

1 ANN G. GRIMALDI (SBN 160893)  
2 McKENNA & CUNEO, L.L.P.  
3 One Market Plaza, Steuart Tower  
4 San Francisco, CA 94105  
5 Telephone: (415) 267-4000  
6 Facsimile: (415) 267-4198

ENDORSED  
FILED  
ALAMEDA COUNTY

JUN 21 2001

Attorneys for Defendant  
PRODUCTS ENGINEERING CORPORATION

CLERK OF THE SUPERIOR COURT  
By LINDNELL WILLIAMS  
Deputy

7  
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **COUNTY OF ALAMEDA**

11 MICHAEL DIPIRRO,

12 Plaintiffs,

13 v.

14 PRODUCTS ENGINEERING  
15 CORPORATION; and DOES 1 through  
16 1000,

Defendants.

No. H217707-0

~~PROPOSED~~ **CONSENT JUDGMENT**

17  
18 **1. Introduction**

19 1.1 Michael DiPirro is an individual residing in San Francisco, California, who seeks  
20 to promote awareness of exposures to toxic chemicals and improve human health by reducing or  
21 eliminating hazardous substances contained in consumer and industrial products.

22 1.2 PRODUCTS ENGINEERING CORPORATION ("PEC") is a company that  
23 currently sells certain hammers as set forth in Exhibit A hereto that are alleged to contain lead  
24 (or lead compounds). Lead and lead compounds are identified as substances listed in the  
25 regulations promulgated under the California Safe Drinking Water and Toxic Enforcement Act,  
26 California Health & Safety Code sections 25249.5 *et seq.* ("Proposition 65") as chemicals  
27 known to the State of California to cause cancer and reproductive harm. A list of the products  
28

1 which allegedly contain lead (or lead compounds) (collectively, the “Listed Chemicals”) and  
2 which are covered by this Consent Judgment is provided in Exhibit A (the “Products”).

3 1.3 On November 6, 2000, Michael DiPirro first served PEC and other public  
4 enforcement agencies with a document entitled “60-Day Notice of Violation” which provided  
5 PEC and such public enforcers with notice that PEC was allegedly in violation of Proposition 65  
6 for failing to warn purchasers that certain products it sells in California expose users to  
7 Proposition 65-listed chemicals (the “Notice”).

8 1.4 On January 11, 2001, Michael DiPirro brought an action in the public interest  
9 entitled *Michael DiPirro v. Products Engineering Corporation* in the Alameda County Superior  
10 Court, Case No. H217707-0, naming PEC as a defendant and alleging violations of Business &  
11 Professions Code § 17200 and Health & Safety Code § 25249.6 on behalf of individuals in  
12 California who allegedly have been exposed to chemicals listed pursuant to Proposition 65  
13 contained in certain Products (the “Action”).

14 1.5 Neither the Attorney General nor any of the other designated public prosecutors  
15 has commenced any action in response to the Notices. For purposes of this Consent Judgment,  
16 Plaintiff acts on behalf of the general public as to those matters alleged in the Notice and in the  
17 Action.

18 1.6 For purposes of this Consent Judgment only, the parties stipulate that this Court  
19 has jurisdiction over the allegations of violations contained in the Complaint filed in the Action,  
20 that the Court has personal jurisdiction over settling Defendant PEC as to the acts alleged in the  
21 Complaint filed in the Action, that venue is proper in the county of Alameda and that this Court  
22 has jurisdiction to enter this Consent Judgment as a full settlement and resolution of the  
23 allegations contained in the Complaint filed in the Action, and of all claims which were or could  
24 have been raised by any person or entity based on whole or in part, directly or indirectly, on the  
25 facts alleged in the Notice, in the Complaint filed in the Action, or arising therefrom or related  
26 thereto.

27 1.7 This Consent Judgment resolves claims that are denied and disputed. The parties  
28 enter into this Consent Judgment to settle disputed claims between them, to avoid prolonged

1 litigation and to provide a prompt remedy for the matters alleged in the Notice and in the  
2 Complaint filed in the Action. The parties intend this settlement to be full and final adjudication  
3 of all claims that were or could have been brought against PEC, its customers, directors,  
4 officers, employees, parent companies, sister companies, subsidiaries, and any person who may  
5 use, maintain or sell the Products, and the successors and assigns of any of them, whether or not  
6 they were named in the Action, with respect to the claims that were the subject of the Notice and  
7 the Action.

8 1.8 Nothing in this Consent Judgment shall be construed as an admission by PEC of  
9 any fact, finding, issue of law, or violation of law, nor shall compliance with this Consent  
10 Judgment constitute or be construed as an admission by PEC of any fact, finding, conclusion,  
11 issue of law, or violation of law. However, this paragraph shall not diminish or otherwise affect  
12 the obligations, responsibilities, and duties of PEC under this Consent Judgment.

13 **2. Entry of Consent Judgment.**

14 2.1 The parties hereby request that the Court promptly enter this Consent Judgment.  
15 Upon entry of the Consent Judgment, the parties waive their respective rights to a hearing or  
16 trial on the allegations of the Complaint.

17 **3. Court Approval.**

18 3.1 If this Consent Judgment is not approved by the Court, it shall be of no force or  
19 effect, and cannot be used in any proceeding for any purpose.

20 **4. Injunctive Relief -- Proposition 65 Warnings.**

21 4.1 PEC asserts that it already has begun providing Proposition 65 warnings prior to  
22 the Effective Date, with text that complies with California Code of Regulations, tit. 22, Section  
23 12601(b), on the Products. Nevertheless, in the interest of avoiding prolonged litigation, PEC  
24 agrees that it will not knowingly sell any Products containing the Listed Chemicals for sale in  
25 the State of California unless such Products comply with section 4.1(a) below:

26 (a) *All Products containing lead.* All Products containing lead shall bear the  
27 following warning statement, beginning on October 1, 2001:  
28

1                   “WARNING: This product contains lead, a chemical known to the State of  
2                   California to cause cancer and birth defects or other reproductive  
3                   harm.”

4           4.2     The warning statement referenced in Paragraph 4.1 above shall be prominently  
5 placed on or near the Products at the point of sale with such conspicuousness, as compared with  
6 other words, statements, designs, or devices in proximity of the location of the Products on the  
7 store shelf or on the label as to render it likely to be read and understood by an ordinary  
8 individual under customary conditions of purchase.

9     **5.     Payment Pursuant To Health & Safety Code § 25249.7(b).**

10           5.1     Pursuant to Health & Safety Code § 25249.7(b), PEC shall pay a civil penalty of  
11 \$ 2,600.00 (two thousand six hundred dollars). The payment of \$2,600.00 shall be paid within  
12 five (5) calendar days after June 15, 2001 (hereinafter the “Effective Date”). The penalty  
13 payment is to be made payable to “Chanler Law Group In Trust For Michael DiPirro” and shall  
14 be held in trust until the Alameda County Superior Court approves and enters the Consent  
15 Judgment. If the Alameda County Superior Court refuses to enter the Consent Judgment, then  
16 PEC shall be reimbursed within five (5) calendar days of such refusal. Under such  
17 circumstances, DiPirro will be given a five (5) calendar day grace period. DiPirro agrees to pay  
18 PEC a \$250 per calendar day fee for each day payment is not received in full after the grace  
19 period ends. For purposes of this paragraph, each new day (requiring a additional \$250  
20 payment) will begin at 5 p.m. PST.

21           Penalty monies shall be apportioned by DiPirro in accordance with Health & Safety  
22 Code § 25192, with 75% of these funds remitted to the State of California’s Department of  
23 Toxic Substances Control.

24           5.2     PEC understands that the payment schedule as stated in this Consent Judgment is  
25 a material factor upon which DiPirro and his counsel have relied in entering into this Consent  
26 Judgment. PEC agrees that all payments will be made in a timely manner in accordance with  
27 the payment due dates. PEC will be given a five (5) calendar day grace period from the date  
28 payment is due. PEC agrees to pay DiPirro a \$250 per calendar day fee for each day payment is

1 received after the grace period ends. For purposes of this paragraph, each new day (requiring a  
2 additional \$250 payment) will begin at 5 p.m. PST.

3 **6. Reimbursement Of Fees And Costs.**

4 6.1 The parties acknowledge that DiPirro and his counsel offered to resolve the  
5 dispute without reaching terms on the amount of fees and costs to be reimbursed, thereby  
6 leaving this open issue to be resolved after the material terms of the Consent Judgment had been  
7 reached, and the matter settled. PEC then expressed a desire to resolve the fee and cost issue  
8 concurrently with other settlement terms, so the parties tried to (and did) reach an accord on the  
9 compensation due to DiPirro and his counsel under the private attorney general doctrine  
10 codified at C.C.P. § 1021.5.

11 6.2 PEC shall reimburse DiPirro and his attorneys for his fees and costs, incurred as  
12 a result of investigating, bringing this matter to PEC's attention, litigating and negotiating a  
13 settlement in the public interest. PEC shall pay the total sum of \$16,900.00 (sixteen thousand  
14 nine hundred dollars) for investigation fees, attorneys' fees and litigation costs. PEC agrees to  
15 pay \$16,900.00 within five (5) calendar days after the Effective Date. Payment should be made  
16 payable to the "Chanler Law Group" and shall be held in trust until the Alameda County  
17 Superior Court approves and enters the Consent Judgment. If the Alameda County Superior  
18 Court refuses to enter the Consent Judgment, then PEC shall be reimbursed within five (5)  
19 calendar days of such refusal. Under such circumstances, DiPirro will be given a five (5)  
20 calendar day grace period. DiPirro agrees to pay PEC a \$250 per calendar day fee for each day  
21 payment is not received in full after the grace period ends. For purposes of this paragraph, each  
22 new day (requiring a additional \$250 payment) will begin at 5 p.m. PST.

23 6.3 PEC understands that the payment schedule as stated in this Consent Judgment is  
24 a material factor upon which DiPirro and his counsel have relied in entering into this Consent  
25 Judgment. PEC agrees that all payments will be made in a timely manner in accordance with  
26 the payment due dates. PEC will be given a five (5) calendar day grace period from the date  
27 payment is due. PEC agrees to pay Michael DiPirro and his attorneys a \$250 per calendar day  
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1 fee for each day payment is received after the grace period ends. For purposes of this  
2 paragraph, each new day (requiring a additional \$250 payment) will begin at 5 p.m. PST.

3 **7. Claims Covered.**

4 7.1 This Consent Judgment is a final and binding resolution between and among the  
5 Plaintiff and its agents and attorneys, acting in the interest of the general public, on the one  
6 hand, and PEC, its customers, directors, officers, employees, parent companies, sister  
7 companies, subsidiaries, or any other person who may use, maintain or sell the Products, and the  
8 successors and assigns of any of them, on the other hand, of any and all Claims, as that term is  
9 defined in herein. "Claims" shall mean all manner of action or actions, cause or causes of  
10 action, in law or in equity, administrative actions, petitions, suits, debts, liens contracts,  
11 agreements, promises, liabilities, claims, demands, known or unknown, fixed or contingent, that  
12 have existed or now exist, all to the extent based upon or arising out of compliance by PEC with  
13 Proposition 65, its implementing regulations, and Business & Professions Code section 17200 *et*  
14 *seq.*, with respect to the sale, distribution, marketing or use of the Products without the requisite  
15 toxic warnings.

16 7.2 Compliance with the terms of this Consent Judgment resolves any issue, now and  
17 in the past, concerning compliance by PEC, its customers, directors, officers, employees, parent  
18 companies, sister companies, subsidiaries, or any other person who may use, maintain or sell the  
19 Products, and the successors and assigns of any of them, with the requirements of Proposition  
20 65, its implementing regulations, and Business & Professions Code section 17200, with respect  
21 to Products that were sold, distributed or marketed by PEC without the requisite toxic warnings.

22 **8. Mutual Releases of Claims**

23 8.1 **Michael DiPirro's Release of PEC.** Michael DiPirro, by this Consent  
24 Judgment, on behalf of himself, his agents, representatives, attorneys, assigns, and in the interest  
25 of the general public, waives all rights to institute or participate in, directly or indirectly, any  
26 form of legal action, and releases all claims, liabilities, obligations, losses, costs, expenses,  
27 penalties, fines and damages, against PEC and its customers, directors, officers, employees,  
28 parent companies, sister companies, subsidiaries, or any other person who may use, maintain or

1 sell the Products, and the successors and assigns of any of them, whether under Proposition 65  
2 or the Business & Profession Code § 17200 *et seq.* based on PEC's failure to warn about  
3 exposure to the chemicals contained in any of the Products.

4 **8.2 PEC's Release of Michael DiPirro.** PEC, by this Consent Judgment, releases  
5 and waives all rights to institute any form of legal action against Michael DiPirro and his  
6 attorneys or representatives, for all actions or statements made by Michael DiPirro, and his  
7 attorneys or representatives, in the course of seeking enforcement of Proposition 65 or Business  
8 & Profession Code § 17200 against PEC that are the subject of the Notice and of the Action.

9 **9. Retention of Jurisdiction.**

10 This Court shall retain jurisdiction of this matter to implement the Consent Judgment.

11 **10. PEC Sales Data.**

12 10.1 PEC understands that the sales data provided to counsel for DiPirro by PEC was  
13 a material factor upon which DiPirro has relied to determine the amount of payments made  
14 pursuant to Health & Safety Code § 25249.7(b) in this Consent Judgment. To the best of PEC's  
15 knowledge, the sales data provided is true and accurate. In the event that DiPirro discovers facts  
16 which demonstrate to a reasonable degree of certainty that the sales data are materially  
17 inaccurate, the parties shall meet in a good faith attempt to resolve the matter within ten (10)  
18 days of PEC's receipt of notice from DiPirro of his intent to challenge the accuracy of the sales  
19 data. If this good faith attempt fails to resolve DiPirro's concerns, DiPirro shall have the right to  
20 re-institute this enforcement action against PEC within ten (10) days from the date on which  
21 DiPirro notifies PEC of his intent to do so. In such case, all applicable statutes of limitations  
22 shall be deemed tolled for the period between the date DiPirro filed the Action and the date  
23 DiPirro notifies PEC that he is re-instituting this enforcement action pursuant to this Paragraph,  
24 but this tolling period shall not exceed two years.

25 **11. No Waiver of Right to Seek Modification from the Court.**

26 11.1 Nothing in this Consent Judgment is intended to limit or waive any of the parties'  
27 rights to seek modifications hereto from the Court, and any modification to this Consent  
28 Judgment are effective only upon entry of a modified Consent Judgment by the Court.

1     **12. Severability.**

2             12.1 In the event that any of the provisions of this Consent Judgment are held by a  
3 court to be unenforceable, the validity of the enforceable provisions shall not be adversely  
4 affected.

5     **13. Attorneys' Fees.**

6             13.1 In the event that a dispute arises with respect to any provision(s) of the Consent  
7 Judgment, including, but not limited to the late payment provisions, and such disputes are  
8 resolved by the Court or through mediation, arbitration or other alternative dispute resolution  
9 proceeding, the prevailing party in such action or proceeding shall be entitled to recover costs  
10 and reasonable attorneys' fees.

11     **14. Entire Agreement.**

12             This Consent Judgment contains the sole and entire agreement and understanding of the  
13 parties with respect to the entire subject matter hereof, and any and all prior discussions,  
14 negotiations, commitments and understandings related hereto. No representations, oral or  
15 otherwise, express or implied, other than those contained herein have been made by any party  
16 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be  
17 deemed to exist or bind any of the parties.

18     **15. Governing Law.**

19             15.1 The terms of this Consent Judgment shall be governed by the laws of the State of  
20 California.

21     **16. Notices.**

22             16.1 All correspondence to Michael DiPirro shall be mailed to:

23  
24                     David R. Bush or Jennifer Henry  
25                     Bush & Henry  
26                     4400 Keller Ave., Suite 200  
27                     Oakland, CA 94605-4229  
28                     (510) 577-0747

27             16.2 All correspondence to PEC shall be mailed to:



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Richard Luboviski, Vice President  
Products Engineering Corp.  
2645 Maricopa Street  
Torrance, CA 90503-5144

with copy to

Ann G. Grimaldi, Esq.  
McKenna & Cuneo, L.L.P.  
One Market Plaza, Steuart Tower  
San Francisco, CA 94105  
Tel.: 415-267-4000  
Fax: 415-267-4198

**17. Compliance With Reporting Requirements.**

17.1 The parties acknowledge that the reporting provisions of Health & Safety Code § 25249.7(f) apply to this Consent Judgment. As of the Effective Date, the California Attorney General's reporting forms are not available. In order to effect compliance with that section, counsel for Plaintiff DiPirro will send a copy of this Consent Judgment to the California Attorney General's Office prior to or concurrently with the presentation of the Consent Judgment to the Alameda County Superior Court.

**18. Counterparts and Facsimile.**

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

**19. Authorization.**

19.1 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 of this Consent Judgment.

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AGREED TO:

AGREED TO:

DATE: 6/18/01

DATE: \_\_\_\_\_

*Michael DiPirro*  
Michael DiPirro  
PLAINTIFF

PRODUCTS ENGINEERING  
CORPORATION  
DEFENDANT

AGREED AS TO FORM:

AGREED AS TO FORM:

BUSH & HENRY

MCKENNA & CUNEO

David Bush  
Attorneys for Plaintiff Michael DiPirro

Ann G. Grimaldi  
Attorneys for Defendant PPRODUCTS  
ENGINEERING CORPORATION

DATE: \_\_\_\_\_

DATE: \_\_\_\_\_

IT IS SO ORDERED, ADJUDGED AND DECREED.

Date:

The Honorable David E. Hunter  
Judge of the Superior Court

1 **AGREED TO:**

**AGREED TO:**

2 **DATE:** \_\_\_\_\_

**DATE:** 6-18-01

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5 **Michael DiPirro**  
6 **PLAINTIFF**

  
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8 **PRODUCTS ENGINEERING**  
9 **CORPORATION**  
10 **DEFENDANT**

11 **AGREED AS TO FORM:**

**AGREED AS TO FORM:**

12 **BUSH & HENRY**

**MCKENNA & CUNEO**

13 **David Bush**  
14 **Attorneys for Plaintiff Michael DiPirro**

  
15 **Ann G. Grimaldi**  
16 **Attorneys for Defendant PRODUCTS**  
17 **ENGINEERING CORPORATION**

18 **DATE:** \_\_\_\_\_

**DATE:** 6/18/01

19  
20 **IT IS SO ORDERED, ADJUDGED AND DECREED.**

21 **Date:**

22 \_\_\_\_\_  
23 **The Honorable David E. Hunter**  
24 **Judge of the Superior Court**

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DATE: \_\_\_\_\_

DATE: \_\_\_\_\_

\_\_\_\_\_  
Michael DiPirro  
PLAINTIFF


\_\_\_\_\_  
PRODUCTS ENGINEERING  
CORPORATION  
DEFENDANT

**AGREED AS TO FORM:**

**AGREED AS TO FORM:**

BUSH & HENRY

MCKENNA & CUNEO

\_\_\_\_\_  


\_\_\_\_\_  
Ann G. Grimaldi  
Attorneys for Defendant PPRODUCTS  
ENGINEERING CORPORATION

David Bush  
Attorneys for Plaintiff Michael DiPirro

DATE: June 18, 2001

DATE: \_\_\_\_\_

IT IS SO ORDERED, ADJUDGED AND DECREED.

Date:

\_\_\_\_\_  
The Honorable David E. Hunter  
Judge of the Superior Court

# **Exhibit A**

Exhibit A

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**Brass Hammers**  
**Non-Marring Hammers**  
**Non-Sparking Hammers**