

Gregory M. Sheffer, State Bar No. 173124
SHEFFER & CHANLER
4400 Keller Avenue, Suite 200\
Oakland, CA 94605
Tel: (510) 577-0747
Fax: (510) 577-0787

Clifford A. Chanler, State Bar No. 135534
SHEFFER & CHANLER
Magnolia Lane (off Huckleberry Hill)
New Canaan, CT 06840-3801
Tel: (203) 966-9911
Fax: (203) 801-5222

Attorneys for Plaintiff
MICHAEL DIPIRRO

Steven P. Case
MCGRATH, NORTH, MULLIN & KRATZ, P.C.
222 South 15th Street, Suite 1400
Omaha, NE 68102
Tel: (402) 341-3070
Fax: (402) 341-0216

Attorneys for Defendant
BYRON ORIGINALS, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

MICHAEL DIPIRRO,)
)
Plaintiff,)
)
v.)
)
BYRON ORIGINALS, INC.; and DOES)
1 through 1000)
)
Defendants.)
_____)

Case No. 407463

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement” or “Consent Judgment”) is entered into by and between Michael DiPirro and Byron Originals, Inc. (“Byron”), as of June 14, 2002 (the “Effective Date”). The parties agree to the following terms and conditions:

WHEREAS:

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

B. Byron is a company that currently manufactures and distributes certain fuels that contain nitromethane, a substance known to the State of California to cause cancer;

C. A list of the products which contain nitromethane (the “Listed Chemicals”) and which are covered by this Agreement is provided in Exhibit A (the “Products”). The Products have been distributed and sold by Byron in California since April 1998; and

D. On December 28, 2001, Michael DiPirro first served Byron and other public enforcement agencies with a document entitled “60-Day Notice of Violation” which provided Byron and such public enforcers with notice that Byron was in violation of Health & Safety Code §25249.6 for allegedly failing to warn purchasers that certain products it sells in California expose users to the Listed Chemical; and

E. On May 2, 2002, Michael DiPirro filed a complaint entitled Michael DiPirro v. Byron Originals, Inc., et al. In the San Francisco County Superior Court, naming Byron as a defendant and alleging violations of Business & Professions Code §17200 and Health & Safety Code §25249.6 in the interest of the general public in California who allegedly have been exposed to the Listed Chemical contained in certain products that Byron distributes and sells.

F. Byron denies the material factual and legal allegations contained in DiPirro's above-mentioned 60-Notice of Violation and Complaint and maintains that all products distributed or sold by Byron in California including, but not limited to, the Products, have been and are in compliance with all laws.

G. Nothing in this Agreement shall be construed as an admission by Byron of any fact, finding, issue of law or violation of law; nor shall compliance with this Agreement constitute or be construed as an admission by Byron of any fact, finding, conclusion, issue of law or violation of law. However, this paragraph shall not diminish or otherwise affect the obligations, responsibilities and duties of Byron under this Agreement.

NOW, THEREFORE, MICHAEL DIPIRRO AND BYRON AGREE AS FOLLOWS:

1. **Product Warnings.** As of the Effective Date of this Agreement, Byron shall begin to initiate revisions to its health hazard warnings for its Products to provide the language set forth in the section 1.1 below. Beginning on July 15, 2002, however; Byron agrees that it will not knowingly ship, or cause to be shipped, any Products containing the Listed Chemical for sale in the State of California unless such Products comply with section 1.1 below:

1.1 For all fuel containing nitromethane, such Products shall bear the following warning statement:

“WARNING: Use of this product will expose you to nitromethane, a chemical known to the State of California to cause cancer.”

or

“WARNING: This product contains nitromethane, a chemical known to the State of California to cause cancer.”

or

“WARNING: This product contains a chemical known to the State of California to cause cancer.”

This warning statement shall be prominently placed on the Products with such conspicuousness (as compared with other words, statements, designs or devices) on the product label, as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase.

2. Warning Limitation/Elimination. DiPirro alleges that the customary use or application of the Products is likely to expose users to one or more of the Listed Chemicals. In the event that Byron obtains analytical, risk assessment or other data (“Exposure Data”) that shows an exposure to any or all of those Products poses “no significant risk” as such standard is applicable and as is defined under Health & Safety Code §25249.10(c) and Byron seeks to limit or eliminate any of the warning provisions required under this Agreement, then Byron shall provide DiPirro with ninety (90) days’ prior written notice of its intent to limit or eliminate the warning provisions under this Agreement based on the Exposure Data and shall provide DiPirro with all such supporting Exposure Data. Within ninety (90) days of receipt of Byron’s Exposure Data, DiPirro shall provide Byron with written notice of his intent to challenge the Exposure Data (in the event that he chooses to make such a challenge). If DiPirro fails to provide Byron written notice of his intent to challenge the Exposure Data within ninety (90) days of receipt of Byron’s notice and the Exposure Data, DiPirro shall waive all rights to challenge the Exposure Data, and Byron shall be entitled to limit or eliminate the warning provisions required under this Agreement with respect to those Product(s) to which the Exposure Data applies. If DiPirro timely notifies Byron of his intent to challenge the Exposure Data, DiPirro and Byron (a) may stop its efforts to eliminate the warnings upon notice to DiPirro with no further liability or obligations or (b) shall negotiate in good faith for a period not to exceed thirty (30) days

following receipt of Byron's notice to attempt to reach a settlement of this issue. If a settlement is not reached, DiPirro and Byron agree to submit such challenge to the Superior Court for determination, pursuant to the Court's continuing jurisdiction of this matter under C.C.P. §664.6 and this Agreement. The prevailing party shall be entitled to reasonable attorneys' fees and costs associated with bringing a motion brought under this paragraph to the Court for determination. Should Byron so request, DiPirro shall not unreasonably withhold his consent to modifying or eliminating the warning program set forth in Sections 1 and 1.1 herein to make it consistent with the warning program applicable to other nitromethane fuel products substantially similar to the nitromethane-containing Products.

3. Payment Pursuant to Health and Safety Code §25249.7(b). In light of the factors enumerated in Health & Safety Code §25249.7(b), Byron agrees to pay a civil penalty of \$1,000. The payment of \$1,000 shall be paid within five (5) calendar days of the Effective Date. The penalty payment is to be made payable to "Sheffer & Chanler in Trust for Michael DiPirro." If the Agreement is not approved by the Court, DiPirro will return all funds, with interest thereon at the prevailing federal funds rate (currently set at 1.75%), with ten (10) calendar days of notice of the Court's final decision. Penalty monies shall be apportioned by DiPirro in accordance with Health & Safety Code §25192, with 75% of those funds remitted to the State of California's Department of Toxic Substance Control.

4. Reimbursement of Fees and Costs. The parties acknowledge that once the injunctive relief provisions and other monetary terms had been resolved, DiPirro and his counsel offered to resolve the issue of reimbursement of attorneys' fees and costs through a noticed motion pursuant to C.C.P. §1021.5. Byron then expressed a desire to resolve the fees and cost issue shortly after the other settlement terms had been finalized. The parties then attempted to

(and did) reach an accord on the compensation due to DiPirro and his counsel under the private attorney general doctrine codified at C.C.P. §1021.5 for all work performed through the Effective Date of the Agreement.

Pursuant to C.C.P. §1021.5, Byron agrees to reimburse DiPirro and his counsel for their reasonable attorneys' fees and costs incurred as a result of investigating, litigating and negotiating a settlement in the public interest in the amount of \$14,346. Byron agrees to pay the total sum of \$14,346 within five (5) calendar days of the Effective Date. Payment should be made payable to the "Sheffer & Chanler." If the Agreement is not approved by the Court, DiPirro will return all funds, with interest thereon at the prevailing federal funds rate (currently set at 1.75%), within ten (10) calendar days of notice of the Court's final decision.

4.1 Additional Fees and Costs in Seeking Judicial Approval. The parties acknowledge that, pursuant to recent interpretations of Health & Safety Code §25249.7, a noticed opinion is required to obtain judicial approval of this Agreement. Accordingly, the parties agree to use their best efforts to file a Joint Motion to Approve the Agreement within a reasonable period of time after execution of this Agreement. Pursuant to C.C.P. §1021.5, Byron agrees to reimburse DiPirro and his counsel for their reasonable fees and costs incurred in seeking judicial approval of this Agreement.

4.2 DiPirro and his counsel expressly agree that Byron's liability for payment due under this paragraph for work performed in the trial court shall not exceed \$3,800 if no opposition to the motion (nor objection to the terms of the Agreement) is filed or otherwise transmitted by any third party.

4.3 In the event that any third party, including any public enforcer, objects or otherwise comments to one or more provisions of this Agreement, Byron agrees to use its best

efforts to support each of the terms of the Agreement, as well as to seek judicial approval of this Agreement.

4.4 In the event that such an objection or opposition is transmitted or filed by any third party, Byron agrees to reimburse DiPirro for his reasonable attorneys' fees and costs in an amount not to exceed \$3,700 (above the cap set forth in 4.2).

4.5 In the event that defending this Agreement from such objection or opposition from any third party requires a declaration from an expert, then Byron agrees to reimburse DiPirro for such expert's reasonable fees and costs in an amount not to exceed \$1,600 (above the caps set forth in 4.2 and 4.4).

4.6 In the event that DiPirro and his counsel incur fees in connection with work in the appellate courts as part of the process to obtain judicial approval of this Agreement, Byron agrees to reimburse DiPirro for his reasonable fees and costs for such efforts; provided, however, no fees shall be incurred with any such work in the appellate courts unless Byron, in its sole discretion, approves in writing the defense by DiPirro of any such appeal.

4.7 DiPirro agrees to document all fees and costs incurred from the date of receipt of the Attorney General's and/or third party's objections, and/or beginning of any work in the appellate courts, through the date of court approval of this Agreement. Prior to receiving such documentation, Byron agrees to enter into a letter agreement in which the parties agree that by transmitting such information, no privilege will be waived by DiPirro or his counsel.

4.8 Byron's payment of DiPirro's legal fees and costs under these subsections shall be due within ten (10) calendar days after receipt of a billing statement from DiPirro ("Additional Fee Claim"). Payment of the Additional Fee Claim shall be made payable to the "Sheffer & Chanler." Byron has the right to object to DiPirro's reimbursement request. If Byron does

object, it shall notify DiPirro's counsel in writing within five (5) calendar days of its receipt of both the notice of the Court's approval of the Agreement and DiPirro's billing statement. The parties shall meet and confer in good faith to resolve the dispute. If the dispute is not resolved within twenty-one (21) calendar days, either party may submit the dispute to the Court, pursuant to the Court's continuing jurisdiction to implement the terms of this Agreement. The parties may also agree to resolve the dispute through mediation, arbitration or other neutral third-party dispute resolution proceeding.

5. **Michael DiPirro's Release of Byron.** Michael DiPirro, by this Agreement, on behalf of himself, his agents, representatives, attorneys, assigns and in the interest of the general public, waives all rights to institute or participate in, directly or indirectly, any form of legal action, and releases all claims, liabilities, obligations, losses, costs, expenses, fines and damages, against Byron and its distributors, customers, retailers, directors, officers, employees, successors and assigns, whether under Proposition 65 or the Business & Profession Code §17200 et seq. Based on Byron's alleged failure to warn about exposure to the Listed Chemical contained in any of the Products.

6. **Byron's Release of Michael DiPirro.** Byron, by this Agreement, waives all rights to institute any form of legal action against Michael DiPirro or his attorneys or representatives, for all actions or statements made by Michael DiPirro, or his attorneys or representatives, in the course of seeking enforcement of Proposition 65 or Business & Profession Code §17200 against Byron.

7. **Court Approval.** If, for any reason, this Agreement is not ultimately approved by the Court, this Agreement shall be deemed null and void.

8. **Byron Sales Data.** Byron understands that the sales data provided to counsel for DiPirro by Byron was a material factor upon which DiPirro has relied to determine the amount of payments made pursuant to Health & Safety Code §25249.7(b) in this Agreement. To the best of Byron's knowledge, the sales data provided is true and accurate. In the event that DiPirro discovers facts which demonstrate to a reasonable degree of certainty that the sales data is materially inaccurate, the parties shall meet in a good faith attempt to resolve the matter within ten (10) days of Byron's receipt of notice from DiPirro of his intent to challenge the accuracy of the sales data. If this good faith attempt fails to resolve DiPirro's concerns, DiPirro shall have the right to rescind the Agreement and re-institute an enforcement action against Byron, provided that all sums paid by Byron pursuant to paragraphs 2 and 3 are returned to Byron within ten (10) days from the date on which DiPirro notifies Byron of his intent to rescind this Agreement. In such case, all applicable statutes of limitation shall be deemed tolled for the period between the date DiPirro filed the instant action and the date DiPirro notifies Byron that he is rescinding this Agreement pursuant to this Paragraph; provided, however, in no event shall any statute of limitations be tolled beyond four (4) years from the date this action was filed.

9. **Severability.** In the event that any of the provisions of this Agreement are ultimately held by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.

10. **Attorney's Fees.** Unless otherwise noted, in the event that a dispute arises with respect to any provision(s) of this Agreement (including, but not limited to, disputes arising from the payments to be made under this Agreement), the prevailing party shall be entitled to recover costs and reasonable attorney's fees.

11. Governing Law. The terms of this Agreement shall be governed by the laws of the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products specifically, Byron shall have no further obligations pursuant to this Agreement with respect to, and to the extent that, those Products are so affected.

12. Notices. All correspondence and notices required to be provided pursuant to this Agreement shall be in writing and shall be personally delivered or sent by first-class, registered, certified mail, overnight courier and/or via facsimile transmission (with presentation of facsimile transmission confirmation) addressed as follows:

If to Michael DiPirro:

Gregory Sheffer, Esq.
Sheffer & Chanler
4400 Keller Ave., Suite 200
Oakland, CA 94605
Phone (510) 577-0747
Fax (510) 577-0787

If to Byron:

Bruce Godbersen
Byron Originals, Inc.
P.O. Box 279
Ida Grove, IA 51445
Phone (712) 364-3165
Fax (712) 364-2028

With a copy to:

Steven P. Case, Esq.
McGrath, North, Mullin & Kratz, P.C.
222 South 15th St., Suite 1400
Omaha, NE 68102
Phone (402) 341-3070
Fax (402) 341-0216

13. No Admissions. Nothing in this Agreement shall constitute or be construed as an admission by Byron of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this Agreement constitute or be construed as an admission by Byron of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Byron. Byron reserves all of its rights and defenses with regard to any claim by any party under Proposition 65 or otherwise. However, this paragraph shall not diminish or otherwise affect Byron's obligations, responsibilities and duties under this Agreement.

14. Compliance with Reporting Requirements (Health & Safety Code §25249.7(f)). The parties acknowledge that the reporting provisions of Health & Safety Code §25249.7(f) apply to this Agreement. Counsel for DiPirro shall comply with that section by submitting the required reporting form to, and serving a copy of this Agreement on, the California Attorney General's Office when noticing the Motion to Approve hearing. Counsel for DiPirro shall submit the Agreement to the Court in accordance with the requirements of Health & Safety Code §25249.7(f) and its implementing regulations, thereby allowing the Attorney General to serve any comments to this Agreement as provided by law.

15. Counterparts and Facsimile. This Agreement may be execute 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.

16. Authorization. The undersigned are authorized to execute this Agreement on behalf of their respective parties and have read, understood and agree to all of the terms and conditions of this Agreement.

AGREED TO:

DATE: _____

AGREED TO:

DATE: June 14, 2002

Michael DiPirro
PLAINTIFF

Bruce Godbersen

Byron Originals, Inc.
DEFENDANT

APPROVED AS TO FORM:

APPROVED AS TO FORM:

DATE: _____

DATE: *June 14, 2002*

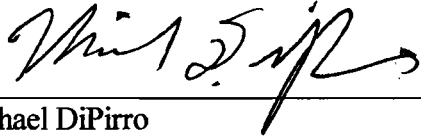
David Bush
Attorneys for Plaintiff
MICHAEL DIPIRRO

Steven P. Case

Steven P. Case
Attorneys for Defendant
BYRON ORIGINALS, INC.

AGREED TO:

DATE: June 19, 2002



Michael DiPirro
PLAINTIFF

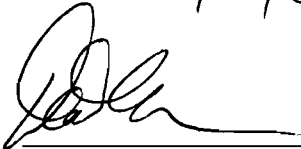
AGREED TO:

DATE: _____

Byron Originals, Inc.
DEFENDANT

APPROVED AS TO FORM:

DATE: 6/19/02



David Bush
Attorneys for Plaintiff
MICHAEL DIPIRRO

APPROVED AS TO FORM:

DATE: _____

Steven P. Case
Attorneys for Defendant
BYRON ORIGINALS, INC.

EXHIBIT A

All Byron products containing nitromethane, regardless of blend type of container quantity (e.g., gallon, ½ gallon, quart, pint, etc.), including but not limited to the following:

25% Nitro, 1/2A Fuel, Quart
0% Nitro, FAI Blend, Gallon
10% Nitro, Premium Super Tigre, Gallon
5% Nitro, Premium Sport Blend, Gallon
10% Nitro, Premium 4 Cycle, Gallon
10% Nitro, Premium Sport Blend, Gallon
15% Nitro, Premium 4 Cycle Blend, Gallon
15% Nitro, Premium Sport Blend, Gallon
5% Nitro, Premium Traditional, Gallon
10% Nitro, Premium Traditional, Gallon
15% Nitro, Premium Traditional, Gallon
5% Nitro, Premium 18 Blend, Gallon
10% Nitro, Premium 18 Blend, Gallon
15% Nitro, Premium 18 Blend, Gallon
25% Nitro, Premium Competition Blend, Gallon
35% Nitro, Premium Competition Blend, Gallon
45% Nitro, Premium Competition Blend, Gallon
60% Nitro, Premium Competition Blend, Gallon
10% Nitro, Premium Sport Blend, Quart
10% Nitro, Premium Sport Synthetic, Gallon
15% Nitro, Premium Sport Synthetic, Gallon
20% Nitro, Premium YS Blend, Gallon
10% Nitro, Performance Helicopter, Gallon
15% Nitro, Performance Helicopter, Gallon
30% Nitro, Competition Helicopter, Gallon
35% Nitro, Heli Pro Glow, Gallon
10% Nitro, RACE 1000 Car Fuel, Gallon
15% Nitro, RACE 1500 Car Fuel, Gallon
16% Nitro, RACE 1600 Car Fuel, Gallon
20% Nitro, RACE 2000 Car Fuel, Gallon
25% Nitro, RACE 2500 Car Fuel, Gallon
30% Nitro, RACE 3000 Car Fuel, Gallon
40% Nitro, RACE 4000 Car Fuel, Gallon
10% Nitro, RACE 1000 Car Fuel, 1/2 Gallon
15% Nitro, RACE 1500 Car Fuel, 1/2 Gallon
16% Nitro, RACE 1600 Car Fuel, 1/2 Gallon
20% Nitro, RACE 2000 Car Fuel, 1/2 Gallon
25% Nitro, RACE 2500 Car Fuel, 1/2 Gallon
30% Nitro, RACE 3000 Car Fuel, 1/2 Gallon

Track Pack w/20% RACE 2000, 16 Oz.