

1 ERIC S. SOMERS (139050)
2 MARK N. TODZO (168389)
3 LEXINGTON LAW GROUP, LLP
4 1627 Irving Street
5 San Francisco, CA 94122
6 Telephone: (415) 759-4111
7 Facsimile: (415) 759-4112
8
9 Attorneys for Plaintiff
10 CENTER FOR ENVIRONMENTAL HEALTH

11 BILL LOCKYER
12 Attorney General of the State of California
13 SUSAN L. DURBIN (81750)
14 EDWARD G. WEIL (88302)
15 Deputy Attorneys General
16 1300 I Street, P.O. Box 944255
17 Sacramento, CA 94244-2550
18 Telephone: (916) 324-5475
19 Facsimile (916) 327-2319

20 Attorneys for Plaintiff
21 THE PEOPLE OF THE STATE OF CALIFORNIA

22 SUPERIOR COURT OF CALIFORNIA
23 IN AND FOR THE COUNTY OF SAN FRANCISCO

24 CENTER FOR ENVIRONMENTAL HEALTH,)
25)
26 Plaintiff)
27)
28 v.)
29)
30 PHARMACIA CORPORATION, et al.,)
31)
32 Defendants.)
33)
34 Defendants.)

35 THE PEOPLE OF THE STATE OF)
36 CALIFORNIA,)
37)
38 Plaintiff)
39)
40 v.)
41)
42 PHARMACIA CORPORATION, et al.,)
43)
44 Defendants.)
45)

FILED AND ENTERED
SUPERIOR COURT
COUNTY OF SAN FRANCISCO
03 NOV 13 PM 12:21
GORDON PARK - CLERK
BY: M. SANCHEZ
DEPUTY CLERK

Case No. 319276

Consolidated with:
Case No. 400928

**NOTICE OF ENTRY OF CONSENT
JUDGMENTS AS TO DEFENDANT
ACCUMED, INC.**

Dept. 308
Judge: Hon. Richard A. Kramer

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 29,2003, this Court entered Consent Judgment as to Accumed, Inc., attached to this Notice as Exhibit 1.

Dated: November 11, 2003

LEXINGTON LAW GROUP, LLP

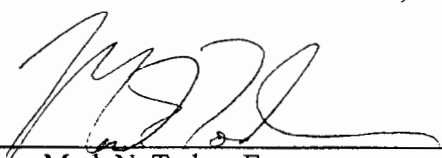
By: 
Mark N. Todzo, Esq.
Attorneys for Plaintiff,
Center For Environmental Health

Exhibit 1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ERIC S. SOMERS, State Bar No. 139050
MARK N. TODZO, State Bar No. 168389
TODD E. ROBINS, State Bar No. 191853
LEXINGTON LAW GROUP, LLP
1627 Irving Street
San Francisco, CA 94122
Telephone: (415) 759-4111
Facsimile: (415) 759-4112

Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH

BILL LOCKYER, Attorney General
THEODORA P. BERGER, Assistant Attorney General
ED WEIL, State Bar No. 88302
SUSAN DURBIN, State Bar No. 81750
Deputy Attorneys General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550

Attorneys for Plaintiff
PEOPLE OF THE STATE OF CALIFORNIA

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

CENTER FOR ENVIRONMENTAL
HEALTH, a non-profit corporation,

Plaintiff,

v.

PHARMACIA CORPORATION, et al.,

Defendants.

CASE NO. 319276

Consolidated with

THE PEOPLE OF THE STATE OF
CALIFORNIA EX REL. BILL LOCKYER,

Plaintiffs,

v.

PHARMACIA CORPORATION, et al.,

Defendants.

CASE NO. 400928

**[PROPOSED] CONSENT
JUDGMENT-DEFENDANT
ACCUMED, INC.**

Dept. 308
Judge: Hon. Richard A. Kramer

ENDORSED
FILED
San Francisco County Superior Court
OCT 29 2003
GORDON PARK-LI, Clerk
BY: JOSE RIOS MERIDA
Deputy Clerk

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. INTRODUCTION

1.1 The Center for Environmental Health (“CEH”) is a non-profit corporation dedicated to protecting the public from environmental health hazards and toxic exposures.

1.2 Accumed, Inc. (“Accumed”) is a corporation that employs more than 10 persons and that manufactures, distributes and/or sells in the State of California anti-diarrheal medicines containing attapulgite as an active ingredient. The attapulgite-containing anti-diarrheal medicines manufactured, distributed and/or sold by Accumed are referred to herein as the “Products.” A list of the Products is attached hereto as Exhibit A.

1.3 On March 1, 2001, on behalf of itself and the general public, CEH filed a complaint in San Francisco County Superior Court, entitled *Center for Environmental Health v. Pharmacia Corporation, et al.* (S.F.S.C. Case No. 319276), for civil penalties and injunctive relief pursuant to the provisions of Cal. Health & Safety Code § 25249.5 *et seq.* (“Proposition 65”) and Cal. Business & Professions Code § 17200 *et seq.* (the “Unfair Competition Law”) (the “CEH Action”). The CEH complaint alleges that the defendants violated Proposition 65 and the Unfair Competition Law by failing to provide clear and reasonable warning to purchasers of attapulgite-containing anti-diarrheal products manufactured, distributed and/or sold by defendants regarding the carcinogenicity and reproductive toxicity of the lead and lead compounds and the reproductive toxicity of the cadmium and cadmium compounds contained in such products.

1.4 Beginning on or about May 6, 2003, CEH served Accumed, as well as the appropriate public enforcement agencies, with the requisite 60-day notices alleging that Accumed was in violation of Proposition 65. CEH’s notice alleges that Accumed did not provide a clear and reasonable warning to purchasers of the Products regarding the carcinogenicity and reproductive toxicity of the lead and lead compounds and the reproductive toxicity of the cadmium and cadmium compounds contained in such Products, in violation of Proposition 65.

1.5 On or about July 15, 2003, CEH filed amendments to the complaint in the CEH Action pursuant to Cal. Code of Civil Procedure § 474, adding Accumed, who had previously been named as “Defendant DOE,” as a defendant in the CEH Action.

///

1 1.6 On November 5, 2001, the Attorney General of the State of California, on
2 behalf of the People of the State of California, filed a complaint in San Francisco County Superior
3 Court, entitled *People of the State of California ex. rel. Bill Lockyer v. Pharmacia Corp., et al.*,
4 for civil penalties and injunctive relief pursuant to the provisions of Proposition 65 and the Unfair
5 Competition Law (the "AG Action").¹ Accumed was named as a Doe defendant in the Attorney
6 General's original complaint. On January 8, 2002, the Attorney General filed a First Amended
7 Complaint.

8 1.7 On May 1, 2002, the CEH Action and the AG Action were consolidated by
9 the Court.

10 1.8 On August 22, 2003, Accumed answered the Complaints denying any
11 violation of Proposition 65, Business and Professions Code § 17200 *et seq.* and Business and
12 Professions Code § 17500 *et seq.*

13 1.9 For purposes of this Consent Judgment only, the parties stipulate that this
14 Court has jurisdiction over the allegations of violations contained in the Complaints and personal
15 jurisdiction over Accumed as to the acts alleged in the Complaints, that venue is proper in the
16 County of San Francisco, and that this Court has jurisdiction to enter this Consent Judgment as a
17 full and final resolution of all claims which were or could have been raised in the Complaints
18 based on the facts alleged therein.

19 1.10 For the purposes of resolving this dispute by compromise and avoiding
20 prolonged litigation, CEH, the State of California and Accumed enter into this Consent Judgment
21 as a full and final settlement of all claims that were raised in the Complaints, or which could have
22 been raised in the Complaints, arising out of the facts or conduct alleged therein with respect to
23 the Products insofar as such claims relate to violations of the Proposition 65 warning requirement.
24 By execution of this Consent Judgment and agreeing to provide the relief and payments specified
25 herein, Accumed does not admit any question of fact or conclusion of law, including but not
26 limited to any violations of the Proposition 65 duty to warn or the Unfair Competition Law or any

27 _____
28 ¹ The CEH Action and the AG Action are referred to collectively herein as the "Actions." The operative
complaints filed in the two Actions are referred to collectively herein as the "Complaints."

1 other law or legal duty related to the provision of warnings regarding lead and cadmium in the
2 Products.

3 **2. COMPLIANCE**

4 2.1 As of 30 days after entry of this Consent Judgment (“Compliance Date”),
5 Accumed shall not ship (or cause to be shipped) to California any anti-diarrheal medicines
6 containing attapulgite as an active ingredient unless such anti-diarrheal medicines bear the
7 following warning language:

8 **“WARNING! This product contains lead, a chemical known to the**
9 **State of California to cause birth defects and other**
10 **reproductive harm.”**

11 The warning statement shall be prominent and displayed with such conspicuousness, as compared
12 with other words, statements, or designs on the label as to render it likely to be read and
13 understood by an ordinary individual under customary conditions of purchase.

14 2.2 On or before the Compliance Date, Accumed shall reformulate its Products
15 in order to reduce the lead content in the Products. Accumed agrees to reduce the lead in its
16 Products by 80% from the amount of lead in its Products prior to reformulation. Such
17 reformulated Products are determined under this Consent Judgment to be in compliance with
18 Proposition 65 for lead and cadmium.

19 2.3 Notwithstanding Section 2.1, should any final court decision or settlement
20 entered by CEH and/or the State of California against another defendant in this Action regarding
21 an attapulgite-containing anti-diarrheal product require warning labels regarding reproductive
22 toxicity different than those required in Section 2.1 hereof, then Accumed may comply with such
23 remedy, provided that the Products would qualify to be part of such other settlement or final court
24 decision.

25 2.4 All non-reformulated Products on shelves or in transit to retailers in the
26 State of California on the Compliance Date (“Non-Complying Products”) may continue to be sold
27 subject to the requirements of this Section 2.4. In order to provide users of the non-reformulated
28 Products with clear and reasonable warnings, Accumed shall, on or before the Compliance Date,

1 provide "Warning Materials" by certified mail to each of its retail customers. Such Warning
2 Materials shall include:

3 (A) a reasonably sufficient number (considering the number of Non-Complying
4 Products each Retailer Defendant has and will have in stock through the
5 Compliance Date) of warning stickers identical to the warning stickers
6 described in Section 2.1 above; and

7 (B) a reasonably sufficient number of shelf signs, which shall have dimensions
8 of no less than 3 inches by 5 inches, and shall both identify the Products
9 and state the warning language set forth in Section 2.1 above with such
10 prominence and conspicuousness as to render them likely to be read and
11 understood by an ordinary individual.

12 Copies of the actual Warning Materials sent to Accumed's retail customers pursuant to this
13 Section 2.4, with a Proof of Service executed by an authorized officer of Accumed, shall be
14 provided to CEH and the Attorney General within 15 days after the Compliance Date.

15 3. PAYMENTS

16 3.1 In the manner set forth in Section 5.1 below, Accumed shall make a
17 payment in the amount of \$8,340.00, with one-half of that sum allocated to civil penalties and
18 one-half to CEH or another qualified public interest entity of the Attorney General's choosing to
19 support work directed at reducing public exposure to lead, cadmium, or other heavy metals.

20 4. REIMBURSEMENT OF FEES AND COSTS

21 4.1 In the manner set forth in Section 5.1 below, Accumed shall pay CEH
22 \$8,430.00 to reimburse CEH for investigating and bringing the CEH Action and to reimburse
23 CEH's outside attorneys, pursuant to Code of Civil Procedure § 1021.5, for their investigation
24 fees and costs, expert fees, reasonable attorneys' fees and costs, and any other costs incurred as a
25 result of investigating, bringing this matter to Accumed's attention, litigating and negotiating a
26 settlement in the public interest.

27 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5. MANNER OF PAYMENTS

5.1 Payments made pursuant to Sections 3 and 4 of this Consent Judgment shall be made in the following manner: Accumed shall, on or before the Compliance Date, send the civil penalty payment required under section 3.1 above to the Office of the Attorney General, attention to Susan Durbin, at the address set forth in Section 15 below, and the payment required in Section 4.1 to Lexington Law Group, LLP at the address set forth below in Section 15 below.

6. MODIFICATION OF CONSENT JUDGMENT

6.1 This Consent Judgment may be modified by written agreement of CEH, the State of California and Accumed, after noticed motion, and upon entry of a consent judgment by the Court thereon, or upon motion of CEH, the State of California or Accumed as provided by law and upon entry of a modified consent judgment by the Court.

7. ENFORCEMENT OF CONSENT JUDGMENT

7.1 The State of California, CEH and/or Accumed may, by motion or application for an order to show cause before the Superior Court of the County of San Francisco, enforce the terms and conditions contained in this Consent Judgment.

8. APPLICATION OF CONSENT JUDGMENT

8.1 This Consent Judgment shall apply to and be binding upon the parties, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

9. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT

9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the party he or she represents to stipulate to this Consent Judgment and to enter into and execute the Consent Judgment on behalf of the party represented and legally bind that party.

10. RELEASE

10.1 In consideration of the terms set forth above, plaintiffs Center for Environmental Health and the People of the Sate of California agree to release all claims that have been brought or could have been brought in the actions entitled *Center for Environmental Health v. Pharmacia et al.*, San Francisco Superior Court Case No. 319276, and *People v.*

///

1 *Pharmacia et al.*, San Francisco Superior Court Case No. 400928, based on the facts alleged
2 therein.

3 10.2 This Consent Judgment is a final and binding resolution and release
4 between, on the one hand, Accumed and Accumed's past, present and future officers, directors,
5 trustees, agents, employees, attorneys, parents, subsidiaries, affiliates, divisions, successors and
6 assigns (collectively, "Releasees") and any person within Accumed's chain of distribution,
7 including, but not limited to, suppliers, wholesalers, distributors, retailers, sales personnel,
8 customers, hospitals, health care providers, physicians, nurses and any other person in the course
9 of doing business who may use, sell, or otherwise distribute Products (collectively "Other
10 Releasees"), and on the other hand, CEH, and the People of the State of California of (a) all
11 claims, violations or causes of action for violation of Proposition 65, the Unfair Competition Act,
12 and the False Advertising Act with regard to lead and cadmium in the Products, or (b) any other
13 statutory or common law claims or causes of action that were or could have been asserted against
14 any Releasee or Other Releasee with respect to the Products by any of the Plaintiffs based upon
15 the facts alleged in the Complaints.

16 10.3 Compliance with the terms of this Consent Judgment constitutes
17 compliance by the Releasees, and each Other Releasee, or any other person in the course of doing
18 business who may use, sell or otherwise distribute the Products manufactured, distributed or sold
19 by any Releasee or Other Releasee with any requirement to provide any Proposition 65 warning
20 with respect to the Products and any exposure from lead or cadmium.

21 10.4 CEH and the People of the State of California covenant and agree that with
22 regard to those matters which CEH and the People of the State of California have released and
23 which are described above, CEH and the People of the State of California will never institute a
24 lawsuit or administrative proceeding, nor will they assert any claim in any forum against any
25 person or entity hereby released with regard to the matters that have been released. Nothing in
26 this paragraph limits CEH's or the People's rights to enforce the Consent Judgment pursuant to
27 Section 7 of this Agreement.

28 ///

DOCSSC1:328329.3

- 7 -

1 10.5 The parties agree that they will not seek to challenge or to have determined
2 invalid, void or unenforceable, any provision of this Consent Judgment or the Consent Judgment
3 itself. The parties understand that this Consent Judgment contains the relinquishment of legal
4 rights and each has, to the extent each has deemed appropriate, sought the advice of legal counsel,
5 which each of the parties has encouraged the other to seek. Further, the parties have not reposed
6 such trust or confidence in another party so as to create a fiduciary, agency or confidential
7 relationship.

8 **11. SPECIFIC PERFORMANCE**

9 11.1 The parties expressly recognize that Accumed's obligations under this
10 Consent Judgment are unique. In the event that Accumed is found to be in material breach of this
11 Consent Judgment for failure to comply with the provisions of Section 2 hereof, the parties agree
12 that it would be extremely impracticable to measure the resulting damages and that such breach
13 would cause irreparable damage. Accordingly, CEH and/or the State of California, in addition to
14 any other available rights or remedies, may sue in equity for specific performance, and Accumed
15 expressly waives the defense that a remedy in damages will be adequate.

16 **12. ATTORNEYS' FEES**

17 12.1 In the event that a dispute arises with respect to any provision(s) of this
18 Consent Judgment, the prevailing party shall be entitled to recover costs and reasonable
19 attorneys' fees.

20 **13. GOVERNING LAW**

21 13.1 The terms of this Consent Judgment shall be governed by the laws of the
22 State of California.

23 **14. RETENTION OF JURISDICTION**

24 14.1 This Court shall retain jurisdiction of this matter to implement this Consent
25 Judgment.

26 **15. PROVISION OF NOTICE**

27 15.1 All notices required pursuant to this Consent Judgment and correspondence
28 shall be sent to the following:

1 For the People of the State of California:

2 Susan Durbin, Esq.
3 Office of the California Attorney General
4 1300 I Street, 15th Floor
5 Sacramento, CA 95814

6 For CEH:

7 Mark N. Todzo, Esq.
8 Lexington Law Group, LLP
9 1627 Irving Street
10 San Francisco, CA 94122

11 For Accused:

12 Peg Carew Toledo, Esq.
13 Orrick, Herrington & Sutcliffe, LLP
14 400 Capitol Mall, Suite 3000
15 Sacramento, CA 95814-4497


16 **16. EXECUTION AND COUNTERPARTS**

17 16.1 The stipulations to this Consent Judgment may be executed in counterparts
18 and by means of facsimile, which taken together shall be deemed to constitute one document.

19 **17. AUTHORIZATION**

20 17.1 The undersigned are authorized to execute this Consent Judgment on
21 behalf of their respective parties and have read, understand and agree to all of the terms and
22 conditions of this Consent Judgment. Except as explicitly provided herein, each party is to bear
23 its own fees and costs.

24 **AGREED TO:**

25 
26 _____
27 Michael Green, Executive Director
28 Center for Environmental Health

Dated: 10/10/09

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AGREED TO:

Susan Durbin

Susan Durbin, Esq., Deputy Attorney General
The State of California

Dated: 10/3/03

AGREED TO:

Burgise Palkhiwala

Burgise Palkhiwala
Accumed Pharmacal Company, Inc.

Dated: 09/26/03

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JUDGMENT

Based upon the stipulated Consent Judgment between CEH, the People of the State of California, and Accumed, Inc., judgment is ~~hereby~~ ^{shall be} entered according to the terms herein.

RAK
GPA

Dated: OCT 29 2008

/s/ RICHARD A. KRAMER
Judge, Superior Court of the State of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

Walgreen's Concentrated Anti-Diarrheal Advanced Formula
Rite Aid K-Pec (Kaolin Pectin)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I declare that:

I am employed in San Francisco County, California. I am over the age of 18 years and not a party to the within cause; my business address is 1627 Irving Street, San Francisco, California 94122.

On November 11, 2003, I served a true copy of the following document:

NOTICE OF ENTRY OF CONSENT JUDGMENTS AS TO ACCUMED, INC.

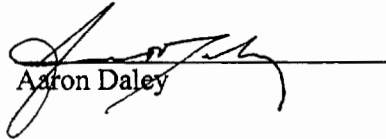
I placed a true copy of this paper in envelopes addressed to:

See attached service list.

I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service, to wit, that correspondence will be deposited with the United States Postal service this same day in the ordinary course of business. I placed the envelopes containing the above-mentioned documents for collection and mailing on November 11, 2003, following the ordinary business practice.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on November 11, 2003, at San Francisco, California.

Signed:


Aaron Daley

1 CEH v. PHARMACIA CORPORATION, et al;
2 SFSC Case No. 319276 (Consolidated with 400928)

3 **SERVICE LIST**

4 Carol R. Brophy, Esq. 5 Deborah E. Beck, Esq. 6 Daniel J. Gerald, Esq. 7 Nossaman, Guthner, Knox & Elliot, LLP 8 50 California Street, 34 th Floor 9 San Francisco, CA 94111-4799 10 (415) 398-2438	Attorneys for Defendants Bergen Brunswig Drug Company and Hi-Tech Pharmacal Company; Thrifty Payless, Inc., dba Rite-Aid
11 Renée D. Wasserman, Esq. 12 Alexis Janssen Morris, Esq. 13 Rogers Joseph O'Donnell & Phillips 14 311 California Street 15 San Francisco, CA 94104 16 (415) 956-6457	Attorneys for Defendant Walgreen Co.
17 Martin M. Goldwyn, Esq. 18 Tashlik Kreutzer Goldwyn & Crandell P.C. 19 40 Cuttermill Road, Ste 200 20 Great Neck, NY 11021 21 (516) 829-6509	Attorneys for Defendant Hi-Tech Pharmacal Company
22 Susan L. Durbin, Esq. 23 Deputy Attorney General 24 State of California, Dept. of Justice 25 1300 I Street 26 P.O. Box 944255 27 Sacramento, CA 94244-2550 28 (916) 327-2319	Attorney for Plaintiff The People of the State of California
Mark Holscher, Esq. Steven E. Soule, Esq. O'Melveny & Myers, LLP 400 South Hope Street Los Angeles, CA 90071-2899 (213) 430-6407	Attorney for Defendant Columbia Laboratories, Inc.
Margaret Toledo Orrick, Herrington & Sutcliffe LLP 400 Capitol Mall, Suite 3000 Sacramento, CA 95814-4407 (916) 329-4900	Attorney for Accumed, Inc.