

CONFORMED COPY  
OF ORIGINAL FILED  
Los Angeles Superior Court

DEC 04 2009

John A. Clarke, Executive Officer/Clerk  
By SHAUNYA WESLEY, Deputy

1 Reuben Yeroushalmi (SBN 193981)  
2 Daniel D. Cho (SBN 105409)  
3 Ben Yeroushalmi (SBN 232540)  
4 **YEROUSHALMI & ASSOCIATES**  
5 3700 Wilshire Boulevard, Suite 480  
6 Los Angeles, California 90010  
7 Telephone: 213-382-3183  
8 Facsimile: 213-382-3430

9 Attorneys for Plaintiffs,  
10 Consumer Advocacy Group, Inc.

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF LOS ANGELES

13 BC 427434

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

CASE NO.

16 Plaintiff,

COMPLAINT FOR PENALTY,  
INJUNCTION, AND RESTITUTION

17 v.

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

18 GROW MORE, INC., a California  
19 corporation; INTERNATIONAL GARDEN  
20 CENTER, INC., a California corporation;  
21 and DOES 1-20;

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

22 Defendants.

23 Plaintiff Consumer Advocacy Group, Inc. alleges a cause of action against defendants as  
24 follows:

25 ///

26 ///

27 ///

28 ///

///

COPY

**THE PARTIES**

- 1  
2 1. Plaintiff Consumer Advocacy Group, Inc. ("Plaintiff" OR "CAG") is a non-profit  
3 corporation qualified to do business in the State of California. CAG is a person within  
4 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting  
5 as a private attorney general, brings this action in the public interest as defined under  
6 Health and Safety Code section 25249.7, subdivision (d).
- 7 2. Defendant Grow More, Inc. ("Grow More") is a California corporation, qualified to do  
8 business and doing business in the State of California at all relevant times herein.
- 9 3. Defendant International Garden Center, Inc. ("IGC") is a California corporation,  
10 qualified to do business and doing business in the State of California at all relevant times  
11 herein.
- 12 4. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-20,  
13 and therefore sues these defendants by such fictitious names. Plaintiff will amend this  
14 Complaint to allege their true names and capacities when ascertained. Plaintiff is  
15 informed, believes, and thereon alleges that each fictitiously named defendant is  
16 responsible in some manner for the occurrences herein alleged and the damages caused  
17 thereby.
- 18 5. At all times mentioned herein, the term "Defendants" includes Grow More, IGC, and  
19 Does 1-20.
- 20 6. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all  
21 times mentioned herein has conducted business within the State of California.
- 22 7. At all times relevant to this action, each of the Defendants, including Does 1-20, was an  
23 agent, servant, or employee of each of the other Defendants. In conducting the activities  
24 alleged in this Complaint, each of the Defendants was acting within the course and scope  
25 of this agency, service, or employment, and was acting with the consent, permission, and  
26 authorization of each of the other Defendants. All actions of each of the Defendants  
27 alleged in this Complaint were ratified and approved by every other Defendant or their  
28

1 officers or managing agents. Alternatively, each of the Defendants aided, conspired with  
2 and/or facilitated the alleged wrongful conduct of each of the other Defendants.

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

7  
8 **JURISDICTION**

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

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

- 22 11. Venue is proper in the County of Los Angeles because one or more of the instances of  
23 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or  
24 because Defendants conducted, and continue to conduct, business in the County of Los  
25 Angeles with respect to the consumer products that are the subject of this action.

26 ///

27 ///

28 ///

**BACKGROUND AND PRELIMINARY FACTS**

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

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

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

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

16. Through research and investigation, Plaintiff identified certain practices of Defendants of exposing, knowingly and intentionally, persons in California to the Proposition 65-listed

1 chemicals of the consumer products discussed below without first providing clear and  
2 reasonable warnings of such to the exposed persons prior to the time of exposure.  
3

4 **SATISFACTION OF PRIOR NOTICE**

5 17. On or about December 7, 2008, Plaintiff gave notice of alleged violations of Health and  
6 Safety Code section 25249.6, concerning consumer products exposures, subject to a  
7 private action to Grow More, identified in the notice as "Grow More, Inc.," IGC,  
8 identified in the notice as "International Garden Center, Inc.," and to the California  
9 Attorney General, County District Attorneys, and City Attorneys for each city containing  
10 a population of at least 750,000 people in whose jurisdictions the violations allegedly  
11 occurred, concerning the consumer product Growmore Research Farms Diatomaceous  
12 Earth.

13 18. Before sending the notice of alleged violations, Plaintiff investigated the consumer  
14 product involved, and the likelihood that such product would cause users to suffer  
15 significant exposures to the relevant Proposition 65-listed chemical at issue.

16 19. Plaintiff's notice of alleged violations each included a Certificate of Merit executed by  
17 the attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney  
18 for Plaintiff who executed the certificate had consulted with at least one person with  
19 relevant and appropriate expertise who reviewed data regarding the exposures to  
20 Crystalline silica (airborne particles of respirable size), which is the subject Proposition  
21 65-listed chemical of this action. Based on that information, the attorney for Plaintiff  
22 who executed the Certificate of Merit believed there was a reasonable and meritorious  
23 case for this private action. The attorney for Plaintiff attached to the Certificate of Merit  
24 served on the Attorney General the confidential factual information sufficient to establish  
25 the bases of the Certificate of Merit.

26 20. Plaintiff's notice of alleged violation also each included a Certificate of Service and a  
27 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986  
28 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

1 21. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
2 gave notice of the alleged violations to Defendants and the public prosecutors referenced  
3 in Paragraphs 17.

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

7  
8 **FIRST CAUSE OF ACTION**

9 **(By Consumer Advocacy Group, Inc. and against Grow More, Inc., International Garden  
10 Center, Inc., and Does 1-20 for Violations of Proposition 65, The Safe Drinking Water and  
11 Toxic Enforcement Act of 1986 (*Health & Safety Code, §§ 25249.5, et seq.*))**

12 **Growmore Research Farms Diatomaceous Earth**

13 23. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference  
14 paragraphs 1 through 22 of this Complaint as though fully set forth herein.

15 24. Defendants are, and at all times mentioned herein were, manufacturers, distributors,  
16 promoters, or retailers of Growmore Research Farms Diatomaceous Earth (hereinafter  
17 "Growmore DE"), a consumer product designed for use as an absorbent material for  
18 drying and dehydrating soil in the process of gardening, and as an insecticide.

19 25. Plaintiff is informed, believes, and thereon alleges that Growmore DE contains  
20 Crystalline silica (airborne particles of respirable size).

21 26. On October 1, 1988, the Governor of California added Crystalline silica (airborne  
22 particles of respirable size) to the list of chemicals known to the State to cause cancer  
23 (*Cal. Code Regs. tit. 27, § 27001(b)*). Pursuant to Health and Safety Code sections  
24 25249.9 and 25249.10, twenty (20) months after addition of Crystalline silica (airborne  
25 particles of respirable size) to the list of chemicals known to the State to cause cancer,  
26 Crystalline silica (airborne particles of respirable size) became fully subject to  
27 Proposition 65 warning requirements and discharge prohibitions.

1 27. Defendants knew or should have known that Crystalline silica (airborne particles of  
2 respirable size) has been identified by the State of California as a chemical known to  
3 cause cancer and therefore were subject to Proposition 65 warning requirements.

4 Defendants were also informed of the presence of Crystalline silica (airborne particles of  
5 respirable size) in the Growmore DE within Plaintiff's notice of alleged violation further  
6 discussed above at Paragraph 17.

7 28. Plaintiff's allegations regarding Growmore DE concern "[c]onsumer products  
8 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,  
9 storage, consumption, or other reasonably foreseeable use of a consumer good, or any  
10 exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, §*  
11 *25602(b)*. Growmore DE is a consumer product, and, as mentioned in herein, exposures  
12 to Crystalline silica (airborne particles of respirable size) took place as a result of such  
13 normal and foreseeable consumption and use.

14 29. Plaintiff's allegations regarding Growmore DE concern "[e]nvironmental exposure[s],"  
15 which "is an exposure that may foreseeably occur as the result of contact with an  
16 environmental medium, including, but not limited to, ambient air, indoor air, drinking  
17 water, standing water, running water, soil vegetation, or manmade or natural substances,  
18 either through inhalation, ingestion, skin contact, or otherwise. Environmental exposures  
19 include all exposures that are not consumer products exposures or occupational  
20 exposures." *Cal. Code Regs. tit. 27, § 25602(c)*. As mentioned in herein, exposures to  
21 Crystalline silica (airborne particles of respirable size) by way of Growmore DE took  
22 place as a result of such contact with an environmental medium, including but not limited  
23 to ambient air and indoor air.

24 30. Plaintiff's allegations regarding Growmore DE as to Grow More concern "[o]ccupational  
25 exposure[s]," which "means an exposure to any employee in his or her employer's  
26 workplace." *Cal. Code Regs. tit. 27, § 25602(f)*. Exposures to Crystalline silica  
27 (airborne particles of respirable size) to Grow More's employees occurred through their  
28

1 activities and tasks handling and packaging Grow More DE with regard to the sale,  
2 distribution, and promotion of Growmore DE.

3 31. Plaintiff is informed, believes, and thereon alleges that between December 7, 2005 and  
4 the present, each of the Defendants knowingly and intentionally exposed California  
5 consumers and users of Growmore DE, which Defendants manufactured, distributed, or  
6 sold, to Crystalline silica (airborne particles of respirable size), without first providing  
7 any type of clear and reasonable warning of such to the exposed persons before the time  
8 of exposure. Defendants have distributed and sold Growmore DE in California.  
9 Defendants know and intend that California consumers will use and consume Growmore  
10 DE thereby exposing them to Crystalline silica (airborne particles of respirable size).  
11 Defendants thereby violated Proposition 65.

12 32. The principal routes of exposure were and are through respiration and inhalation caused  
13 when persons spray or distribute Growmore DE into the soil of gardens and plants, and  
14 when, per the instructions, persons spray a fluid suspension of the Growmore DE silica  
15 dust product into their gardens and plants. The foregoing routes of exposure assume use  
16 of the product in accordance with its instructions.

17 33. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of  
18 Proposition 65 as to Growmore DE have been ongoing and continuous to the date of the  
19 signing of this Complaint, as Defendants engaged and continue to engage in conduct  
20 which violates Health and Safety Code section 25249.6, including the manufacture,  
21 distribution, promotion, and sale of Growmore DE, so that a separate and distinct  
22 violation of Proposition 65 occurred each and every time a person was exposed to  
23 Crystalline silica (airborne particles of respirable size) by Growmore DE as mentioned  
24 herein.

25 34. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65  
26 mentioned herein is ever continuing. Plaintiff further alleges and believes that the  
27 violations alleged herein will continue to occur into the future.  
28



1 35. Based on the allegations herein, Defendants are liable for civil penalties of up to  
2 \$2,500.00 per day per individual exposure to Crystalline silica (airborne particles of  
3 respirable size) from Growmore DE, pursuant to Health and Safety Code section  
4 25249.7(b).

5 36. In the absence of equitable relief, California consumers, the general public, and others  
6 will continue to be involuntarily exposed to Crystalline silica (airborne particles of  
7 respirable size) that is contained in Growmore DE, creating a substantial risk of  
8 irreparable harm. Thus, by committing the acts alleged herein, Defendants have caused  
9 irreparable harm for which there is no plain, speedy, or adequate remedy at law.

10 37. Plaintiff has engaged in good faith efforts to resolve the claim alleged herein prior to  
11 filing this Complaint.

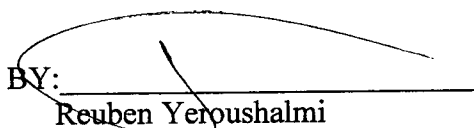
12  
13 **PRAYER FOR RELIEF**

14 Plaintiff demands against each of the Defendants as follows:

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

20  
21 Dated: December 4, 2009

YEROUSHALMI & ASSOCIATES

22  
23  
24 BY:   
25 Reuben Yeroushalmi  
26 Attorneys for Plaintiff,  
27 Consumer Advocacy Group, Inc.  
28