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6 RUSSELL BRIMER

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2011-01-19 11:13
D. Weber, Deputy Clerk

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF CONTRA COSTA
10 UNLIMITED CIVIL JURISDICTION
11

12 RUSSELL BRIMER,

13 Plaintiff,

14 v.

15 POWERMAX BATTERY (U.S.A.) INC.; and
16 DOES 1-150, inclusive,

17 Defendants.

Case No. C10-00171

REVISED ~~PROPOSED~~ JUDGMENT

Date: January 19, 2011

Time 9:00 a.m.

Dept.: 33

Judge: Hon. Steve Austin

Action Filed: January 21, 2010

1 Now come Plaintiff RUSSELL BRIMER and Defendant POWERMAX BATTERY (U.S.A.)
2 INC., having agreed through their respective counsel that judgment be entered pursuant to the terms
3 of the Proposition 65 settlement agreement in the form of a Consent Judgment executed by the
4 above-referenced parties, and following issuance of an order approving this Proposition 65 settlement
5 agreement on January 19, 2011.

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Health & Safety
7 Code § 25249.7(f)(4) and Code of Civil Procedure §664.6, judgment is entered in accordance with
8 the terms of the Revised Consent Judgment attached hereto as Exhibit 1. By stipulation of the
9 parties, the Court will retain jurisdiction to enforce the settlement under Code of Civil Procedure §
10 664.6.

11 **IT IS SO ORDERED.**

12 Dated: MAR 01 2011

STEVEN K. AUSTIN

Judge of the Contra Costa County Superior Court

Exhibit 1

1 Clifford A. Chanler, State Bar No. 135534
2 Jennifer Henry, State Bar No. 208221
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Tel: (510) 848-8880
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Attorneys for Plaintiff
RUSSELL BRIMER

7 Andrew Lichtman, State Bar No. 71682
8 ATTORNEY AT LAW
9 255 South Grand Avenue #215
10 Los Angeles, CA 90012
11 Telephone: (949) 586-6666

Attorneys for Defendant
POWERMAX BATTERY (U.S.A.) INC.

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF CONTRA COSTA
14 UNLIMITED CIVIL JURISDICTION
15

16 RUSSELL BRIMER,
17)
18) Plaintiff,

19 v.)

20 POWERMAX BATTERY (U.S.A.) INC.; and)
21 DOES 1-150, inclusive,)
22) Defendants.)

Case No. C10-00171

**[PROPOSED] REVISED CONSENT
JUDGMENT**

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Powermax Battery (U.S.A.) Inc.**

3 This Consent Judgment is entered into by and between Russell Brimer, who was and is,
4 acting in the interest of the general public in California, (hereinafter “Brimer”) and Powermax
5 Battery (U.S.A.) Inc. (hereinafter “Powermax”), with Brimer and Powermax collectively referred to
6 as the “Parties.” The Parties also intend for this Consent Judgment to provide, to the maximum
7 extent permitted by law, *res judicata* and/or collateral estoppel protection for Defendant against any
8 and all other claims based upon the same or similar allegations to the Products and the Listed
9 Chemical. This Consent Judgment was revised on or about December 10, 2010, in consultation
10 with the California Office of the Attorney General for the Consent Judgment to unconditionally
11 require that Powermax either reformulate the Products (as defined in Section 1.5 below) or provide
12 Proposition 65-compliant warnings as described in Section 2 below.

13 **1.2 Plaintiff**

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

17 **1.3 Defendant**

18 The Parties disagree whether Powermax is or has been, for purposes of this case, a person in
19 the course of doing business under the Safe Drinking Water and Toxic Enforcement Act of 1986,
20 California Health & Safety Code § 25249.6 *et seq.* (“Proposition 65”); i.e. whether Powermax has
21 employed 10 or more persons, including full time and part-time employees. The last time
22 Powermax employed more than nine persons was before July, 2009. The parties also disagree
23 whether any such past time that Powermax employed more than nine persons was a time material to
24 this case, such that Brimer could enforce Proposition 65 against Powermax in this case solely on the
25 basis of those times.

26 **1.4 General Allegations**

27 Brimer alleges that, in addition to Powermax having sufficient employees to be subject to
28 Proposition 65, Powermax has manufactured, distributed and/or sold in the State of California

1 flashlights that exposed people to an excessive amount of lead such that it was required to provide
2 Proposition 65 warnings on its products. Lead is listed pursuant to Proposition 65 as a chemical
3 known to the State of California to cause birth defects and other reproductive harm. Lead is
4 referred to herein as the “Listed Chemical.”

5 **1.5 Product Description**

6 The products that are covered by this Consent Judgment are defined as follows: flashlights
7 containing the Listed Chemical such as, but not limited to, *ACDelco Industrial Flashlight, Item*
8 *#AC305/848026 (#6 83969 99243 4)* and *ACDelco Industrial Flashlight, Item #AC303*. All such
9 flashlights containing the Listed Chemical are referred to hereinafter as the “Products”.

10 **1.6 Notice of Violation**

11 On or about September 30, 2009, Brimer served Powermax and various public enforcement
12 agencies with documents entitled “60-Day Notice of Violation” (“Notice”) that provided Powermax
13 and public enforcers with notice of alleged violations of Proposition 65 for failing to warn
14 consumers that the Products that Powermax sold exposed users in California to the Listed Chemical.
15 To the best of the parties’ knowledge, no public enforcer (such as an attorney general) has diligently
16 prosecuted the allegations set forth in the Notices. After receipt of the Notice, Powermax
17 determined that it was not required to sell the Products in California with a Proposition 65 warning
18 because it employed fewer than 10 persons.

19 **1.7 Complaint**

20 On or about January 21, 2010, Brimer, in the Superior Court in and for the County of Contra
21 Costa, filed a complaint against Powermax Battery (U.S.A.) Inc. alleging violations of Proposition
22 65 by Powermax based on the alleged exposures to the Listed Chemical contained in the Products
23 manufactured, distributed and/or offered for sale in California by Powermax (“Complaint”). On or
24 about March 24, 2010, Brimer effected service of the complaint on Powermax.

25 **1.8 No Admission**

26 Powermax denies the material, factual and legal allegations contained in Brimer’s Notice
27 and maintains that all Products that it has manufactured, sold and/or distributed in California have
28 been and are in compliance with all laws. Nothing in this Consent Judgment shall be construed as

1 an admission by Powermax of any fact, finding, issue of law, or violation of law; nor shall
2 compliance with this Consent Judgment constitute or be construed as an admission by Powermax of
3 any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by
4 Powermax. However, this section shall not diminish or otherwise affect Powermax's obligations,
5 responsibilities, or duties under this Consent Judgment.

6 **1.9 Consent to Jurisdiction**

7 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
8 jurisdiction over Powermax as to the allegations contained in the Complaint, that venue is proper in
9 the County of Contra Costa, and that this Court has jurisdiction to enter and enforce the provisions
10 of this Consent Judgment.

11 **1.10 Effective Date**

12 For purposes of this Consent Judgment, except as otherwise noted, the term "Effective Date"
13 shall mean July 30, 2010.

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

15 **2.1 Product Warnings**

16 Beginning on January 14, 2011 (the "Compliance Date"), Powermax shall not sell, ship, or
17 offer to be shipped for sale in California any Products containing lead unless at the time of such
18 selling, shipping, or offering to sell, such Products are either : 1) sold or shipped with one of the
19 clear and reasonable warnings required by the law at that time under Proposition 65 in compliance
20 with the warnings set forth in subsections 2.1(a) and (b) below; or 2) in compliance with the
21 reformulation standard set forth in Section 2.3. In achieving either option, Powermax shall be
22 deemed in due compliance with Proposition 65. Beginning with the Compliance Date, each
23 downstream customer of Powermax also shall be deemed in due compliance with Proposition 65
24 regarding such Products to the extent that either option has been achieved at the time of its selling,
25 shipping, or offering any of them for sale in California.

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

27 Each warning shall be prominently placed with such conspicuousness as compared with
28 other words, statements, designs, or devices as to render it likely to be read and understood by an

1 ordinary individual under customary conditions before purchase or use. Each warning shall be
2 provided in a manner such that the consumer or user understands to which specific Product the
3 warning applies.

4 (i) **Product Labeling.** Powermax may perform its warning obligation
5 by ensuring that a warning is affixed to the packaging, labeling, or directly on each Product sold in
6 retail outlets in the State of California by Powermax or its agents, that states:

7 **WARNING:** This product contains Lead, a
8 chemical known to the State of
9 California to cause birth defects and
other reproductive harm.

10 (ii) **Point-of-Sale Warnings.** Powermax may, alternatively, perform its
11 warning obligations by ensuring that signs are posted at retail outlets in the State of California
12 where the Products are sold. Point-of-sale warnings shall be provided through one or more signs
13 posted in close proximity to the point of display of the Products that states:

14 **WARNING:** This product contains Lead, a chemical
15 known to the State of California to
16 cause birth defects and other
reproductive harm.

17 Where more than one Product is sold in proximity to other like items or to those that do not
18 require a warning (e.g., Reformulated Products as defined in Section 2.3), the following statement
19 must be used:

20 **WARNING:** The following products contain Lead, a
21 chemical known to the State of
22 California to cause birth defects and
other reproductive harm.

[list products]

23 (b) **Mail Order Catalog and Internet Sales.** In the event that Powermax sells
24 its Products via catalog or internet to customers located in California after the Compliance Date,
25 Powermax shall provide a warning: (i) in the mail order catalog; or (ii) on the website. Warnings
26 given in the mail order catalog or on the website shall identify the specific Product to which the
27 warning applies as further specified in Sections 2.1(b)(i) and (ii).

28 (i) **Mail Order Catalog Warning.** Any warning provided in a mail

1 order catalog must be in the same type size or larger than the Product description text within the
2 catalog. The following warning shall be provided on the same page and in the same location as the
3 display and/or description of the Product:

4 **WARNING:** This product contains Lead, a chemical
5 known to the State of California to
6 cause birth defects and other
reproductive harm.

7 Where it is impracticable to provide the warning on the same page and in the same location
8 as the display and/or description of the Product, Powermax may utilize a designated symbol (▼) to
9 cross reference the applicable warning and shall define the term "designated symbol" with the
10 following language on the inside of the front cover of the catalog or on the same page as any order
11 form for the Product(s):

12 **WARNING:** Certain products identified with this
13 symbol ▼ and offered for sale in this
14 catalog contain Lead, a chemical
15 known to the State of California to
cause birth defects and other
reproductive harm.

16 The designated symbol must appear on the same page and in close proximity to the display
17 and/or description of the Product. On each page where the designated symbol appears, Powermax
18 must provide a header or footer directing the reseller to the warning language and definition of the
19 designated symbol.

20 If Powermax elects to provide warnings in the mail order catalog, then the warnings must be
21 included in all catalogs offering to sell one or more Products printed after the date of entry of this
22 Consent Judgment.

23 (ii) **Internet Website Warning.** A warning may be given in conjunction
24 with the sale of the Product via the Internet, provided it appears either: (a) on the same web page on
25 which the Product is displayed; (b) on the same web page as the order form for the Product; (c) on
26 the same page as the price for any Product; or (d) on one or more web pages displayed to a
27 purchaser during the checkout process. The following warning statement shall be used and shall
28 appear in any of the above instances adjacent to or immediately following the display, description,

1 or price of the Product for which it is given in the same type size or larger than the Product
2 description text:

3 **WARNING:** This product contains Lead, a chemical
4 known to the State of California to
5 cause birth defects and other
6 reproductive harm.

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

10 **WARNING:** Products identified on this page with
11 the following symbol contain Lead, a
12 chemical known to the State of
13 California to cause birth defects and
14 other reproductive harm: ▼

15 **2.2 Exceptions To Warning Requirements**

16 The warning requirements set forth in Section 2.1 shall not apply to Reformulated Products
17 (as defined in Section 2.3 below).

18 **2.3 Reformulation Standards**

19 Reformulated Products are defined as those that contain no more than 100 parts per million
20 ("ppm") of lead in any component that may be handled, touched or mouthed by a consumer, when
21 analyzed pursuant to Environmental Protection Agency ("EPA") testing methodologies 3050B and
22 6010B or any other method allowed by a federal or state agency to assess the content of lead in a
23 solid substance and which yield less than 1.0 micrograms of lead when using a wipe test pursuant to
24 NIOSH Test Method 9100.

25 **3. MONETARY PAYMENTS**

26 In settlement of all claims related to the Products and Listed Chemical referred to in the
27 Complaint, and this Consent Judgment, pursuant to Health & Safety Code § 25249.7(b), Powermax
28 shall pay a civil penalty totaling \$2,000 as follows: Powermax shall issue two separate checks for
29 the Civil Penalty payment pursuant to Health & Safety Code § 25192: (a) one check made payable
30 to "The Chanler Group in Trust For The State of California's Office of Environmental Health
31 Hazard Assessment (OEHHA)" in the amount of \$1,500, representing 75% of the total penalty; and

1 (b) one check to "The Chanler Group in Trust for Russell Brimer" in the amount of \$500,
2 representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments:
3 (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Russell Brimer,
4 whose information shall be provided five (5) calendar days before the payment is due.

5 Payment shall be delivered to Brimer's counsel on or before August 6, 2010 at the following
6 address:

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

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

13 **4.1 Attorney Fees and Costs.**

14 The Parties reached an accord on the compensation due to Brimer and his counsel under the
15 private attorney general doctrine and principles of contract law. Under these legal principles,
16 Powermax shall reimburse Brimer's counsel for fees and costs, incurred as a result of investigating,
17 bringing this matter to Powermax's attention, negotiating a settlement in the public interest, and
18 obtaining court approval of the settlement. Powermax shall pay Brimer and his counsel \$23,000 for
19 all attorneys' fees, expert and investigation fees, and related costs. The payment shall be issued in a
20 third separate check made payable to "The Chanler Group" and shall be delivered on or before
21 August 6, 2010, at the following address:

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

27 Powermax shall issue a separate 1099 for fees and cost paid in the amount of \$23,000 to The
28 Chanler Group, 2560 Ninth Street, Parker Plaza, Suite 214, Berkeley, California, 94710 (EIN: 94-
3171522).

1 **5. RELEASE OF ALL CLAIMS**

2 **5.1 Brimer's Release of Powermax**

3 In further consideration of the promises and agreements herein contained, and for the
4 payments to be made pursuant to Sections 3 and 4 above, Brimer on behalf of himself and in his
5 representative capacity, his past and current agents, representatives, attorneys, successors, and/or
6 assignees, and in the interest of the general public, hereby waives all rights to institute or participate
7 in, directly or indirectly, any form of legal action and releases, as of the Compliance Date, all
8 claims, including, without limitation, all actions, and causes of action, in law or in equity, suits,
9 liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses (including, but
10 not limited to, investigation fees, expert fees, and attorney's fees) of any nature whatsoever,
11 whether known or unknown, fixed or contingent (collectively "claims"), against Powermax and its
12 manufacturers, importers, wholesalers, licensors, licensees, auctioneers, retailers, distributors,
13 franchisees, dealers, customers, owners, purchasers, users, parent companies, predecessors,
14 successors, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys,
15 representatives, shareholders, agents, and employees, specifically including, but not limited to, Big
16 Lots Stores, Inc., 99 Cent Only Stores, Inc., Dollar Tree, Inc., and Fry's Electronics, Inc.
17 (collectively "Releasees"), that arise under Proposition 65, as such claims relate to Powermax's
18 and/or the Releasees' alleged failure to warn about exposures to the Listed Chemical contained in
19 the Products.

20 **5.2 Powermax's Release of Brimer**

21 Powermax, on behalf of itself and its Releasees, waives any and all claims against Brimer,
22 his attorneys, and other representatives for any and all actions taken by Brimer and his attorneys and
23 other representatives, whether in the course of investigating claims or otherwise seeking
24 enforcement of Proposition 65 against them in this matter, and/or with respect to the Products.

25 **6. COURT APPROVAL**

26 This Consent Judgment is not effective until it is approved and entered by the Court and
27 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
28 after it has been fully executed by all Parties, in which event any monies that have been provided to

1 Brimer, or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within fifteen
2 (15) days after receiving written notice from Powermax that the one year period has expired.

3 **7. SEVERABILITY**

4 If, subsequent to the execution of this Revised Consent Judgment, any of the provisions of
5 this Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
6 provisions remaining shall not be adversely affected, subject to the monetary refund provision of
7 Section 6 above, if applicable.

8 **8. GOVERNING LAW**

9 The terms of this Consent Judgment shall be governed by the laws of the State of California
10 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
11 is otherwise rendered inapplicable by reason of law generally, or as to the Products specifically,
12 then Powermax may provide written notice to Brimer of any asserted change in the law, and shall
13 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that,
14 the Products are so affected.

15 **9. NOTICES**

16 Unless specified herein, all correspondence and notices required to be provided pursuant to
17 this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
18 registered or certified mail, return receipt requested; or (ii) overnight courier on any party by the
19 other party at the following addresses:

20 For Powermax:

21 Andrew Lichtman, Esq.
22 Attorney at Law
23 255 South Grand Avenue #215
Los Angeles, CA 90012

24 For Brimer:

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

1 Any party, from time to time, may specify in writing to the other party a change of address
2 to which all notices and other communications shall be sent. The Parties intend and agree that this
3 Consent Judgment shall be given full effect for purposes of precluding claims regarding the
4 Products against Powermax or the Releasees under Proposition 65 as covered under the release in
5 Section 5 of this Consent Judgment.

6 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

11 Brimer agrees to comply with the reporting form requirements referenced in California
12 Health & Safety Code §25249.7(f) and any applicable provisions of the Occupational Safety Health
13 Act (“OSH Act”).

14 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

15 The Parties acknowledge that, pursuant to Health & Safety Code §25249.7 and any
16 applicable provisions of the OSH Act, a noticed motion is required to obtain judicial approval of
17 this Consent Judgment. In furtherance of obtaining such approval, Brimer, Powermax and their
18 respective counsel agree to mutually employ their best efforts to support the entry of this agreement
19 as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely
20 manner. Brimer shall prepare and file all documents necessary to obtain court approval of this
21 Consent Judgment. For purposes of this paragraph, best efforts shall include, at a minimum,
22 cooperating on the drafting and filing any papers in support of the required motion for judicial
23 approval.

24 **13. MODIFICATION**

25 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
26 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of
27 any party and entry of a modified consent judgment by the Court.

1 **14 AUTHORIZATION**


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

4 **AGREED TO:**

AGREED TO:

5 Date: 12-13-10

Date: _____

6
7
8 By:  _____

By: _____

9 Russell Brimer

_____, President

10 POWERMAX BATTERY (U.S.A.) INC.

11
12 **IT IS SO ORDERED.**

13
14 Date: _____

15 JUDGE OF THE SUPERIOR COURT

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14 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 hereof.

AGREED TO:

AGREED TO:

Date: _____

Date: 12/13/2010

By:  _____

By:  _____

Russell Brimer

, President

POWERMAX BATTERY (U.S.A.) INC

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT