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Los Angeles Superior Court

MAY 12 2010

John A. Blake, Executive Officer/Clerk
By *[Signature]* Deputy
DOROTHY SWAIN

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2 DANIEL D. CHO (SBN 105409)
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9 Attorneys for Plaintiffs,
10 Consumer Advocacy Group, Inc

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF LOS ANGELES - UNLIMITED

13 CONSUMER ADVOCACY GROUP, INC.,
14 in the public interest,

15 Plaintiff,

16 v.

17 BONIDE PRODUCTS, Inc. a New York
18 Corporation, and DOES 1-50;

19 Defendants.

20 CASE NO. 80437565

21 COMPLAINT FOR PENALTY,
22 INJUNCTION, AND RESTITUTION

23 Violation of Proposition 65, the Safe
24 Drinking Water and Toxic Enforcement
25 Act of 1986 (Health & Safety Code., §§
26 25249.5, et seq.)

27 ACTION IS AN UNLIMITED CIVIL
28 CASE (exceeds \$25,000)

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29 Plaintiff Consumer Advocacy Group, Inc. alleges, based on information and belief, a
30 cause of action against defendants as follows:

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THE PARTIES

1. Plaintiff Consumer Advocacy Group, Inc. ("Plaintiff" OR "CAG") is a non-profit corporation qualified to do business in the State of California. CAG is a person within the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting as a private attorney general, brings this action in the public interest as defined under Health and Safety Code section 25249.7, subdivision (d).
2. Defendant Bonide Products, Inc. is a New York Corporation, qualified to do business and doing business in the State of California at all relevant times herein;
3. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-50, and therefore sues these defendants by such fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when ascertained. Plaintiff is informed, believes, and thereon alleges that each fictitiously named defendant is responsible in some manner for the occurrences herein alleged and the damages caused thereby.
4. At all times mentioned herein, the term "Defendants" includes Bonide Products, Inc. and Does 1-50.
5. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all times mentioned herein has conducted business within the State of California.
6. At all times relevant to this action, each of the Defendants, including Does 1-50, was an agent, servant, or employee of each of the other Defendants. In conducting the activities alleged in this Complaint, each of the Defendants was acting within the course and scope of this agency, service, or employment, and was acting with the consent, permission, and authorization of each of the other Defendants. All actions of each of the Defendants alleged in this Complaint were ratified and approved by every other Defendant or their officers or managing agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged wrongful conduct of each of the other Defendants.

1 7. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
2 Defendants was a person doing business within the meaning of Health and Safety Code
3 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
4 employees at all relevant times.

5 **JURISDICTION**

6 8. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
7 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
8 those given by statute to other trial courts. This Court has jurisdiction over this action
9 pursuant to Health and Safety Code section 25249.7, which allows enforcement of
10 violations of Proposition 65 in any Court of competent jurisdiction.

11 9. This Court has jurisdiction over Defendants named herein because Defendants either
12 reside or are located in this State or are foreign corporations authorized to do business in
13 California, are registered with the California Secretary of State, or who do sufficient
14 business in California, have sufficient minimum contacts with California, or otherwise
15 intentionally avail themselves of the markets within California through their manufacture,
16 distribution, promotion, marketing, or sale of their products within California to render
17 the exercise of jurisdiction by the California courts permissible under traditional notions
18 of fair play and substantial justice.

19 10. Venue is proper in the County of Los Angeles because one or more of the instances of
20 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
21 because Defendants conducted, and continue to conduct, business in the County of Los
22 Angeles with respect to the consumer product that is the subject of this action.

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24 **BACKGROUND AND PRELIMINARY FACTS**

25 11. In 1986, California voters approved an initiative to address growing concerns about
26 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to
27 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
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1 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 53. The initiative, The Safe Drinking
2 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
3 25249.5, et seq. ("Proposition 65"), helps protect California's drinking water sources
4 from contamination, allow consumers to make informed choices about the products they
5 buy, and enable persons to protect themselves from toxic chemicals as they see fit.

6 12. Proposition 65 requires the Governor of California to publish a list of chemicals known to
7 the state to cause cancer, birth defects, or other reproductive harm. Health & Safety Code
8 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
9 chemicals and chemical families. Proposition 65 imposes warning requirements and
10 other controls that apply to Proposition 65-listed chemicals.

11 13. All businesses with ten (10) or more employees that operate or sell products in California
12 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
13 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
14 water (Health & Safety Code § 25249.5), and (2) required to provide "clear and
15 reasonable" warnings before exposing a person, knowingly and intentionally, to a
16 Proposition 65-listed chemical (Health & Safety Code § 25249.6).

17 14. Proposition 65 provides that any person "violating or threatening to violate" the statute
18 may be enjoined in any court of competent jurisdiction. Health & Safety Code §
19 25249.7. "Threaten to violate" means "to create a condition in which there is a
20 substantial probability that a violation will occur." Health & Safety Code § 25249.11(e).
21 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
22 recoverable in a civil action. Health & Safety Code § 25249.7(b).

23 15. Through research and investigation, Plaintiff identified certain practices of Defendants of
24 exposing, knowingly and intentionally, persons in California to the Proposition 65-listed
25 chemicals in the consumer products discussed below without first providing clear and
26 reasonable warnings of such to the exposed persons prior to the time of exposure.

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SATISFACTION OF PRIOR NOTICE

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- 2 16. On or about August 11, 2008, Plaintiff gave notice of alleged violations of Health and
- 3 Safety Code section 25249.6, concerning consumer products exposure, subject to a
- 4 private action to Bonide Products, Inc. and to the California Attorney General, County
- 5 District Attorneys, and City Attorneys for each city containing a population of at least
- 6 750,000 people in whose jurisdictions the violations allegedly occurred, concerning
- 7 consumer product Bonide® Fungonil™ Multipurpose Fungicide.
- 8 17. On or about October 26, 2008, Plaintiff gave notice of alleged violations of Health and
- 9 Safety Code section 25249.6, concerning consumer products exposure, subject to a
- 10 private action to Bonide Products, Inc. and to the California Attorney General, County
- 11 District Attorneys, and City Attorneys for each city containing a population of at least
- 12 750,000 people in whose jurisdictions the violations allegedly occurred, concerning the
- 13 consumer product Bonide® Fungonil™ Multipurpose Fungicide.
- 14 18. On or about July 1, 2009, Plaintiff gave notice of alleged violations of Health and Safety
- 15 Code section 25249.6, concerning consumer products exposure, subject to a private
- 16 action to Bonide Products, Inc. and to the California Attorney General, County District
- 17 Attorneys, and City Attorneys for each city containing a population of at least 750,000
- 18 people in whose jurisdictions the violations allegedly occurred, concerning the consumer
- 19 product Bonide® Fungonil™ Multipurpose Fungicide.
- 20 19. On or about August 13, 2009, Plaintiff gave notice of alleged violations of Health and
- 21 Safety Code section 25249.6, concerning consumer products exposure, subject to a
- 22 private action to Bonide Products, Inc. and to the California Attorney General, County
- 23 District Attorneys, and City Attorneys for each city containing a population of at least
- 24 750,000 people in whose jurisdictions the violations allegedly occurred, concerning the
- 25 consumer product Bonide® Fungonil™ Multipurpose Fungicide.
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1 20. Before sending the notices of alleged violations, Plaintiff investigated the consumer
2 product involved, and the likelihood that such product would cause users to suffer
3 exposures to Chlorothalonil, and the corporate structure of each of the Defendants.

4 21. Plaintiff's notices of alleged violations each included a Certificate of Merit executed by
5 the attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney
6 for Plaintiff who executed the certificates had consulted with at least one person with
7 relevant and appropriate expertise who reviewed data regarding the exposures to
8 Chlorothalonil, which is the subject Proposition 65-listed chemical of this action. Based
9 on that information, the attorney for Plaintiff who executed the Certificate of Merit
10 believed there was a reasonable and meritorious case for this private action. The attorney
11 for Plaintiff attached to each Certificate of Merit served on the Attorney General the
12 confidential factual information sufficient to establish the bases of the Certificate of
13 Merit.

14 22. Plaintiff's notices of alleged violation also each included a Certificate of Service and a
15 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
16 (Proposition 65) A Summary." Health & Safety Code § 25249.7(d).

17 23. Plaintiff is commencing this action more than sixty (60) days from the date that Plaintiff
18 gave notice of the alleged violation to Bonide Products, Inc., and to the public
19 prosecutors referenced in Paragraphs 16-19.

20 24. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
21 any applicable district attorney or city attorney has commenced and is diligently
22 prosecuting an action against the Defendants.

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1 CAUSE OF ACTION

2 (By Consumer Advocacy Group, Inc. against Bonide Products, Inc., and Does 1-50 for
3 Violations Of Proposition 65, The Safe Drinking Water And Toxic Enforcement Act Of
4 1986 (*Health & Safety Code, §§ 25249.5, et seq.*))

5 25. Plaintiff, Consumer Advocacy Group, Inc. repeats and incorporates by reference
6 paragraphs 1 through 24 of this complaint as though fully set forth herein.

7 26. Each of the Defendants is, and at all times mentioned herein, was a manufacturer, or
8 distributor, or retailer of Bonide® Fungonil™ Multipurpose Fungicide ("Fungonil"), a
9 consumer product which is designed for use as a pesticide to prevent or control listed
10 disease in the home garden.

11 27. Plaintiff is informed, believes, and thereon alleges that Fungonil contains Chlorothalonil.

12 28. On January 1, 1989, the Governor of California added Chlorothalonil to the list of
13 chemicals known to the State to cause cancer (Cal. Code Regs. 27 § 25001(c)). Pursuant
14 to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months after
15 addition of Chlorothalonil to the list of chemicals known to the State to cause
16 reproductive toxicity, Chlorothalonil became fully subject to Proposition 65 warning
17 requirements and discharge prohibitions.

18 29. Plaintiff is informed, believes, and thereon alleges that between June 1, 2007, and the
19 present, each of the Defendants knowingly and intentionally exposed California
20 consumers and users of Fungonil, which it manufactured or distributed as mentioned
21 above, to Chlorothalonil without first giving clear and reasonable warning of such to the
22 exposed persons before the time of exposure. Defendants have distributed Fungonil in
23 California. Defendants thereby violated Proposition 65.

24 30. The principal, but not exclusive, routes of exposure were and are through dermal contact,
25 ingestion and inhalation caused when users of Fungonil, are exposed to chlorothalonil via
26 skin, mucuous membranes, hand to mouth contact, hand to mucous membrane contact, or
27 breathing in particulate matter during use of the product. Persons also suffer exposure
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1 through inadvertent ingestion by handling food after handling Fungonil and then eating
2 that food.

3 31. Plaintiff's allegations regarding Fungonil concern a "[c]onsumer products exposure,"
4 which "is an exposure that results from a person's acquisition, purchase, storage,
5 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
6 that results from receiving a consumer service." Cal. Code Regs. 27 § 25602(b).

7 Fungonil is a consumer product, and exposures to Chlorothalonil took place as a result of
8 such consumption and foreseeable use as is described herein.

9 32. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
10 Proposition 65 as to Fungonil have been ongoing and continuous to the date of the
11 signing of this complaint, so that a separate and distinct violation of Proposition 65
12 occurred each and every time a consumer was exposed to Chlorothalonil by using
13 Fungonil as mentioned herein.

14 33. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
15 mentioned herein is ever continuing.

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PRAYER FOR RELIEF

Plaintiff demands against each of the Defendants as follows:

1. A permanent injunction mandating Proposition 65-compliant warnings;
2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
3. Costs of suit;
4. Reasonable attorney fees and costs; and
5. Any further relief that the court may deem just and equitable.

Dated: March 22, 2010

YEROUSHALMI & ASSOCIATES

BY: _____

Reuben Yeroushalmi
Attorneys for Plaintiff,
Consumer Advocacy Group, Inc.