Section 2.2, below; or (b) Products that contain a clear
18 and reasonable warning, as described in Section 2.3, below.

19 **2.2 Reformulated Products**

20 For purposes of this Consent Judgment, “Reformulated Products” are defined as Products
21 containing DEHP in a maximum concentration of 1,000 parts per million (0.1%) in any accessible
22 component (*i.e.*, any component that may be touched during a reasonably foreseeable use), when
23 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and
24 8270C or equivalent methodologies utilized by federal or state agencies for the purpose of
25 determining DEHP content in a solid substance.
26
27
28

1 **2.3 Clear and Reasonable Warnings**

2 **2.3.1 Product Warnings**

3 Spectrum agrees that as of the Effective Date, all Products it manufactures for sale, imports
4 for sale, or purchases for sale, in or into California, which do not qualify as Reformulated
5 Products, will bear a clear and reasonable warning pursuant to this Section. Spectrum further
6 agrees that the warning will be prominently placed with such conspicuousness, when compared
7 with other words, statements, designs, or devices, as to render it likely to be read and understood
8 by an ordinary individual under customary conditions of use. For purposes of this Consent
9 Judgment, a clear and reasonable warning for the Products shall consist of a warning affixed to the
10 packaging, labeling, hang-tag, or directly to Products sold in California containing the following
11 statement:

12 **WARNING:** This product can expose you to DEHP, a chemical
13 known to the State of California to cause birth defects
14 or other reproductive harm. For more information go
 to www.P65Warnings.ca.gov.

15 Or, for Products that Spectrum knows, or reasonably believes, contain a Proposition 65-listed
16 chemical in addition to DEHP, it may use the following warning statement:

17 **WARNING:** This product can expose you to chemicals including
18 DEHP, which is known to the State of California to
19 cause [cancer and] birth defects or other reproductive harm. For
 more information go to www.P65Warnings.ca.gov.

20 Alternatively, before August 30, 2018, Spectrum shall also have the option to use the
21 following statement:

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

24 Or, for Products that Spectrum knows, or reasonably believes, contain a Proposition 65-listed
25 chemical in addition to DEHP, it may use the following warning statement:

26 **WARNING:** This product contains chemicals known to the
27 State of California to cause [cancer and] birth defects
28 or other reproductive harm.

1 Alternately, in addition to the above, Spectrum may, at any time, use the safe harbor
2 language provided at 27 Cal. Code Regs. secs. 25601 *et seq.*, effective as amended August 30,
3 2016, to warn about the risks of exposure to DEHP (and other chemicals, if applicable) from the
4 Products.

5 **2.3.2** Spectrum represents that all Products that it has manufactured for sale,
6 imported for sale, or purchased for sale in or into California on or after May 10, 2016, which do
7 not qualify as Reformulated Products, bear the following statement:

8 WARNING: This product contains a chemical known to the
9 State of California to cause birth defects or
10 other reproductive harm.

11 Spectrum further represents that warnings described in this subparagraph 2.3.2 have been placed
12 in a manner that complies with the placement requirements of subparagraph 2.3.1 above.

13 **2.3.3 Internet Warnings**

14 In the event that Spectrum sells non-Reformulated Products via its internet website to
15 consumers located in California, the warning shall appear either: (a) on the same web page on
16 which a non-Reformulated Product is displayed and/or described; (b) on the same page as the
17 price for the non-Reformulated Product; or (c) on one or more web pages displayed to a purchaser
18 during the checkout process. Alternatively, a symbol consisting of a black exclamation point in a
19 yellow or white equilateral triangle may appear adjacent to or immediately following the display,
20 description, price, or checkout listing of the Product, provided that the warning statement appears
21 elsewhere on the same web page in a manner that clearly associates it with the Product(s) to which
22 the warning applies.

23 **3. MONETARY SETTLEMENT TERMS**

24 **3.1 Civil Penalty Payment**

25 Pursuant to Health and Safety Code § 25249.7(b), and in settlement of all the claims
26 referred to in the Notices, Complaint and this Consent Judgment, Spectrum agrees to pay \$25,000
27 in civil penalties in accordance with this Section. The civil penalty payment shall be allocated
28 according to Health and Safety Code §§ 25249.12(c)(1) and (d), with seventy-five percent (75%)

1 of the penalty paid to the California Office of Environmental Health Hazard Assessment
2 (“OEHHA”), and the remaining twenty-five percent (25%) of the penalty retained by Brimer.
3 Spectrum shall issue its payment in two checks for the following amounts: (a) “OEHHA” in the
4 amount of \$18,750; and (b) “Russell Brimer” in the amount of \$6,250. Brimer’s counsel shall be
5 responsible for delivering OEHHA’s portion of any penalty payment made under this Consent
6 Judgment.

7 **3.2 Reimbursement of Attorney’s Fees and Costs**

8 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute
9 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
10 the issue to be resolved after the material terms of this Consent Judgment had been settled.
11 Shortly after the other settlement terms had been finalized, the Parties negotiated the compensation
12 due to Brimer and his counsel under general contract principles and the private attorney general
13 doctrine, codified at California Code of Civil Procedure § 1021.5, for all work performed through
14 the mutual execution of this Consent Judgment, and through court approval of the same, but
15 exclusive of fees and costs on appeal, if any. Spectrum shall pay \$40,000 for all fees and costs
16 incurred by Brimer in investigating, bringing this matter to Spectrum’s attention, litigating and
17 negotiating a settlement in the public interest.

18 **3.3 Payment Timing; Payments Held in Trust**

19 All payments due under this Consent Judgment shall be held in trust until such time as the
20 Court approves the Parties’ settlement. Within fifteen (15) business days of the date that this
21 Consent Judgment is fully executed by the Parties, all payments due under this agreement shall be
22 delivered to Spectrum’s counsel, Dentons US LLP (“Dentons”), and held in trust by Dentons,
23 until the Court grants the motion for approval of this Consent Judgment, as contemplated by
24 Section 5. Dentons shall provide Brimer’s counsel with written confirmation, upon its receipt of
25 Spectrum’s settlement payments. Within five business days of the Effective Date, Dentons shall
26 deliver all payments due under this agreement to Brimer’s counsel at the address in Section 3.4
27 below.
28

1 **3.4 Payment Address**

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

3 The Chanler Group
4 Attn: Proposition 65 Controller
5 2560 Ninth Street
6 Parker Plaza, Suite 214
7 Berkeley, CA 94710

8 **4. CLAIMS COVERED AND RELEASED**

9 **4.1 Brimer’s Public Release of Proposition 65 Claims**

10 In consideration of the promises and commitments herein contained, Brimer, on his own
11 behalf and on behalf of his past and current agents, representatives, attorneys, successors, and
12 assignees, and in the public interest, releases Spectrum and its parents, subsidiaries, affiliated
13 entities under common ownership, directors, officers, employees, and attorneys (“Releasees”),
14 and each entity to whom Spectrum directly or indirectly distributes or sells the Products
15 including, without limitation, its downstream customers, distributors, wholesalers, and retailers
16 (“Downstream Releasees”) for any violation arising under Proposition 65 pertaining to the
17 failure to warn about exposures to DEHP from Products manufactured for sale, imported for sale,
18 purchased for sale, sold, or distributed for sale by Spectrum prior to the Effective Date, as set
19 forth in the Notices. Compliance with the terms of this Consent Judgment constitutes
20 compliance with Proposition 65 with respect to exposures to DEHP from Products manufactured
21 for sale, imported for sale, purchased for sale, sold or distributed for sale by Spectrum after the
22 Effective Date.

23 **4.2 Brimer’s Individual Release of Claims**

24 Brimer, in his individual capacity only and *not* in his representative capacity, also provides
25 a release to Spectrum, Releasees, and Downstream Releasees which shall be effective as a full and
26 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
27 attorneys’ fees, damages, losses, claims, liabilities and demands of Brimer of any nature, character
28 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
 exposures to DEHP in Products manufactured for sale, imported for sale, purchased for sale, sold
 or distributed for sale by Spectrum before the Effective Date.

1 **4.3 Spectrum’s Release of Brimer**

2 Spectrum, on its own behalf, and on behalf of its past and current agents, representatives,
3 attorneys, successors, and assignees, hereby waives any and all claims against Brimer and his
4 attorneys and other representatives, for any and all actions taken or statements made by Brimer
5 and his attorneys and other representatives, whether in the course of investigating claims,
6 otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the
7 Products.

8 **5. COURT APPROVAL**

9 This Consent Judgment is not effective until it is approved and entered by the Court and
10 shall be null and void if it is not approved and entered by the Court within one year after it has
11 been fully executed by the Parties, or within such additional time as the Parties may agree to in
12 writing.

13 **6. SEVERABILITY**

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

17 **7. GOVERNING LAW**

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

24 **8. NOTICE**

25 Unless specified herein, all correspondence and notice required by this Consent Judgment
26 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
27 return receipt requested; or (iii) a recognized overnight courier to the following addresses:
28

1 For Spectrum:

2 General Counsel
3 Spectrum Brands, Inc.
4 3001 Deming Way
5 Middleton, WI 53562

6 with a copy to Spectrum's counsel:

7 Sarah Choi, Esq.
8 Dentons US LLP
9 1999 Harrison St., Suite 1300
10 Oakland, CA 94612

11 For Brimer:

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

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

19 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

23 **10. POST EXECUTION ACTIVITIES**

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

1 **11. MODIFICATION**

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

5 **12. COUNTERPARTS**

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

9 **13. AUTHORIZATION**

10 The undersigned are authorized to execute this Consent Judgment and acknowledge that
11 they have read, understand, and agree to all of the terms and conditions contained herein.

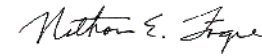
12
13 **AGREED TO:**

AGREED TO:

14 Date: 5/2/2017

Date: 4/24/2017 | 10:26 AM CDT

15
16 By:  _____
17 RUSSELL BRIMER

By:  _____
Nathan Fazio, Esq., General Counsel and
Secretary
SPECTRUM BRANDS, INC.