

**FILED**

**SEP - 3 2009**

KIM TURNER, Court Executive Officer  
MARIN COUNTY SUPERIOR COURT

*By: J. Dale, Deputy*

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5 Attorneys for Defendant  
PANACEA PRODUCTS CORPORATION

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11 Attorneys for Plaintiff  
RUSSELL BRIMER

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF MARIN

16 RUSSELL BRIMER,  
17 Plaintiff,

18 v.

19 PANACEA PRODUCTS CORPORATION;  
20 MICHAELS STORES, INC., and DOES 1  
through 150, inclusive,

21 Defendants.

Case No. CIV 092609

ASSIGNED FOR ALL PURPOSES TO:  
JUDGE MICHAEL B. DUFFICY  
DEPARTMENT B

**[PROPOSED] JUDGMENT  
PURSUANT TO TERMS OF  
CONSENT JUDGMENT**

Date: August 27, 2009  
Time: 9:00 a.m.  
Action Filed: May 28, 2009

1 In the above-entitled action, Plaintiff RUSSELL BRIMER and Defendant PANACEA  
2 PRODUCTS CORPORATION, having agreed through their respective counsel that judgment be  
3 entered pursuant to the terms of the Proposition 65 settlement agreement in the form of a [Proposed]  
4 Consent Judgment entered into by the parties, and following issuance of an order approving this  
5 Proposition 65 settlement agreement and entering the Consent Judgment on August 27, 2009.

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Code of Civil  
7 Procedure §664.6, judgment is entered in accordance with the terms of the Consent Judgment  
8 attached hereto as Exhibit 1.

9  
10 IT IS SO ORDERED.

11 Dated: SEP - 3 2009

12 W. CRAIG B. DUFFICY  
13 JUDGE OF THE SUPERIOR COURT  
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# **Exhibit 1**

1 ROBERT L. FALK (BAR NO. 142007)  
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11 Attorneys for Plaintiff  
RUSSELL BRIMER

12  
13  
14  
15 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
16 COUNTY OF MARIN

17  
18 RUSSELL BRIMER,  
19 Plaintiff,  
20 v.  
21 PANACEA PRODUCTS CORPORATION,  
MICHAELS STORES, INC., and DOES 1  
22 through 150, inclusive,  
23 Defendants.

Case No. CIV092609  
[PROPOSED] CONSENT  
JUDGMENT  
Health & Safety Code §25249.6  
Department: B  
Judge: Hon. Michael Dufficy  
Action Filed: May 28, 2009

1       **1. INTRODUCTION**

2               **1.1 Russell Brimer and Panacea Products Corporation**

3               This Consent Judgment is entered into by and between plaintiff Russell Brimer (“Brimer” or  
4               “Plaintiff”) and defendant Panacea Products Corporation (“Panacea” or “Defendant”), with Plaintiff  
5               and Panacea collectively referred to as the “parties.”

6               **1.2 Plaintiff**

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

10              **1.3 Defendants**

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

14              **1.4 General Allegations**

15              Brimer generally alleges that Panacea has manufactured, distributed and/or sold certain color-  
16              coated products containing lead without the requisite health hazard warnings allegedly required by  
17              Proposition 65. Lead is listed as a reproductive toxicant pursuant to Proposition 65 and is referred to  
18              hereinafter as the “Listed Chemical.”

19              **1.5 Product Description**

20              The products that are addressed in this Consent Judgment are defined as: (a) color-coated  
21              metal wire used for crafts or floral arrangements (collectively, the “Products”), and (b) colored  
22              waterproof tape (“Additional Products”). All Products and Additional Products are collectively  
23              referred to hereinafter as the “Covered Products.”

24              **1.6 Notices of Violation**

25              On February 24, 2009 and May 6, 2009 respectively, Brimer served Panacea and various  
26              public enforcement agencies with a “60-Day Notice of Violation” and “Supplemental 60-Day Notice  
27              of Violation (collectively, the “Notices”) that respectively provided Panacea and public enforcers  
28              with notice of alleged violations of Health & Safety Code §25249.6 for failing to warn consumers

1 that Products and Additional Products that Panacea sold exposed users in California to the Listed  
2 Chemical. No public enforcer has of the Effective Date diligently prosecuted the allegations set forth  
3 in the February 24, 2009 Notice.

4 **1.7 Complaint**

5 On May 28, 2009, Brimer, who was and is acting in the interest of the general public in  
6 California, filed a complaint in the Superior Court in and for the County of Marin alleging violations  
7 of Health & Safety Code §25249.6 by Panacea based on the alleged exposures to lead contained in  
8 the Products distributed for sale in California by Panacea. The case number for the action is  
9 CIV092609 (“Complaint” or “Action”). Provided that no authorized public prosecutor has then filed  
10 suit against Panacea based on the Supplemental Notice, the Complaint shall be deemed amended as  
11 of July 6, 2009 to include Brimer’s allegations as to the Listed Chemical in the Additional Products.

12 **1.8 No Admission**

13 Panacea denies the material, factual and legal allegations contained in Brimer’s Notice and  
14 Complaint and maintain that all Covered Products that it has sold and distributed in California have  
15 been and are in compliance with all applicable laws. Nothing in this Consent Judgment shall be  
16 construed as an admission by Panacea of any fact, finding, issue of law, or violation of law; nor shall  
17 compliance with this Consent Judgment constitute or be construed as an admission by Panacea of any  
18 fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Panacea.  
19 However, this Section shall not diminish or otherwise affect Panacea’s obligations, responsibilities,  
20 and duties under this Consent Judgment.

21 **1.9 Consent to Jurisdiction**

22 For purposes of this Consent Judgment only, the parties stipulate that this Court has  
23 jurisdiction over Panacea as to the allegations contained in the Complaint, that venue is proper in the  
24 County of Marin and that this Court has jurisdiction to enter and enforce the provisions of this  
25 Consent Judgment.

26 **1.10 Effective Date**

27 For purposes of this Consent Judgment, the term “Effective Date” shall mean June 30, 2009.  
28

1     **2.     INJUNCTIVE RELIEF: REFORMULATION IN LIEU OF WARNINGS**

2             **2.1     Reformulation Definitions, Representations, and Commitments**

3             For purposes of this section, "Lead Free" Covered Products shall mean Covered Products  
4 containing components that may be handled, touched or mouthed by a consumer and that have less  
5 than 300 ppm lead when analyzed pursuant to EPA method 3050B. Covered Products that are Lead  
6 Free are referred to hereinafter as "Reformulated Products."

7             Following its receipt of Brimer's February 24, 2009 Notice, Panacea: (a) immediately  
8 conducted an investigation concerning the potential presence of the Listed Chemical in Covered  
9 Products; (b) implemented a reformulation process to terminate the use of the Listed Chemical in the  
10 manufacture of the Products; and (c) began investigating the potential reformulation of the Additional  
11 Products.

12             Pursuant to this Consent Judgment, Panacea agrees to: (a) as of May 30, 2009, only to  
13 purchase or cause to be manufactured Products that constitute Reformulated Products; (b) after the  
14 Effective Date, only ship to customers known to Panacea to do business in California, Products that  
15 constitute Reformulated Products unless they contain the warnings specified in Section 2.2 below. In  
16 addition, as of the Effective Date, Panacea shall provide Proposition 65 warnings on all Additional  
17 Products as further specified in Section 2.2 below and continue to do so until such time as they are  
18 manufactured to be Lead Free.

19             **2.2     Clear and Reasonable Warnings**

20             Where a Proposition 65 warning is required under Section 2.1 above, the following language  
21 shall be used:

22                     **WARNING:** This product contains lead, a chemical known to cause birth  
23                             defects or other reproductive harm. Wash hands after  
   handling.

24                     or

25                     **WARNING:** This product contains lead, a chemical known to the State  
26                             of California to cause birth defects or other reproductive  
   harm. Wash hands after handling.

27             The foregoing warning shall be placed on or affixed to the packaging or a label which is  
28 visible to the consumer at retail and with such conspicuousness as compared with other

1 words, statements, designs, or devices as to render it likely to be read and understood by  
2 an ordinary individual under customary conditions before purchase or use.

3 **3. MONETARY PAYMENTS**

4 **3.1 Payments Pursuant to Health & Safety Code §25249.7(b)**

5 Pursuant to Health & Safety Code §25249.7(b), the total civil penalty assessed shall be  
6 \$8,000. The foregoing amount of civil penalties was calculated in light of Panacea's prompt  
7 cooperation with Brimer in resolving this matter, its volunteering to expand the scope of this Consent  
8 Judgment to cover a wider range of products than those originally covered in the 60-Day Notice of  
9 Violation, and its reformulation representations and commitments as set forth in Section 2.1 and 2.2  
10 above.

11 Civil penalties are to be apportioned in accordance with California Health & Safety Code  
12 §25192, with 75% of these funds remitted to the State of California's Office of Environmental Health  
13 Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Brimer as  
14 provided by California Health & Safety Code §25249.12(d). Panacea shall issue two separate checks  
15 for the penalty payment: (a) one check made payable to "Hirst & Chanler LLP in Trust For OEHHA"  
16 in the amount of \$6,000, representing 75% of the total penalty; and (b) one check to "Hirst &  
17 Chanler LLP in Trust for Russell Brimer" in the amount of \$2,000, representing 25% of the total  
18 penalty. Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box 4010,  
19 Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Russell Brimer, whose information shall be  
20 provided to Panacea at least fifteen days before the payment is due.

21 Payment shall be delivered to Brimer's counsel on June 26, 2009:

22 Hirst & Chanler LLP  
23 Attn: Proposition 65 Controller  
24 2560 Ninth Street  
25 Parker Plaza, Suite 214  
26 Berkeley, CA 94710-2565  
27  
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1     **4.     REIMBURSEMENT OF FEES AND COSTS**

2             **4.1     Attorney Fees and Costs.**

3             The parties acknowledge that Brimer and his counsel offered to resolve this dispute without  
4 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee  
5 issue to be resolved after the material terms of the agreement had been settled. Panacea then  
6 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been  
7 finalized. The parties then attempted to (and did) reach an accord on the compensation due to Brimer  
8 and his counsel under general contract principles and the private attorney general doctrine codified at  
9 California Code of Civil Procedure (CCP) §1021.5, for all work performed through the mutual  
10 execution of this agreement. Panacea shall reimburse Brimer and his counsel a total of \$37,000 for  
11 fees and costs incurred as a result of investigating, bringing this matter to Panacea's attention, and  
12 litigating and negotiating a settlement in the public interest. Panacea shall issue a separate 1099 for  
13 fees and costs (tax identification number to be provided to Panacea at least fifteen days prior to when  
14 this payment is due) and shall make the check payable to "Hirst & Chanler LLP." Said check shall be  
15 delivered by June 26, 2009 to the following address:

16                     Hirst & Chanler LLP  
17                     Attn: Proposition 65 Controller  
18                     2560 Ninth Street  
19                     Parker Plaza, Suite 214  
20                     Berkeley, CA 94710-2565

21     **5.     RELEASE OF ALL CLAIMS**

22             **5.1     Brimer's Release of Panacea**

23             In further consideration of the promises and agreements herein contained, the injunctive relief  
24 commitments set forth in Section 2.1 and 2.2 above, and for the payments to be made pursuant to  
25 Sections 3 and 4, Brimer on behalf of himself, his past and current agents, representatives, attorneys,  
26 successors, and/or assignees, and in the interest of the general public, hereby waives all rights to  
27 institute or participate in, directly or indirectly, any form of legal action and releases all claims,  
28 including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities,  
demands, obligations, damages, costs, fines, penalties, losses, or expenses (including, but not limited

1 to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or  
2 unknown, fixed or contingent (collectively "claims"), against Panacea and each of their wholesalers,  
3 licensors, licensees, import partners, auctioneers, retailers, franchisees, dealers, customers (including,  
4 but not limited to, Michaels Stores, Inc.), owners, purchasers, users, parent companies, corporate  
5 affiliates, and subsidiaries, and their respective officers, directors, attorneys, representatives,  
6 shareholders, agents, and employees, and sister and parent entities (collectively "Releasees"). This  
7 release is limited pursuant to the Notices to those claims that arise under Proposition 65 with respect  
8 to the Listed Chemical in the Covered Products, as such claims relate to the alleged failure to warn  
9 under Health & Safety Code §25249.6.

10 **5.2 Panacea's Release of Brimer**

11 Panacea waives any and all claims against Brimer, his attorneys, and other representatives for  
12 any and all actions taken or statements made (or those that could have been taken or made) by Brimer  
13 and his attorneys and other representatives, whether in the course of investigating claims or otherwise  
14 seeking enforcement of Proposition 65 against them in this matter, and/or with respect to the Covered  
15 Products.

16 **5.3 Dismissal of Michaels Stores, Inc.**

17 In consideration of the terms set forth herein and Michaels representations that it does not  
18 offer Covered Products for sale in California other than those supplied by Panacea, Brimer shall,  
19 within twenty days of the Effective Date, dismiss Michaels from the Complaint without prejudice.

20 **6. COURT APPROVAL**

21 This Consent Judgment is not effective until it is approved and entered by the Court and shall  
22 be null and void if, for any reason, it is not approved and entered by the Court within one year after it  
23 has been fully executed by all parties, in which event any monies that have been provided to Brimer,  
24 or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within fifteen (15) days  
25 after receiving written notice from Panacea that the one year period has expired.

1     **7.     SEVERABILITY**

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

5     **8.     GOVERNING LAW**

6             The terms of this Consent Judgment shall be governed by the laws of the State of California  
7     and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or is  
8     otherwise rendered inapplicable by reason of law generally, or as to the Covered Products, then  
9     Panacea shall have no further obligations pursuant to this Consent Judgment with respect to, and to  
10    the extent that, the Covered Products are so affected.

11    **9.     NOTICES**

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

16            To Panacea:

17                    Randy Swords  
18                    PANACEA PRODUCTS CORPORATION  
19                    2711 International St.  
                      Columbus, OH 43228

20                    With a copy to:

21                    Robert L. Falk  
22                    MORRISON & FOERSTER LLP  
                      425 Market Street, 32nd Floor  
                      San Francisco, California 94105

23            To Brimer:

24                    Proposition 65 Coordinator  
25                    HIRST & CHANLER LLP  
26                    2560 Ninth Street  
                      Parker Plaza, Suite 214  
27                    Berkeley, CA 94710-2565  
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1 Any party, from time to time, may specify in writing to the other party a change of address to which  
2 all notices and other communications shall be sent.

3 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

8 Brimer agrees to comply with the reporting form requirements referenced in California Health  
9 & Safety Code §25249.7(f).

10 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

11 The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed motion  
12 is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such  
13 approval, Brimer and Panacea and their respective counsel agree to mutually employ their best efforts  
14 to support the entry of this agreement as a Consent Judgment and obtain approval of the Consent  
15 Judgment by the Court in a timely manner. For purposes of this paragraph, best efforts shall include,  
16 at a minimum, cooperating on the drafting and filing any papers in support of the required motion for  
17 judicial approval, with counsel for Panacea taking responsibility for developing the first draft of a  
18 memorandum of points and authorities for such a motion.

19 **13. MODIFICATION**

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

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1 **14. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment on behalf of their respective  
3 parties and have read, understood, and agree to all of the terms and conditions hereof.  
4

5 **AGREED TO:**

6 Date: 6.10.09

7   
8 By: \_\_\_\_\_  
Plaintiff, RUSSELL BRIMER

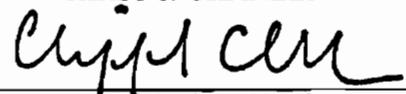
**AGREED TO:**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Defendant, PANACEA PRODUCTS CORPORATION

9  
10 **APPROVED AS TO FORM:**

11 Date: 6.16.09

12 HIRST & CHANLER LLP  
13   
14 By: \_\_\_\_\_  
Clifford A. Chanler  
Attorneys for Plaintiff  
15 RUSSELL BRIMER

**APPROVED AS TO FORM:**

Date: \_\_\_\_\_

MORRISON & FOERSTER LLP  
By: \_\_\_\_\_  
Robert L. Falk  
Attorneys for Defendant  
16 PANACEA PRODUCTS CORPORATION

17 **IT IS SO ORDERED.**

18 Date: \_\_\_\_\_

\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

1 **14. AUTHORIZATION**

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

4  
5 **AGREED TO:**

6 Date: \_\_\_\_\_

7  
8 By: \_\_\_\_\_  
9 Plaintiff, RUSSELL BRIMER

**AGREED TO:**

6 Date: 6-8-09

7  
8 By: [Signature]  
9 Defendant, PANACEA PRODUCTS CORPORATION

10 **APPROVED AS TO FORM:**

11 Date: \_\_\_\_\_

12 HIRST & CHANLER LLP

13  
14 By: \_\_\_\_\_  
15 Clifford A. Chanler  
16 Attorneys for Plaintiff  
17 RUSSELL BRIMER

**APPROVED AS TO FORM:**

11 Date: 6-9-09

MORRISON & FOERSTER LLP

13  
14 By: [Signature]  
15 Robert L. Falk  
16 Attorneys for Defendant  
17 PANACEA PRODUCTS CORPORATION

17 **IT IS SO ORDERED.**

18 Date: \_\_\_\_\_

\_\_\_\_\_  
19 JUDGE OF THE SUPERIOR COURT

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