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6 Attorneys for Plaintiff,
7 Consumer Advocacy Group, Inc.

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9
10 COUNTY OF LOS ANGELES – CENTRAL DISTRICT

11 CONSUMER ADVOCACY GROUP, INC., in
12 the interest of the Public,

13 Plaintiff,

14 v.

15 THE SCOTTS MIRACLE-GRO COMPANY,
16 an Ohio corporation; THE SCOTTS
COMPANY, LLC, an Ohio corporation, and
17 DOES 1-50;

18 Defendants.

CASE NO. BC437487

**[PROPOSED] STIPULATED CONSENT
JUDGMENT AND [PROPOSED] ORDER**

Health & Safety Code § 25249.5 *et seq.*

ACTION FILED: May 10, 2010

TRIAL DATE: October 19, 2011

19
20 **1. INTRODUCTION**

21 1.1 On May 10, 2010, Plaintiff, the Consumer Advocacy Group, Inc. (“CAG”), filed a
22 complaint in the Los Angeles Superior Court entitled *Consumer Advocacy Group, Inc. v. The*
23 *Scotts Miracle-Gro Company, et al*, Case No. BC437487 (the “Action”), for civil penalties and
24 injunctive relief pursuant to the provisions of California Health & Safety Code § 25249.5, *et seq.*
25 (“Proposition 65”) against The Scotts Miracle-Gro Company and The Scotts Company LLC
26 (collectively “Defendants”). CAG and Defendants are collectively referred to hereinafter as
27 “Parties.”
28

1 1.2 Defendants are corporations that employ 10 or more persons. In the Action, CAG
2 alleges that Defendants have made available for distribution in the State of California the
3 following products: (1) Ortho® RosePride® Insect, Disease & Mite Control Aerosol (“Aerosol”);
4 (2) Ortho® Orthenex® Insect & Disease Control Concentrate (“Orthenex Concentrate”); (3)
5 Ortho® RosePride® Disease Control Concentrate (“RosePride Concentrate”); and (4) ORTHO®
6 Max Garden Disease Control (“Garden Disease”) (Aerosol, Orthenex Concentrate, RosePride
7 Concentrate, and Garden Disease hereinafter collectively referred to as “Products”). Aerosol
8 allegedly contains Triforine, a chemical known to the State of California to cause birth defects or
9 other reproductive harm, and Resmethrin, a chemical known to the State of California to cause
10 cancer and birth defects or other reproductive harm. Orthenex Concentrate and RosePride
11 Concentrate allegedly contain Triforine, a chemical known to the State of California to cause birth
12 defects or other reproductive harm. Garden Disease allegedly contains Chlorothalonil, a chemical
13 known to the State of California to cause cancer. (Triforine, Resmethrin, and Chlorothalonil are
14 hereinafter collectively referred to as “Noticed Chemicals.”)

15 1.3 On or about December 12, 2006, CAG served Defendants and the appropriate
16 public enforcement agencies with a notice claiming that Defendants were in violation of
17 Proposition 65 in regard to RosePride Concentrate’s predecessor, Ortho® RosePride® Rose &
18 Shrub Disease Control. CAG’s notice and the Complaint in this Action allege that Defendants
19 exposed people who handle the RosePride Concentrate or its predecessor to Triforine, without first
20 providing clear and reasonable warnings, in violation of California Health & Safety Code
21 § 25249.6.

22 1.4 On or about June 28, 2007, CAG served Defendants and the appropriate public
23 enforcement agencies with three notices claiming that Defendants were in violation of Proposition
24 65 in regard to Orthenex Concentrate, Garden Disease’s predecessor, ORTHO® Garden Disease
25 Control Concentrate and Aerosol’s predecessor, Ortho® Orthenex® Insect & Disease Control
26 Aerosol. CAG’s notices and the Complaint in this Action allege that Defendants exposed people
27 who handle Garden Disease or its predecessor to Chlorothalonil, Aerosol or its predecessor to
28 Triforine and Resmethrin, and Orthenex Concentrate to Triforine, without first providing clear and

1 reasonable warnings, in violation of California Health & Safety Code § 25249.6.

2 1.5 On or about June 12, 2008, CAG served Defendants and the appropriate public
3 enforcement agencies with two notices claiming that Defendants were in violation of Proposition
4 65 in regard to the Products and/or their respective predecessors. CAG's notices and the Complaint
5 in this Action allege that Defendants exposed people who handle the Products and/or their
6 respective predecessors to the respective Noticed Chemicals, without first providing clear and
7 reasonable warnings, in violation of California Health & Safety Code § 25249.6.

8 1.6 On or about July 1, 2009, CAG served Defendants and the appropriate public
9 enforcement agencies with two notices claiming that Defendants were in violation of Proposition
10 65 in regard to the Products and/or their respective predecessors. CAG's notices and the Complaint
11 in this Action allege that Defendants exposed people who handle the Products and/or their
12 respective predecessors to the respective Noticed Chemicals, without first providing clear and
13 reasonable warnings, in violation of California Health & Safety Code § 25249.6.

14 1.7 Defendants deny all of CAG's the material allegations, including allegations
15 averred in the notices, and the Complaint, and deny liability for the cause of action alleged in the
16 Complaint and in connection with the Action. By executing this Stipulated Consent Judgment and
17 agreeing to provide the relief and remedies specified herein, Defendants do not admit that they
18 have committed any violations of Proposition 65, or any other law or legal duty and specifically
19 deny that they have committed any such violations and no such admission shall be deemed to have
20 occurred as a result of Defendants agreement to settle and compromise the Action. Defendants
21 maintain that all Products distributed, marketed and/or sold by Defendants in California have at all
22 times been in compliance with Proposition 65.

23 1.8 For purposes of this Stipulated Consent Judgment only, the Parties stipulate that
24 this Court has jurisdiction over the allegations of violations contained in CAG's Complaint and
25 personal jurisdiction over Defendants with respect to the matters set forth in the Stipulated
26 Consent judgment, that venue is proper in the County of Los Angeles, and that this Court has
27 jurisdiction to enter this Stipulated Consent Judgment as a full and final resolution of all claims
28 which were or could have been raised in the Complaint based on the facts alleged therein.

1 1.9 The parties enter into this Stipulated Consent Judgment pursuant to a settlement of
2 certain disputed claims as alleged in the Complaint for the purpose of avoiding prolonged and
3 costly litigation.

4 1.10 Neither this Stipulated Consent Judgment nor any of its provisions shall be
5 construed as an admission by the Parties of any fact, conclusion of law, issue of law or violation of
6 law, including without limitation, any admission concerning any violation of Proposition 65 or any
7 other statutory, regulatory, common law, or equitable doctrine, or the meaning of the terms
8 "knowingly and intentionally expose" or "clear and reasonable warning" as used in Health and
9 Safety Code section 25249.6. Nothing in this Stipulated Consent Judgment, nor compliance with
10 its terms, shall constitute or be construed as an admission by the Parties of any fact, conclusion of
11 law, issue of law, or violation of law, or of fault, wrongdoing, or liability by Defendants, their
12 officers, directors, employees, or parent, subsidiary or affiliated corporations, or be offered or
13 admitted as evidence in any administrative or judicial proceeding or litigation in any court,
14 agency, or forum.

15 1.11 Nothing in this Stipulated Consent Judgment shall prejudice, waive or impair any
16 right, remedy, argument, or defense the Parties may have in any other or future legal proceeding,
17 except as expressly provided in this Stipulated Consent Judgment. By executing this Consent
18 Judgment and agreeing to provide the relief and remedies specified herein, Defendants do not
19 admit that this Action or any other action that may be filed against it in the future under
20 Proposition 65 or any other cause of action is not preempted by Federal law. Defendants reserve
21 all of their rights and defenses with regard to any claim by any person under Proposition 65 or
22 otherwise, including the defense of federal preemption.

23 1.12 The parties began negotiations in 2007 to resolve the disputes as alleged in the
24 Notices as discussed above. This Stipulated Consent Judgment is the product of negotiations
25 during the litigation and is accepted by the Parties, for purposes of settling, compromising, and
26 resolving issues disputed in this action, including future compliance by Defendants with Section 2
27 of this Stipulated Consent Judgment, and shall not be used for any other purpose, or in any other
28 matter.

1 2. **COMPLIANCE – INJUNCTIVE RELIEF**

2 2.1 Reformulation: Within two years from the date this Stipulated Consent Judgment
3 is approved by the Court, Defendants agree to either completely reformulate the products Aerosol,
4 Orthenex Concentrate, and RosePride Concentrate by removing the chemicals Triforine and
5 Resmethrin from those products. If reformulation is not commercially reasonable, Defendants
6 agree to seek permission from all applicable government agencies to modify the label for the
7 products Aerosol, Orthenex Concentrate and RosePride Concentrate to contain a warning
8 compliant with California Health and Safety Code section 25249.6 *et seq* within two years from
9 the date this Stipulated Consent is approved by the Court. In the interim, and within 90 days of
10 approval of this Consent Judgment, Defendants will provide to all California retailers where
11 products Aerosol, Orthenex Concentrate and RosePride Concentrate may be purchased materials
12 to ensure point-of-sale warnings, compliant with California Health and Safety Code section
13 25249.6 *et seq.*, are displayed at the cash register(s) at these retailers. The warning provided shall
14 be conspicuous and shall be substantially similar to the following warning language with the
15 appropriate chemical(s) inserted for each product:

16 **WARNING: This product contains [Triforine and/or Resemethrin], a**
17 **chemical known to the State of California to [cause cancer and/or birth**
18 **defects or other reproductive harm].**

19 2.2 Warning: Within 90 days from the date this Stipulated Consent Judgment is
20 approved by the Court, Defendants will provide to all California retailers where Garden Disease
21 may be purchased materials to ensure point-of-sale warnings, compliant with California Health
22 and Safety Code section 25249.6 *et seq.*, are displayed at the cash register(s) at these retailers.
23 The warning provided shall be conspicuous and shall be substantially similar to the following
24 warning language:

25 **WARNING: This product contains Chlorothalonil, a chemical known to**
26 **the State of California to cause cancer.**

27 3. **SETTLEMENT PAYMENT**

28 3.1 Within ten (10) days of the approval and execution of this Stipulated Consent
Judgment by the Court, Defendants shall pay a total of one hundred and five thousand dollars

1 (\$105,000) to Consumer Advocacy Group, Inc. and Yeroushalmi & Associates. The payment shall
2 be made by separate checks apportioned as follows:

3 3.1.1 Monetary Payment in Lieu of Civil Penalty: Eighteen thousand dollars
4 (\$18,000.00) shall be paid to CAG in lieu of any civil penalty pursuant to California Health
5 and Safety Code § 25249.7(b). CAG will use the payment for such projects and purposes
6 related to environmental protection, worker health and safety, or reduction of human exposure
7 to hazardous substances (including administrative and litigation costs arising from such
8 projects), as CAG may choose. The check shall be made payable to Consumer Advocacy
9 Group, Inc. and delivered to Reuben Yeroushalmi, Yeroushalmi & Associates, 9100 Wilshire
10 Boulevard, Suite 610E, Beverly Hills, California 90212.

11 3.1.2 Attorneys' Fees and Costs: Eighty-Seven thousand dollars (\$87,000.00) of
12 such payment shall be paid to Yeroushalmi & Associates, as CAG's attorneys, for
13 reasonable investigation fees and costs, attorneys' fees, and any other costs incurred as a
14 result of investigating, bringing this matter to Defendants' attention, litigating, and
15 negotiating a settlement in the public interest. The check shall be made payable to
16 Yeroushalmi & Associates and delivered to Reuben Yeroushalmi, Yeroushalmi &
17 Associates, 9100 Wilshire Boulevard, Suite 610E, Beverly Hills, California 90212.

18 4. **MODIFICATION OF STIPULATED CONSENT JUDGMENT**

19 4.1 This written Stipulated Consent Judgment may only be modified by written
20 agreement of CAG and Defendants upon stipulation and Order of the Court, or after noticed
21 motion, and upon entry of a Stipulated Consent Judgment by the Court thereon, or upon motion of
22 CAG or Defendants as provided by law and upon entry of a modified Stipulated Consent
23 Judgment by the Court.

24 4.2 The Attorney General shall be served with notice of any proposed modification to
25 this Consent Judgment at least 15 days in advance of its consideration by the Court.

26 5. **ENFORCEMENT OF STIPULATED CONSENT JUDGMENT**

27 5.1 Either party may, by motion or application for an order to show cause before the
28 Superior Court of the County of Los Angeles, consistent with the terms and conditions set forth in

1 paragraphs 9.1 and 9.2 of this Stipulated Consent Judgment, enforce the terms and conditions
2 contained in this Stipulated Consent Judgment. The prevailing party shall be entitled to its
3 reasonable attorneys' fees and costs associated with such motion or application.

4 5.2 The Parties may enforce the terms and conditions of this Consent Judgment
5 pursuant to paragraph 5.1 only after the party seeking to enforce the Stipulated Consent Judgment
6 has first given 30 days notice to the Party allegedly failing to comply with the terms and
7 conditions of the Stipulated Consent Judgment (the Notice of Non-Compliance) and has
8 attempted, in an open and good faith manner, to resolve such Party's alleged failure to comply.
9 The Notice of Non-Compliance shall identify the specific provision that the party seeking
10 enforcement alleges was violated as well as sufficient information to put the party accused of the
11 violation on notice of the scope, nature, timing and substance of the alleged violation.

12 **6. APPLICATION OF STIPULATED CONSENT JUDGMENT**

13 6.1 This Stipulated Consent Judgment shall apply to and be binding upon the
14 Parties hereto, their divisions, subdivisions and subsidiaries, officers, directors, employees, agents
15 and their successors or assigns, and to the extent allowed by law, on the general public.

16 **7. CLAIMS COVERED AND RELEASED**

17 7.1 CAG, on behalf of itself and in the public interest, hereby releases and discharges
18 Defendants, their related subsidiaries, affiliates, predecessors, successors and assigns, and all
19 officers, directors, employees, and shareholders of them (collectively, "Released Parties") from
20 any and all claims asserted, or that could have been asserted, in this litigation arising from the
21 alleged failure to provide Proposition 65 warnings for the Products regarding the exposure of
22 individuals to the Noticed Chemicals in the Products. CAG, on behalf of itself only, hereby
23 releases and discharges the Released Parties from any and all known and unknown past, present,
24 and future rights, claims, causes of action, damages, suits, penalties, liabilities, injunctive relief,
25 declaratory relief, and attorney fees, costs, and expenses related to or arising out of the facts and
26 claims asserted, or that could have been asserted, under state or federal law or the facts alleged in
27 Plaintiff's Proposition 65 Notices or the Complaint relating to any and all claims concerning
28 exposure of any person to the Noticed Chemicals in the Products. Compliance with the terms of

1 this Stipulated Consent Judgment shall constitute compliance by the Released Parties with
2 Proposition 65 with respect to exposures to the Noticed Chemicals contained in the Products. This
3 release does not limit or affect the obligations of any party created under this Stipulated Consent
4 Judgment.

5 7.2 Unknown Claims. It is possible that other injuries, damages, liability, or claims not
6 now known to the Parties arising out of the facts alleged in the Complaint and relating to the
7 exposure of individuals to the Noticed Chemicals in the Products will develop or be discovered,
8 and this Stipulated Consent Judgment is expressly intended to cover and include all such injuries,
9 damages, liability, and claims, including all rights of action therefor. CAG has full knowledge of
10 the contents of Section 1542 of the Civil Code. CAG, on behalf of itself only, acknowledges that
11 the claims released in section 7.1 above may include unknown claims and waives Section 1542 as
12 to any such unknown claims. Section 1542 reads as follows:

13 **"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
14 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER**
15 **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF**
KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
OR HER SETTLEMENT WITH THE DEBTOR"

16 CAG acknowledges and understands the significance and consequences of this specific waiver of
17 Civil Code Section 1542.

18 **8. NOTICE AND CURE**

19 8.1 No action to enforce this Stipulated Consent Judgment may be commenced, and no
20 notice of violation related to the Products may be served or filed against Defendants by CAG,
21 unless the party seeking enforcement or alleging violation notifies the other party of the specific
22 acts alleged to breach this Stipulated Consent Judgment at least 90 days before serving or filing
23 any motion, action, or Notice of Violation. Any notice to Defendants must contain (a) the name of
24 the product, (b) specific dates when the product was sold in California, (c) the store or other place
25 at which the product was available for sale to consumers, and (d) any other evidence or other
26 support for the allegations in the notice.

27 8.2 Within 30 days of receiving the notice described in Section 8.1, Defendants shall
28 either (1) take all steps necessary to bring the sale of the product into compliance under the terms

1 of this Stipulate Consent Judgment, (2) withdraw the product, or (3) refute the information
2 provided under Section 8.1. Should the parties be unable to resolve the dispute, either party may
3 seek relief under Section 5.

4 **9. GOVERNING LAW**

5 9.1 The terms of this Stipulated Consent Judgment shall be governed by the laws of the
6 State of California.

7 **10. PROVISION OF NOTICE**

8 10.1 All notices required pursuant to this Stipulated Consent Judgment and
9 correspondence shall be sent to the following:

10 For Consumer Advocacy Group, Inc.

For The Scotts Miracle-Gro Company and The
Scotts Company, LLC:

11

12 Reuben Yeroushalmi
13 YEROUSHALMI & ASSOCIATES
14 9100 Wilshire Boulevard, Suite 610E
15 Beverly Hills, CA 90212
16 T: 310-623-1926
17 F: 310-623-1930

Peter Obstler, Esq.
BINGHAM MCCUTCHEN LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
T: 415.393.2000
F: 415.393.2286

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

18 **11. ENTIRE AGREEMENT**

19 11.1 This Stipulated Consent Judgment constitutes the sole and entire agreement and
20 understanding between the Parties with respect to the subject matter hereof, and any prior
21 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
22 merged herein and therein. There are no warranties, representations or other agreements between
23 the Parties, except as expressly set forth herein. No representations, oral or otherwise, express or
24 implied, other than those specifically referred to herein, shall be deemed to exist or bind any of the
25 Parties hereto. No supplementation, modification, waiver, or termination of this Stipulated
26 Consent Judgment shall be binding unless executed in writing by the Party to be bound thereby.

27 **12. COURT APPROVAL**

28

1 12.1 The Court shall either approve or disapprove of this Stipulated Consent Judgment
2 in its entirety, without alteration, deletion or amendment, unless otherwise so stipulated by the
3 Parties and their counsel. If this Stipulated Consent Judgment is not approved by the Court, it
4 shall be of no further force or effect.

5 12.2 CAG shall comply with Health and Safety Code section 25249.7(f) and with Title
6 11 California Code of Regulations section 3003.

7 **13. EXECUTION AND COUNTERPARTS**

8 13.1 This Stipulated Consent Judgment may be executed in counterparts and by means
9 of facsimile, which taken together shall be deemed to constitute one document. Facsimile or pdf
10 signatures shall be construed as valid as the original.

11 **14. AUTHORIZATION**

12 14.1 Each signer of this Stipulated Consent Judgment certifies that he or she is fully
13 authorized by the party he or she represents to stipulate to the terms and conditions of this
14 Stipulated Consent Judgment and to enter into and execute the Stipulated Consent Judgment on
15 behalf of the party represented and legally bind that party. The undersigned have read, understand

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1 and agree to all of the terms and conditions of this Stipulated Consent Judgment. Except as
2 explicitly provided herein, each party is to bear its own fees and costs.

3

4 Dated: June 13, 2011

CONSUMER ADVOCACY GROUP, INC.

5

6

Lyn H Marcus

7

Name and Title: Lyn H Marcus, Pres.

8

9 Dated: _____

THE SCOTTS MIRACLE-GRO COMPANY

10

11

12

Name and Title: _____

13

14 Dated: _____

THE SCOTTS COMPANY, LLC

15

16

17

Name and Title: _____

18

19

20

ORDER AND JUDGMENT

21 Based upon the Stipulated Consent Judgment between Consumer Advocacy Group, Inc. and The
22 Scotts Miracle-Gro Company and The Scotts Company, LLC, the Consent Judgment is approved
23 and judgment is hereby entered according to the terms herein.

24

25 Dated: _____

26

Judge, Superior Court of the State of California

27

28

1 and agree to all of the terms and conditions of this Stipulated Consent Judgment. Except as
2 explicitly provided herein, each party is to bear its own fees and costs.

3

4 Dated: _____

CONSUMER ADVOCACY GROUP, INC.

5

6

7

Name and Title: _____

8

9 Dated: 6/13/11

THE SCOTTS MIRACLE-GRO COMPANY

10

11



12

Name and Title: Vincent C. Brockman
VP & General Counsel

13

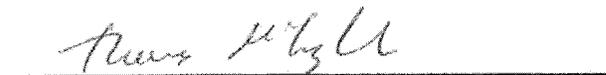
14 Dated: 6/13/11

THE SCOTTS COMPANY, LLC

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Name and Title: Thomas McLouber
VP MARKETING

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ORDER AND JUDGMENT

21

Based upon the Stipulated Consent Judgment between Consumer Advocacy Group, Inc. and The

22

Scotts Miracle-Gro Company and The Scotts Company, LLC, the Consent Judgment is approved

23

and judgment is hereby entered according to the terms herein.

24

25 Dated: _____

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Judge, Superior Court of the State of California

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