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ORIGINAL FILED
Superior Court of California
County of Los Angeles

JUL 27 2011

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By Judy Kelso, Deputy

5 Counsel for Plaintiff Consumer Advocacy Group, Inc.

6 REC'D

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8 FILING WINDOW

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF LOS ANGELES

11 CONSUMER ADVOCACY GROUP, INC.,

CASE No. BC 437565

12 Plaintiff,

[REDACTED] CONSENT JUDGMENT

13 v.

(Health and Safety Code § 25249 et seq.)

14 BONIDE PRODUCTS, INC.; et al.,

15 Defendant.

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19
20 1. INTRODUCTION

21 1.1 Plaintiff: The Plaintiff is Consumer Advocacy Group, Inc. ("CAG" or
22 "Plaintiff"), a non-profit foundation. CAG is dedicated to, among other causes, protecting the
23 environment, improving human health, and supporting environmentally sound practices.

24 1.2 Defendant: The Defendant is Bonide Products, Inc. ("Bonide").

25 1.3 The Parties: Plaintiff and Defendant are sometimes referred to herein in the
26 singular as a "Party" and collectively as the "Parties."

27 1.4 The Action: This action ("Action") is brought under Proposition 65, the popular
28 name for California's Safe Drinking Water and Toxic Enforcement Act of 1986, *Cal. Health and*

[REDACTED] CONSENT JUDGMENT

1 *Safety Code* Section 25249.5 *et seq.* (sometimes referred to as “the Act”). Plaintiff proceeds
2 under Section 25249.7(d) as a “person in the public interest.” Solely for purposes of this Consent
3 Judgment, the Parties stipulate that Plaintiff’s four Notices of Intent to Sue, attached collectively
4 at **Exhibit A** to this Consent Judgment (“Plaintiff’s Notices”) were served upon Defendant and
5 public prosecutors, including the Attorney General and all district attorneys and city attorneys
6 authorized to prosecute an action to enforce the Act, accompanied by certificates of merit, in
7 compliance with Section 25249.7(d)(1) of the Act. Plaintiff is allowed to proceed pursuant to
8 Section 25249.7(d)(2), because none of those public prosecutors commenced an action pursuant
9 to Plaintiff’s Notices.

10 **1.5 The Complaint:** On May 12, 2010, Plaintiff filed a complaint against Defendant
11 in the Superior Court for the City and County of Los Angeles (“Complaint”) alleging that
12 Defendant violated Proposition 65 by exposing individuals in California to chlorothalonil (the
13 “Covered Chemical”), designated under the Act as “known to the State of California to cause
14 cancer” within the meaning of Section 25249.8(b), without providing Proposition 65 warnings to
15 such individuals, as alleged to be required under Section 25249.6. According to the Complaint
16 and Plaintiff’s Notices, individuals in California are exposed to the Covered Chemical upon
17 consumption or foreseeable use of products that contain the Covered Chemical and that are
18 manufactured, packaged, distributed, marketed and/or sold by Defendant for use in California,
19 including: (a) Bonide® Fung-onil™ Multi-purpose Fungicide Concentrate (8 oz.); (b) Bonide®
20 Fung-onil™ Multi-purpose Fungicide Concentrate (Pint); (c) Bonide® Fung-onil™ Multi-
21 purpose Fungicide Concentrate (Quart); and (d) Bonide® Fung-onil™ Multi-purpose Fungicide
22 Ready-to-Use (Quart). These products are identified in Plaintiff’s Notices and the Complaint, and
23 such products, as identified therein, are referred to collectively herein as the “Covered Products.”

24 **1.6 Jurisdiction:** Solely for purposes of this Consent Judgment, the Parties stipulate
25 that the Court has personal jurisdiction over Defendant as to the acts alleged in the Action; that
26 venue is proper in the City and County of Los Angeles; that the claims in the Action present a live
27 controversy as to the application of Proposition 65 to the Covered Products and the Covered
28 Chemical therein; that this Court has jurisdiction to enter this Consent Judgment as a resolution of

1 all claims alleged in the Action; and that the Court shall retain jurisdiction to implement the
2 Consent Judgment.

3 **1.7 The Standard for Determining Whether Proposition 65 Warnings Are**

4 **Required:** Section 25249.6 of Proposition 65 provides that “[n]o person in the course of
5 business shall knowingly and intentionally expose any individual to a chemical known to the state
6 to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such
7 individual, except as provided in Section 25429.10.” Section 25249.10(c), under the heading
8 “Exemptions from Warning Requirement,” provides that Section 25249.6 “shall not apply” to an
9 “exposure for which the person responsible can show that the exposure poses no significant risk
10 assuming lifetime exposure at the level in question for substances known to the state to cause
11 cancer, and that the exposure will have no observable effect assuming exposure at one thousand
12 (1000) times the level in question for substances known to the state to cause reproductive toxicity,
13 based on evidence and standards of comparable scientific validity to the evidence and standards
14 which form the scientific basis for the listing of such chemical In any action brought to
15 enforce Section 25249.6, the burden of showing that an exposure meets the criteria of this
16 subdivision shall be on the defendant.” Proposition 65 thus makes it unlawful for a person
17 subject to the Act to expose an individual in California to a Proposition 65-listed chemical
18 without first providing a Proposition 65 warning unless an exemption to this requirement applies.
19 Where the defendant asserts an exemption because the alleged exposure is beneath the level that
20 would require a warning, the burden of proof is on the defendant to establish that the exemption
21 applies.

22 **1.8 Settlement.** Plaintiff’s Notices were issued to Defendant on October 13, 2008,
23 July 1, 2009, August 13, 2009, and August 15, 2010. The Parties have engaged in informal
24 discovery and settlement negotiations. As a result of this exchange of information, the Parties
25 agree on some aspects of the allegations, but disagree as to several other aspects, and thus
26 disagree as to whether Defendant has violated Proposition 65. Specifically, the Parties agree that
27 each of the Covered Products contains the Covered Chemical. The Defendant disputes, however,
28 that the manufacture, packaging, distribution, marketing, sale or use of the Covered Products

1 results in the exposure of individuals in California to the Covered Chemical in amounts, if any,
2 that would require a warning under Proposition 65. Plaintiff disputes Defendant's assertions.
3 Therefore, in order to avoid prolonged litigation and the waste of private and judicial resources
4 that would arise from prosecuting, defending, and adjudicating the issues on which the Plaintiff
5 and Defendant disagree, the Parties have agreed, subject to the approval of the Court, to
6 compromise their disputed claims and defenses, and have entered into a settlement agreement, the
7 terms of which are embodied in this Consent Judgment.

8 **1.9 No Admissions:** Neither the Consent Judgment nor any of its provisions shall be
9 construed as an admission by any Party of any fact, finding, issue of law, or violation of law,
10 including Proposition 65 or any other statute, regulation, or common law requirement related to
11 exposure to the Covered Chemical or other chemicals listed under Proposition 65 from the
12 Covered Products. By executing this Consent Judgment, and agreeing to provide the relief and
13 remedies specified herein, Defendant does not admit that this Action is not pre-empted by Federal
14 law, or that Defendant has committed any violations of Proposition 65, or any other law or legal
15 duty, and, further, specifically denies that it has committed any such violations. Rather,
16 Defendant maintains that all Covered Products distributed, marketed and/or sold by Defendant in
17 California have at all times been in compliance with Proposition 65. Nothing in this Consent
18 Judgment shall prejudice, waive, or impair any right, remedy, or defense that Plaintiff and
19 Defendant may have in any other or in future legal proceedings unrelated to these proceedings.
20 Defendant reserves all of its rights and defenses with regard to any claim by any person under
21 Proposition 65 or otherwise. Nevertheless, this paragraph shall not diminish or otherwise affect
22 the obligations, responsibilities, waivers, releases, and/or duties provided for under this Consent
23 Judgment.

24 **2. INJUNCTIVE RELIEF**

25 **2.1** In the spirit of settlement and compromise, and in order to promote the public
26 interest, Bonide agrees to provide the following warning on Covered Products it distributes in
27 California:
28

↓

NOTICE: This product contains a chemical known to the State of California to cause cancer.

The warning statement above shall be provided on the label of the Covered Products in a conspicuous manner, where other precautionary statements appear. The Parties acknowledge that the signal word "NOTICE" in Proposition 65 warnings for pesticides is necessary and appropriate because federal regulations promulgated under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), and related guidance documents, prohibit the use of the signal word "WARNING" except in circumstances not presented by Plaintiff's claims. Plaintiff has agreed to the use of the "NOTICE" signal word herein solely due to the application of FIFRA in this matter.

2.2 The Parties acknowledge that no changes to the label or labeling for any Covered Products that are the subject of this Consent Judgment can be made except as permitted by certain federal and California agencies in their implementation of state and federal laws, other than Proposition 65, that regulate the manufacture, sale, labeling, distribution and use of these Covered Products. Bonide has submitted to the U.S. Environmental Protection Agency revised labels for the Covered Products incorporating the warning statement described in Section 2.1 above, and Bonide shall not be required to implement the warning provision of Section 2.1 until 90 days after the last relevant regulatory agency has approved, in writing, the proposed label change. Defendant shall not be required to re-label or recall any Covered Products in the stream of commerce at the time this Consent Judgment is approved, and Defendant shall not be required to change the use instructions on the label from those approved previously by such federal and California agencies. Under no circumstances shall this Consent Judgment be interpreted to require Defendant to make any other applications or secure any other approvals from federal or state agencies regarding the labeling (including specifically the use instructions or warnings thereon) for the Covered Products, on any other aspect of their manufacture, distribution, sale or use or to distribute any Covered Product in violation of federal and California labeling requirements as such labeling requirements are interpreted by the applicable federal or California agency.

1 **3. MONETARY PAYMENTS**

2 **3.1** In settlement of Plaintiff's claims against it, Bonide shall pay a total of \$72,000 to
3 Plaintiff, as described in paragraphs 3.2 and 3.3 below.

4 **3.2 Payment In Lieu of Civil Penalties:** Within fifteen (15) days after the Court's
5 approval of this Consent Judgment, Bonide shall pay \$8,000 in the form of a check made payable
6 to Consumer Advocacy Group, Inc. CAG will use the payment for such projects and purposes
7 related to environmental protection, worker health and safety, or reduction of human exposure to
8 hazardous substances (including administrative and litigation costs arising from such projects), as
9 CAG may choose. The check shall be delivered to: Reuben Yeroushalmi, Yeroushalmi &
10 Associates, 9100 Wilshire Boulevard, Suite 610E, Beverly Hills, California 90212.

11 **3.3 Reimbursement of Attorneys Fees and Costs:** Within fifteen (15) days after the
12 Court approves this Consent Judgment, Bonide shall pay \$64,000 in the form of a check made
13 payable to "YEROUSHALMI & ASSOCIATES" as reimbursement for the investigation fees and
14 costs, testing costs, expert witness fees, attorneys fees, and other litigation costs and expenses.
15 The check shall be delivered by overnight delivery to: Reuben Yeroushalmi, Yeroushalmi &
16 Associates, 9100 Wilshire Boulevard, Suite 610E, Beverly Hills, California 90212.

17 **4. WAIVER AND RELEASE OF ALL CLAIMS**

18 **4.1 Waiver And Release of Claims Against Defendant:** As to those matters raised
19 in this Action, the Complaint, and/or in Plaintiff's Notices (whether as to Covered Products or as
20 to the Covered Chemical, and without regard to any potential disputes about the adequacy of such
21 Notices); and any related actions, Plaintiff, on behalf of the general public, hereby releases
22 Defendant and waives any claims against Defendant for injunctive relief or damages, penalties,
23 fines, sanctions, mitigation, fees (including fees of attorneys, experts, and others), costs, expenses
24 or any other sum incurred or claimed, for any claims under Proposition 65 or any related actions
25 arising from the sale, distribution or use in California of any Covered Products, including all
26 claims that may arise from the acts alleged in the Plaintiff's Notices or the Complaint.

27 **4.2 Defendant's Waiver And Release Of Plaintiff:** Defendant hereby releases
28 Plaintiff from and waive any claims against Plaintiff for injunctive relief or damages, penalties,

1 fines, sanctions, mitigation, fees (including fees of attorneys, experts, and others), costs,
2 expenses, or any other sum incurred or claimed or which could have been claimed for matters
3 related to the Action.

4 **4.3 Matters Covered By This Consent Judgment/Release of Future Claims:** This
5 Consent Judgment is a full, final, and binding resolution between the Plaintiff, acting on behalf of
6 itself and on behalf of the general public in the public interest pursuant to *Health and Safety Code*
7 Section 25249.7(d), and Defendant, as to all claims arising from Defendant's alleged failure to
8 provide clear, reasonable, and lawful warnings of exposure to the Covered Chemical.
9 Compliance with the terms of this Consent Judgment resolves any issue, now and in the future,
10 concerning compliance by Defendant with existing requirements of Proposition 65 to provide
11 clear and reasonable warning about exposure to the Covered Chemical in the Covered Products.

12 **4.4 Waiver Of Civil Code Section 1542:** This Consent Judgment is intended as a full
13 settlement and compromise of all claims arising out of or relating to Plaintiff's Notices and/or the
14 Action regarding the Covered Products. No claim is reserved as between the Parties hereto, and
15 Plaintiff expressly waives any and all rights which it may have under the provisions of
16 Section 1542 of the *Civil Code* of the State of California, which provides:

17 "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
18 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
19 EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE
20 RELEASE, WHICH IF KNOWN BY HIM MUST HAVE
MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
DEBTOR."

21 **4.5.** For purposes of this entire paragraph 4, the terms "Plaintiff" and "Defendant" are
22 defined as follows. The term "Plaintiff" includes the Plaintiff as defined at paragraph 1.1 above,
23 and also includes its members, subsidiaries, successors, and assigns and its directors, officers,
24 agents, attorneys, representatives, and employees. The term "Defendant" includes the Defendant,
25 as that term is defined in paragraph 1.2 above; its corporate affiliates (including any and all
26 corporate parents and subsidiaries; the directors, officers, agents, attorneys, representatives,
27 employees, licensors, licensees, predecessors, or successors of any of them; and the downstream
28

1 customers of each of them (including distributors and retailers) of the Covered Products and the
2 predecessors, successors and assigns of any of them.
3

4 **5. MODIFICATION OF CONSENT JUDGMENT**

5 This Consent Judgment may be modified from time to time on any basis by express
6 written agreement of the Parties, with the approval of the Court, or by an order of this Court in
7 accordance with law.

8 5.1 This paragraph shall not apply to the monetary relief sections of this Consent
9 Judgment.

10 5.2 The Attorney General shall be served with notice of any proposed modification to
11 this Consent Judgment at least fifteen (15) days in advance of its consideration by the Court.
12

13 **6. ENFORCEMENT OF CONSENT JUDGMENT**

14 6.1 The Parties may, by motion or other application before this Court, and upon notice
15 having been given to all Parties in accordance with paragraph 10 below, unless waived, enforce
16 the terms and conditions of this Consent Judgment and seek whatever fines, costs, penalties, or
17 remedies are provided by law. The prevailing party on any such motion or application shall be
18 entitled to recover reasonable attorneys' fees and costs.

19 6.2 The Parties may enforce the terms and conditions of this Consent Judgment
20 pursuant to paragraph 6.1 only after the complaining party has first given thirty (30) days notice
21 to the Party allegedly failing to comply with the terms and conditions of the Consent Judgment
22 and has attempted, in an open and good faith manner, to resolve such Party's alleged failure to
23 comply.
24

25 **7. GOVERNING LAW**

26 7.1 The terms of this Consent Judgment shall be governed by, and construed in
27 accordance with, the laws of the State of California.
28

1 7.2 The Parties have participated jointly in the preparation of this Consent Judgment
2 and this Consent Judgment is the result of the joint efforts of the Parties. This Consent Judgment
3 was subject to revision and modification by the Parties and has been accepted and approved as to
4 its final form by all Parties and their counsel. Accordingly, any uncertainty or ambiguity existing
5 in this Consent Judgment shall not be interpreted against any Party as a result of the manner in
6 which this Consent Judgment was prepared. Each Party to this Consent Judgment agrees that any
7 statute or rule of construction providing that ambiguities are to be resolved against the drafting
8 party should not be employed in the interpretation of this Consent Judgment and, in this regard,
9 the Parties hereby waive the applications of California *Civil Code* Section 1654.

10
11 **8. ENTIRE AGREEMENT**

12 This Consent Judgment constitutes the sole and entire agreement and understanding
13 between the Parties with respect to the subject matter hereof, and any prior discussions,
14 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
15 and therein. There are no warranties, representations, or other agreements between the Parties,
16 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
17 other than those specifically referred to herein, shall be deemed to exist or bind any of the Parties
18 hereto. No supplementation, modification, waiver, or termination of this Consent Judgment shall
19 be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the
20 provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of the
21 other provisions hereof, whether or not similar, nor shall such waiver constitute a continuing
22 waiver.

23
24 **9. NOTICES**

25 All notices or correspondence to be given pursuant to this Consent Judgment shall be in
26 writing and shall be personally delivered or sent by first-class, registered, certified mail, overnight
27 courier, and/or via facsimile transmission (with presentation of facsimile transmission
28 confirmation) addressed to the Parties as follows:

1 **For Plaintiff:**

Yeroushalmi & Associates
Attn: Reuben Yeroushalmi
9100 Wilshire Boulevard, Suite 610E
Beverly Hills, California 90212

4 **For Defendant:**

McKenna Long & Aldridge LLP
Attn: Ann Grimaldi, Esq.
101 California Street, 41st Floor
San Francisco, California 94111

7 The contacts and/or addresses above may be amended by giving notice to all Parties to this
8 Consent Judgment.

10 **10. COURT APPROVAL**

11 The Court shall either approve or disapprove of this Consent Judgment in its entirety,
12 without alteration, deletion or amendment, unless otherwise so stipulated by the Parties and their
13 counsel. If the Court approves of this Consent Judgment, then the terms of this Consent
14 Judgment are incorporated into the terms of the Court's Order.

15 Plaintiff will prepare and file a motion to approve this Consent Judgment in full, and shall
16 take all reasonable measures to ensure that it is entered without delay. In the event that the Court
17 declines to approve and order entry of the Consent Judgment without any change whatsoever, this
18 Consent Judgment shall become null and void upon the election of either Party and upon written
19 notice to all of the Parties to the Action pursuant to the notice provisions herein (unless the Parties
20 stipulate otherwise, in writing).

21 If the Court enters this Consent Judgment, Plaintiff shall, within ten (10) working days
22 thereafter, electronically provide or otherwise serve a copy of it and the report required pursuant
23 to 11 Cal. Code Regs. § 3004 to/on the California Attorney General's Office.

25 **11. AUTHORIZATION**

26 The undersigned are authorized to execute this Consent Judgment on behalf of their
27 respective Parties and have read, understood, and agree to all of the terms and conditions of this
28 Consent Judgment.

1 **12. COUNTERPARTS/FACSIMILE SIGNING**

2 This Consent Judgment may be executed in one or more counterparts, each of which shall
3 be deemed an original, and all of which, when taken together, shall constitute one and the same
4 document. All signatures need not appear on the same page of the document and signatures of
5 the Parties transmitted by facsimile shall be deemed binding.

6
7
8
9 **IT IS SO STIPULATED:**

10
11 Dated: 1/11/11

CONSUMER ADVOCACY GROUP, INC.



(Signature)

Michel Siroon

(Name)

EXECUTIVE DIRECTOR

(Title)

12
13
14
15
16
17
18
19 Dated: _____

BONIDE PRODUCTS, INC.

(Signature)

(Name)

(Title)

1 **12. COUNTERPARTS/FACSIMILE SIGNING**

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3 be deemed an original, and all of which, when taken together, shall constitute one and the same
4 document. All signatures need not appear on the same page of the document and signatures of
5 the Parties transmitted by facsimile shall be deemed binding.

6
7
8
9 **IT IS SO STIPULATED:**

10
11 Dated: _____

CONSUMER ADVOCACY GROUP, INC.

12
13 _____
(Signature)

14
15 _____
(Name)

16
17 _____
(Title)

18
19 Dated: 12/21/2010

BONIDE PRODUCTS, INC.

20
21 _____
(Signature)

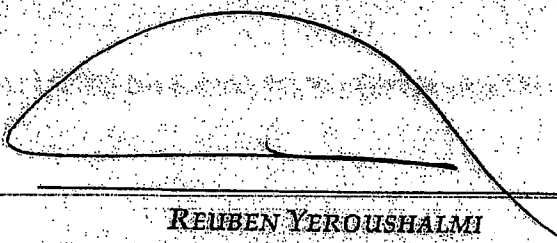
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23 MATT VICKERS
(Name)

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25 V.P. OPERATIONS
(Title)

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APPROVED AS TO FORM:

Dated: 1/11/11



REUBEN YERUSHALMI
YERUSHALMI AND ASSOCIATES
COUNSEL FOR PLAINTIFF CONSUMER
ADVOCACY GROUP, INC.

Dated: 12-21-10

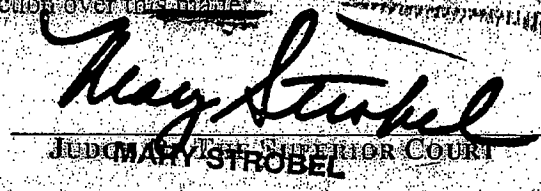


ANN GRIMALDI
MCKENNA LONG & ALDRIDGE
COUNSEL FOR DEFENDANT BONIDE
PRODUCTS, INC.

IT IS SO ORDERED:

In accordance with the stipulation of Plaintiff and Defendant, the Court hereby incorporates the terms of the Consent Judgment into this Order. If a party violates the provisions of this Consent Judgment, this Court retains jurisdiction over this matter.

Dated: 7-21-11


JUDGEMARY STROBEL
SUPERIOR COURT

SP27436676.1