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7 Attorneys for Plaintiff  
8 CONSUMER ADVOCACY GROUP, INC.

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF SAN FRANCISCO

11 CONSUMER ADVOCACY GROUP,

Case No. CGC-12-520303

12 Plaintiff,

**[PROPOSED] CONSENT JUDGMENT**

13 v.

14 GRO-POWER, INC. a California corporation  
15 and DOES 1-20

16 Defendant.  
17

18 **I. INTRODUCTION**

19 1.1 This Consent Judgment is entered into by and between plaintiff Consumer  
20 Advocacy Group, Inc. ("CAG") acting on behalf of itself and in the interest of the public and  
21 defendant Gro-Power, Inc. ("Defendant"), with each a Party and collectively referred to as  
22 "Parties."

23 1.2 Defendant employs ten or more persons, and is a person in the course of doing  
24 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California  
25 Health & Safety Code §§ 25249.6 et seq. ("Proposition 65") that manufactured distributed or sold  
26 Fertilizers containing Cadmium. Cadmium is known to the State of California to cause cancer  
27 and birth defects or other reproductive harm.  
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1           1.3     **Notice of Violation.**

2           On or about July 19, 2011, CAG served Defendant and various public enforcement  
3 agencies with a document entitled "60-Day Notice of Violation" ("July 19, 2011 Notice") that  
4 provided the recipients with notice of alleged violations of Health & Safety Code § 25249.6 for  
5 failing to warn individuals in California of exposures to Cadmium contained in Fertilizers, an  
6 exemplar of which includes, but is not limited to, "Gro-Power Flower 'n' Bloom® 3-12-12, 8.8  
7 lbs" allegedly sold by Defendant. No public enforcer has commenced or diligently prosecuted the  
8 allegations set forth in the July 19, 2011 Notice.

9           1.4     **Complaint.**

10          On April 26, 2012, CAG filed a Complaint for civil penalties and injunctive relief  
11 ("Complaint") in San Francisco County Superior Court, Case No. CGC-12-520303, against  
12 Defendants. The Complaint alleges, among other things, that Defendants violated Proposition 65  
13 by failing to give clear and reasonable Proposition 65 warnings of exposure to Cadmium from  
14 Fertilizers.

15          1.5     **Consent to Jurisdiction.**

16          Solely for purposes of this Consent Judgment, the parties stipulate that this Court has  
17 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction  
18 over Defendants as to the acts alleged in the Complaint, that venue is proper in the County of San  
19 Francisco and that this Court has jurisdiction to enter this Consent Judgment as a full settlement  
20 and resolution of the allegations contained in the Complaint and of all claims which were or could  
21 have been raised by any person or entity based in whole or in part, directly or indirectly, on the  
22 facts alleged therein or arising therefrom or related to.

23          1.6     **No Admission.**

24          This Consent Judgment resolves claims that are denied and disputed. The parties enter  
25 into this Consent Judgment pursuant to a full and final settlement of any and all claims between  
26 the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall not  
27 constitute an admission with respect to any material allegation of the Complaint, each and every  
28 allegation of which Defendants deny, nor may this Consent Judgment or compliance with it be

1 used as evidence of any wrongdoing, misconduct, culpability or liability on the part of  
2 Defendants.

3 **2. DEFINITIONS**

4 2.1 "Covered Products" means Fertilizers containing Cadmium sold, manufactured,  
5 and/or distributed only by Gro-Power, Inc.

6 2.2 "Effective Date" means the date that this Consent Judgment is approved by the  
7 Court.

8 2.3 "Notice" means the July 19, 2011 Notice.

9 **3. INJUNCTIVE RELIEF/REFORMULATION.**

10 3.1 On or after the Effective Date, Defendant shall not purchase in California, import  
11 into California, manufacture in California, distribute in or into California, sell in California, or  
12 offer for sale to California consumers Covered Products containing more than 0.05 micrograms of  
13 Cadmium. In addition, Defendant will affix Proposition 65-compliant warnings on the Covered  
14 Products that state:

15 "WARNING: THIS PRODUCT CONTAINS CHEMICALS KNOWN TO THE  
16 STATE OF CALIFORNIA TO CAUSE CANCER AND/OR BIRTH DEFECTS  
OR OTHER REPRODUCTIVE HARM."

17 **4. SETTLEMENT PAYMENT**

18 4.1 **Settlement Amount:** Defendant shall pay the total sum of \$68,000 as a settlement  
19 payment in full and complete settlement of all monetary claims by CAG related to the Notice, as  
20 follows.

21 4.1.1 **Payment In Lieu of Civil Penalties:** Defendant shall pay \$5,000 in lieu  
22 of civil penalties to "Consumer Advocacy Group, Inc." CAG will use the payment for  
23 such projects and purposes related to environmental protection, worker health and safety,  
24 or reduction of human exposure to hazardous substances (including administrative and  
25 litigation costs arising from such projects), as CAG may choose.

26 4.1.2 **Reimbursement of Attorneys Fees and Costs:** Defendant shall pay  
27 \$58,000 to "Yeroushalmi & Associates" as reimbursement for the investigation fees and  
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1 costs, testing costs, expert fees, attorney fees, and other litigation costs and expenses for  
2 all work performed through the approval of this Consent Judgment.

3 4.1.3 Civil Penalty: Defendant shall issue two separate checks for a total amount  
4 of \$5,000 as penalties pursuant to Health & Safety Code § 25192: (a) one check made  
5 payable to the State of California's Office of Environmental Health Hazard Assessment  
6 (OEHHA) in the amount of \$3,750, representing 75% of the total penalty; and (b) one  
7 check to Consumer Advocacy Group, Inc. in the amount of \$1,250, representing 25% of  
8 the total penalty. Two separate 1099s shall be issued for the above payments: The first  
9 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-  
10 0284486) in the amount of \$3,750. The second 1099 shall be issued in the amount of  
11 \$1,250 to CAG and delivered to: Yeroushalmi & Associates, 9100 Wilshire Boulevard,  
12 Suite 240W, Beverly Hills, California 90212.

13 4.2 **Delivery of Payments**: Payments shall be delivered to: Reuben Yeroushalmi,  
14 Yeroushalmi & Associates, 9100 Wilshire Blvd., Suite 240W, Beverly Hills, CA 90212.

15 **5. MATTERS COVERED BY THIS CONSENT JUDGMENT**

16 5.1 This Consent Judgment is a full, final, and binding resolution between CAG on  
17 behalf of itself and in the public interest and Defendants and its officers, directors, insurers,  
18 employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, sister  
19 companies and their successors and assigns ("Defendant Releasees") and each of their suppliers,  
20 customers, distributors, wholesalers, retailers, or any other person in the course of doing business,  
21 and the successors and assigns of any of them, who may use, maintain, distribute or sell Covered  
22 Products ("Downstream Defendant Releasees"), for all claims for violations of Proposition 65 up  
23 through the Effective Date based on exposure to Cadmium from Covered Products as set forth in  
24 the Notice. Defendant's and Defendant Releasees' compliance with this Consent Judgment shall  
25 constitute compliance with Proposition 65 with respect to Cadmium from the Covered Products  
26 as set forth in the Notice.

27 5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys,  
28 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or

1 indirectly, any form of legal action and releases all claims, including, without limitation, all  
2 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages,  
3 costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert  
4 fees, and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or  
5 contingent (collectively "Claims"), against Defendant, Defendant Releasees, and Downstream  
6 Defendant Releasees arising from any violation of Proposition 65 or any other statutory or  
7 common law regarding the failure to warn about exposure to Cadmium in Covered Products. In  
8 furtherance of the foregoing, as to alleged exposures to Covered Products, CAG hereby waives  
9 any and all rights and benefits which it now has, or in the future may have, conferred upon it with  
10 respect to the Claims by virtue of the provisions of section 1542 of the California Civil Code,  
11 which provides as follows:

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

17 CAG understands and acknowledges that the significance and consequence of this waiver of  
18 California Civil Code section 1542 is that even if CAG suffers future damages arising out of or  
19 resulting from, or related directly or indirectly to, in whole or in part, the Covered Products,  
20 including but not limited to any exposure to, or failure to warn with respect to exposure to  
21 Cadmium from Covered Products, CAG will not be able to make any claim for those damages  
22 against Defendants or the Released Entities. Furthermore, CAG acknowledges that it intends  
23 these consequences for any such Claims as may exist as of the date of this release but which CAG  
24 does not know exist, and which, if known, would materially affect their decision to enter into this  
25 Consent Judgment, regardless of whether their lack of knowledge is the result of ignorance,  
26 oversight, error, negligence, or any other cause.

## 27 6. ENFORCEMENT OF JUDGMENT

28 6.1 The terms of this Consent Judgment shall be enforced exclusively by the parties  
hereeto. The parties may, by noticed motion or order to show cause before the Superior Court of  
California, San Francisco County, giving the notice required by law, enforce the terms and

1 conditions contained herein. A Party may enforce any of the terms and conditions of this Consent  
2 Judgment only after that Party first provides 30 days' notice to the Party allegedly failing to  
3 comply with the terms and conditions of this Consent Judgment and attempts to resolve such  
4 Party's failure to comply in an open and good faith manner.

5       **6.2 Notice of Violation.** Prior to bringing any motion, order to show cause, or other  
6 proceeding to enforce Section 0 of this Consent Judgment, CAG shall provide a Notice of  
7 Violation ("NOV") to Defendants. The NOV shall include for each Covered Product: the date(s)  
8 the alleged violation(s) was observed and the location at which the Covered Product was offered  
9 for sale, and shall be accompanied by all test data obtained by CAG regarding the Covered  
10 Product, including an identification of the component(s) of the Covered Product that were tested.

11               **6.2.1 Non-Contested NOV.** CAG shall take no further action regarding the  
12 alleged violation if, within 30 days of receiving such NOV, Defendants serve a Notice of Election  
13 ("NOE") demonstrating that:

14                       (a) The Covered Product was shipped by Defendants for sale in  
15 California before the Effective Date, or

16                       (b) Since receiving the NOV Defendants have taken corrective action  
17 by either (i) requesting that its customers in California remove the Covered Product identified in  
18 the NOV from sale in California and destroy or return the Covered Product to Defendants, or (ii)  
19 providing a clear and reasonable warning for the Covered Product identified in the NOV pursuant  
20 to 27 Cal. Code Regs. § 25603.

21               **6.2.2 Contested NOV.** Defendant may serve an NOE informing CAG of its  
22 election to contest the NOV within 30 days of receiving the NOV.

23                       (a) In its election, Defendant may request that the sample(s) Covered  
24 Product tested by CAG be subject to confirmatory testing at an EPA-accredited laboratory.

25                       (b) If the confirmatory testing establishes that the Covered Product  
26 does not contain Cadmium in excess of the level allowed in Section 0, CAG shall take no further  
27 action regarding the alleged violation. If the testing does not establish compliance with Section 0,  
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1 Defendant may withdraw its NOE to contest the violation and may serve a new NOE pursuant to  
2 Section 6.2.1.

3 (c) If Defendant do not withdraw an NOE to contest the NOV, the  
4 Parties shall meet and confer for a period of no less than 30 days before CAG may seek an order  
5 enforcing the terms of this Consent Judgment.

6 6.3 In any proceeding brought by either Party to enforce this Consent Judgment, such  
7 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any  
8 violation of Proposition 65 or this Consent Judgment.

## 9 7. ENTRY OF CONSENT JUDGMENT

10 7.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to  
11 California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CAG and  
12 Defendant waive their respective rights to a hearing or trial on the allegations of the Complaint.

13 7.2 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment  
14 and any and all prior agreements between the parties merged herein shall terminate and become  
15 null and void, and the actions shall revert to the status that existed prior to the execution date of  
16 this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the  
17 negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall  
18 have any effect, nor shall any such matter be admissible in evidence for any purpose in this  
19 Action, or in any other proceeding; and (c) the Parties agree to meet and confer to determine  
20 whether to modify the terms of the Consent Judgment and to resubmit it for approval.

## 21 8. MODIFICATION OF JUDGMENT

22 8.1 This Consent Judgment may be modified only upon written agreement of the  
23 parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of  
24 any party as provided by law and upon entry of a modified Consent Judgment by the Court.

25 8.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to  
26 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

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1       **9.       RETENTION OF JURISDICTION**

2           9.1     This Court shall retain jurisdiction of this matter to implement and enforce the  
3 terms of this Consent Judgment.

4       **10.       DUTIES LIMITED TO CALIFORNIA**

5           10.1    This Consent Judgment shall have no effect on Covered Products sold by  
6 Defendant outside the State of California.

7       **11.       SERVICE ON THE ATTORNEY GENERAL**

8           11.1    CAG shall serve a copy of this Consent Judgment, signed by both parties, and the  
9 motion for approval of this Consent Judgment on the California Attorney General in accordance  
10 with 11 C.C.R. § 3003.

11       **12.       ATTORNEY FEES**

12           12.1    Except as specifically provided in Section 4, each Party shall bear its own costs  
13 and attorney fees in connection with this action.

14       **13.       ENTIRE AGREEMENT**

15           13.1    This Consent Judgment contains the sole and entire agreement and understanding  
16 of the parties with respect to the entire subject matter hereof and any and all prior discussions,  
17 negotiations, commitments and understandings related hereto. No representations, oral or  
18 otherwise, express or implied, other than those contained herein have been made by any party  
19 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be  
20 deemed to exist or to bind any of the parties.

21       **14.       GOVERNING LAW**

22           14.1    The validity, construction and performance of this Consent Judgment shall be  
23 governed by the laws of the State of California, without reference to any conflicts of law  
24 provisions of California law.

25           14.2    The Parties, including their counsel, have participated in the preparation of this  
26 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This  
27 Consent Judgment was subject to revision and modification by the Parties and has been accepted  
28 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or



1 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result  
2 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment  
3 agrees that any statute or rule of construction providing that ambiguities are to be resolved against  
4 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in  
5 this regard, the Parties hereby waive California Civil Code § 1654.

6 **15. EXECUTION AND COUNTERPARTS**

7 15.1 This Consent Judgment may be executed in counterparts and by means of  
8 facsimile or portable document format (pdf), which taken together shall be deemed to constitute  
9 one document.

10 **16. NOTICES**

11 16.1 Any notices under this Consent Judgment shall be by personal delivery, overnight  
12 courier, or certified First Class Mail.

13 If to CAG:

14 Reuben Yeroushalmi  
15 Yeroushalmi & Associates  
16 9100 Wilshire Boulevard, Suite 240W  
17 Beverly Hills, CA 90212  
18 Tel: (310) 623-1926

17 If to Defendant:

18 Gro-Power, Inc.  
19 15065 Telephone Ave.  
20 Chino, CA 91710

21 With a copy to:

22 Garth Ward, Esq.  
23 Lewis, Brisbois, Bisgaard, & Smith  
24 701 B Street, Suite 1900  
25 San Diego, CA 92101

26 16.2 Each Party may revise its designated notice recipient(s) in Section 16.1 by  
27 providing written notice to the other Party.

28 **17. AUTHORITY TO STIPULATE**

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


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AGREED TO:

AGREED TO:

Date: ~~July~~ Aug 28, 2014

Date: July \_\_\_\_\_, 2014

By:   
Plaintiff CONSUMER ADVOCACY  
GROUP, INC.

By: \_\_\_\_\_  
Defendant GRO-POWER, INC.

**IT IS SO ORDERED.**

Date: \_\_\_\_\_

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JUDGE OF THE SUPERIOR COURT

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Date: July \_\_\_\_\_, 2014

Date: July \_\_\_\_\_, 2014

By: \_\_\_\_\_  
Plaintiff CONSUMER ADVOCACY  
GROUP, INC.

By: Bret C. Holden, President  
Defendant GRO-POWER, INC.

**IT IS SO ORDERED.**

Date: \_\_\_\_\_

\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT