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 14 Los Angeles, CA 90012
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16 Attorneys for Defendant
 17 POWERMAX BATTERY (U.S.A.) INC.

18 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 19 FOR THE COUNTY OF CONTRA COSTA
 20 UNLIMITED CIVIL JURISDICTION

21 RUSSELL BRIMER,
 22 Plaintiff.

23 v.

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

26 Defendants.

27 Case No. C10-00171

28 **[PROPOSED] CONSENT JUDGMENT**

1 **I. 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.

10 **1.2 Plaintiff**

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

14 **1.3 Defendant**

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

23 **1.4 General Allegations**

24 Brimer alleges that, in addition to Powermax having sufficient employees to be subject to
25 Proposition 65, Powermax has manufactured, distributed and/or sold in the State of California
26 flashlights that exposed people to an excessive amount of lead such that it was required to provide
27 Proposition 65 warnings on its products. Lead is listed pursuant to Proposition 65 as a chemical
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1 known to the State of California to cause birth defects and other reproductive harm. Lead is
2 referred to herein as the "Listed Chemical."

3 **1.5 Product Description**

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

8 **1.6 Notice of Violation**

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

17 **1.7 Complaint**

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

23 **1.8 No Admission**

24 Powermax denies the material, factual and legal allegations contained in Brimer's Notice
25 and maintains that all Products that it has manufactured, sold and/or distributed in California have
26 been and are in compliance with all laws. Nothing in this Consent Judgment shall be construed as
27 an admission by Powermax of any fact, finding, issue of law, or violation of law; nor shall
28 compliance with this Consent Judgment constitute or be construed as an admission by Powermax of

1 any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by
2 Powermax. However, this section shall not diminish or otherwise affect Powermax's obligations,
3 responsibilities, or duties under this Consent Judgment.

4 **1.9 Consent to Jurisdiction**

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

9 **1.10 Effective Date**

10 For purposes of this Consent Judgment, the term "Effective Date" shall mean July 30, 2010

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

12 **2.1 Product Warnings**

13 After the Effective Date, whenever Powermax becomes subject to Proposition 65 in that it
14 has 10 or more employees (including full-time and part-time employees), if ever, Powermax shall
15 not sell, ship, or offer to be shipped for sale in California any Products containing lead unless at the
16 time of such selling, shipping, or offering to sell, such Products are sold or shipped with one of the
17 clear and reasonable warnings required by the law at that time under Proposition 65, where
18 compliance with the warnings set forth in subsections 2.1(a) and (b) below, or compliance with the
19 reformulation standard set forth in Section 2.3 below shall be deemed due compliance with that law.

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

21 Each warning shall be prominently placed with such conspicuousness as compared with
22 other words, statements, designs, or devices as to render it likely to be read and understood by an
23 ordinary individual under customary conditions before purchase or use. Each warning shall be
24 provided in a manner such that the consumer or user understands to which specific Product the
25 warning applies.

26 **(i) Product Labeling** Powermax may perform its warning obligation

27 by ensuring that a warning is affixed to the packaging, labeling, or directly on each Product sold in
28 retail outlets in the State of California by Powermax or its agents, that states:

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

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

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

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

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

[list products]

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

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

1 **WARNING:**

This product contains Lead, a chemical known to the State of California to cause birth defects and other reproductive harm.

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

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

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11 The designated symbol must appear on the same page and in close proximity to the display
12 and/or description of the Product. On each page where the designated symbol appears, Powermax
13 must provide a header or footer directing the reseller to the warning language and definition of the
14 designated symbol.
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16 If Powermax elects to provide warnings in the mail order catalog, then the warnings must be
17 included in all catalogs offering to sell one or more Products printed after the date of entry of this
18 Consent Judgment.

19 (ii) **Internet Website Warning.** A warning may be given in conjunction
20 with the sale of the Product via the Internet, provided it appears either: (a) on the same web page on
21 which the Product is displayed; (b) on the same web page as the order form for the Product; (c) on
22 the same page as the price for any Product; or (d) on one or more web pages displayed to a
23 purchaser during the checkout process. The following warning statement shall be used and shall
24 appear in any of the above instances adjacent to or immediately following the display, description,
25 or price of the Product for which it is given in the same type size or larger than the Product
26 description text:
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1 (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Russell Brimer,
2 whose information shall be provided five (5) calendar days before the payment is due.

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

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

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

10 **4.1 Attorney Fees and Costs.**

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

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

23 Powermax shall issue a separate 1099 for fees and cost paid in the amount of \$23,000 to The
24 Chanler Group, 2560 Ninth Street, Parker Plaza, Suite 214, Berkeley, California, 94710 (EIN: 20-
25 3929984).

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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 all claims, including, without
8 limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands,
9 obligations, damages, costs, fines, penalties, losses, or expenses (including, but not limited to,
10 investigation fees, expert fees, and attorney's fees) of any nature whatsoever, whether known or
11 unknown, fixed or contingent (collectively "claims"), against Powermax and its manufacturers,
12 importers, wholesalers, licensors, licensees, auctioneers, retailers, distributors, franchisees, dealers,
13 customers, owners, purchasers, users, parent companies, predecessors, successors, corporate
14 affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives,
15 shareholders, agents, and employees, specifically including, but not limited to Big Lots Stores, Inc.,
16 99 Cent Only Stores, Inc., Dollar Tree, Inc., and Fry's Electronics, Inc. (collectively "Releasees"),
17 that arise under Proposition 65, as such claims relate to Powermax's and/or the Releasees' alleged
18 failure to warn about exposures to the Listed Chemical contained in the Products.

19 **5.2 Powermax's Release of Brimer**

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

24 **6. COURT APPROVAL**

25 This Consent Judgment is not effective until it is approved and entered by the Court and
26 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
27 after it has been fully executed by all Parties, in which event any monies that have been provided to
28 Brimer, or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within fifteen

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1 (15) days after receiving written notice from Powermax that the one year period has expired.

2 **7. SEVERABILITY**

3 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
4 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions
5 remaining shall not be adversely affected.

6 **8. GOVERNING LAW**

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

13 **9. NOTICES**

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

18 For Powermax:

19 Andrew Lichtman, Esq
20 Attorney at Law
21 255 South Grand Avenue #215
Los Angeles, CA 90012

22 For Brimer:

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

27 Any party, from time to time, may specify in writing to the other party a change of address
28 to which all notices and other communications shall be sent. The Parties intend and agree that this

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1 Consent Judgment shall be given full effect for purposes of precluding claims regarding the
2 Products against Powermax or the Releasees under Proposition 65 as covered under the release in
3 Section 5 of this Consent Judgment.

4 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

9 Brimer agrees to comply with the reporting form requirements referenced in California
10 Health & Safety Code §25249 7(f) and any applicable provisions of the Occupational Safety Health
11 Act ("OSH Act").

12 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

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

22 **13. MODIFICATION**

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

26 **14. AUTHORIZATION**

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


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AGREED TO:

Date: 8-3-10

By: 

Russell Brimer

AGREED TO:

Date: 8/2/2010

By: 

Neville Lin, President

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

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

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