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11 Attorneys for Plaintiff
RUSSELL BRIMER

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MARIN

RUSSELL BRIMER,

Plaintiff,

v.

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

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.
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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.

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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
 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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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: 6.10.09

Date: _____

By: 
Plaintiff, RUSSELL BRIMER

By: _____
Defendant, PANACEA PRODUCTS CORPORATION

APPROVED AS TO FORM:

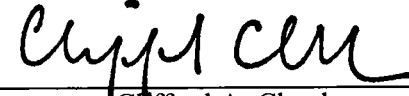
APPROVED AS TO FORM:

Date: 6.16.09

Date: _____

HIRST & CHANLER LLP

MORRISON & FOERSTER LLP

By: 
Clifford A. Chanler
Attorneys for Plaintiff
RUSSELL BRIMER

By: _____
Robert L. Falk
Attorneys for Defendant
PANACEA PRODUCTS CORPORATION

IT IS SO ORDERED.

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.
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5 **AGREED TO:**

AGREED TO:

6 Date: _____

Date: 6-8-09

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8 By: _____
Plaintiff, RUSSELL BRIMER

By: 
Defendant, PANACEA PRODUCTS CORPORATION

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10 **APPROVED AS TO FORM:**

APPROVED AS TO FORM:

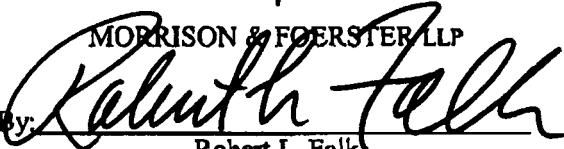
11 Date: _____

Date: 6-9-09

12 HIRST & CHANLER LLP

MORRISON & FOERSTER LLP

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14 By: _____
Clifford A. Chanler
Attorneys for Plaintiff
RUSSELL BRIMER

By: 
Robert L. Falk
Attorneys for Defendant
PANACEA PRODUCTS CORPORATION

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17 **IT IS SO ORDERED.**

18 Date: _____

JUDGE OF THE SUPERIOR COURT

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