

ENDORSED
FILED
Superior Court of California
County of San Francisco

DEC 07 2009

GORDON PARK-LL, Clerk
BY: ROSSALY DELAVEGA
Deputy Clerk

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CASE MANAGEMENT CONFERENCE SET

MAY 07 2010 - 9⁰⁰ AM

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

DEPARTMENT 212

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

11 CONSUMER ADVOCACY GROUP, INC.,
12 in the public interest,

CASE NO.

CGC-09-495033

13 Plaintiff,

COMPLAINT FOR PENALTY,
INJUNCTION, AND RESTITUTION

14 v.

15 ST. GABRIEL ORGANICS, LLC a Virginia
16 corporation; and DOES 1-20;

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

17 Defendants.

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

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

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BY FAX

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 St. Gabriel Organics, LLC. is a Virginia corporation, qualified to do business
8 and doing business in the State of California at all relevant times herein.
- 9 3. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-20,
10 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
11 Complaint to allege their true names and capacities when ascertained. Plaintiff is
12 informed, believes, and thereon alleges that each fictitiously named defendant is
13 responsible in some manner for the occurrences herein alleged and the damages caused
14 thereby.
- 15 4. At all times mentioned herein, the term “Defendants” includes St. Gabriel Organics,
16 LLC, and Does 1-20.
- 17 5. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
18 times mentioned herein has conducted business within the State of California.
- 19 6. At all times relevant to this action, each of the Defendants, including Does 1-20, was an
20 agent, servant, or employee of each of the other Defendants. In conducting the activities
21 alleged in this Complaint, each of the Defendants was acting within the course and scope
22 of this agency, service, or employment, and was acting with the consent, permission, and
23 authorization of each of the other Defendants. All actions of each of the Defendants
24 alleged in this Complaint were ratified and approved by every other Defendant or their
25 officers or managing agents. Alternatively, each of the Defendants aided, conspired with
26 and/or facilitated the alleged wrongful conduct of each of the other Defendants.
- 27 7. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
28 Defendants was a person doing business within the meaning of Health and Safety Code

1 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
2 employees at all relevant times.

3
4 **JURISDICTION**

- 5 8. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
6 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
7 those given by statute to other trial courts. This Court has jurisdiction over this action
8 pursuant to Health and Safety Code section 25249.7, which allows enforcement of
9 violations of Proposition 65 in any Court of competent jurisdiction.
- 10 9. This Court has jurisdiction over Defendants named herein because Defendants either
11 reside or are located in this State or are foreign corporations authorized to do business in
12 California, are registered with the California Secretary of State, or who do sufficient
13 business in California, have sufficient minimum contacts with California, or otherwise
14 intentionally avail themselves of the markets within California through their manufacture,
15 distribution, promotion, marketing, or sale of their products within California to render
16 the exercise of jurisdiction by the California courts permissible under traditional notions
17 of fair play and substantial justice.
- 18 10. Venue is proper in the County of San Francisco because one or more of the instances of
19 wrongful conduct occurred, and continues to occur, in the County of San Francisco
20 and/or because Defendants conducted, and continue to conduct, business in the County of
21 San Francisco with respect to the consumer product that is the subject of this action.

22
23 **BACKGROUND AND PRELIMINARY FACTS**

- 24 11. In 1986, California voters approved an initiative to address growing concerns about
25 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to
26 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
27 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
28 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections

1 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
2 from contamination, to allow consumers to make informed choices about the products
3 they buy, and to enable persons to protect themselves from toxic chemicals as they see
4 fit.

5 12. Proposition 65 requires the Governor of California to publish a list of chemicals known to
6 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
7 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
8 chemicals and chemical families. Proposition 65 imposes warning requirements and
9 other controls that apply to Proposition 65-listed chemicals.

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

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

22 15. Through research and investigation, Plaintiff identified certain practices of Defendants of
23 exposing, knowingly and intentionally, persons in California to the Proposition 65-listed
24 chemicals of the consumer products discussed below without first providing clear and
25 reasonable warnings of such to the exposed persons prior to the time of exposure.
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SATISFACTION OF PRIOR NOTICE

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2 16. On or about December 7, 2008, Plaintiff gave notice of alleged violations of Health and
3 Safety Code section 25249.6, concerning consumer products and environmental
4 exposures, subject to a private action to St. Gabriel Organics, LLC, identified in the
5 notice by its trade name "St. Gabriel Laboratories, LLC", its former name, and to the
6 California Attorney General, County District Attorneys, and City Attorneys for each city
7 containing a population of at least 750,000 people in whose jurisdictions the violations
8 allegedly occurred, concerning the consumer product Insect Dust Diatomaceous Earth.
9 Plaintiff has been informed that Saint Gabriel Laboratories, LLC, subsequent to the date
10 of the 60-day notice, has changed its name to "St. Gabriel Organics, LLC".

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

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

24 19. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
25 gave notice of the alleged violations to St. Gabriel Organics, LLC and the public
26 prosecutors referenced in Paragraph 16.
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1 20. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
2 any applicable district attorney or city attorney has commenced and is diligently
3 prosecuting an action against the Defendants.
4

5 **FIRST CAUSE OF ACTION**

6 **(By Consumer Advocacy Group, Inc. and against St. Gabriel Organics, LLC, and Does 1-**
7 **20 for Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act**
8 **of 1986 (*Health & Safety Code, §§ 25249.5, et seq.*))**

9 **Insect Dust Diatomaceous Earth**

10 21. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference
11 paragraphs 1 through 20 of this Complaint as though fully set forth herein.

12 22. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
13 distributor, promoter, or retailer of Insect Dust Diatomaceous Earth (hereinafter "Insect
14 Dust DE"), a consumer product designed for use in treating surfaces for various insects.

15 23. Plaintiff is informed, believes, and thereon alleges that Insect Dust DE contains
16 Crystalline silica (airborne particles of respirable size).

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

24 25. Defendants knew or should have known that Crystalline silica (airborne particles of
25 respirable size) has been identified by the State of California as a chemical known to
26 cause cancer and reproductive toxicity and therefore were subject to Proposition 65
27 warning requirements. Defendants were also informed of the presence of Crystalline
28 silica (airborne particles of respirable size) in the Insect Dust DE within Plaintiff's notice
of alleged violation further discussed above at Paragraph 16.

1 26. Plaintiff's allegations regarding Insect Dust DE concern "[c]onsumer products
2 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
3 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
4 exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, §*
5 *25602(b)*. Insect Dust DE is a consumer product, and, as mentioned in herein, exposures
6 to Crystalline silica (airborne particles of respirable size) took place as a result of such
7 normal and foreseeable consumption and use.

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

18 28. Plaintiff is informed, believes, and thereon alleges that between December 7, 2005 and
19 the present, each of the Defendants knowingly and intentionally exposed California
20 consumers and users of Insect Dust DE, which Defendants manufactured, distributed, or
21 sold as mentioned above, to Crystalline silica (airborne particles of respirable size),
22 without first providing any type of clear and reasonable warning of such to the exposed
23 persons before the time of exposure. Defendants have distributed and sold Insect Dust
24 DE in California. Defendants know and intend that California consumers will use and
25 consume Insect Dust DE thereby exposing them to Crystalline silica (airborne particles of
26 respirable size). Defendants thereby violated Proposition 65.

27 29. The principal routes of exposure were and are through dermal contact, ingestion, and
28 inhalation. Persons sustain exposures by Handling Insect Dust DE without wearing

1 gloves or by touching bare skin with gloves handling Insect Dust DE, hand-to-mouth
2 contact, or breathing in particulate matter from Insect Dust DE as part of the process of
3 using Insect Dust DE in treating surfaces for insects. The foregoing routes of exposure
4 assume use of the product in accordance with its instructions.

5 30. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
6 Proposition 65 as to Insect Dust DE have been ongoing and continuous to the date of the
7 signing of this Complaint, as Defendants engaged and continue to engage in conduct
8 which violates Health and Safety Code section 25249.6, including the manufacture,
9 distribution, promotion, and sale of Insect Dust DE, so that a separate and distinct
10 violation of Proposition 65 occurred each and every time a person was exposed to
11 Crystalline silica (airborne particles of respirable size) by Insect Dust DE as mentioned
12 herein.

13 31. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
14 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
15 violations alleged herein will continue to occur into the future.

16 32. Based on the allegations herein, Defendants are liable for civil penalties of up to
17 \$2,500.00 per day per individual exposure to Crystalline silica (airborne particles of
18 respirable size) from Insect Dust DE, pursuant to Health and Safety Code section
19 25249.7(b).

20 33. In the absence of equitable relief, California consumers, the general public, and others
21 will continue to be involuntarily exposed to Crystalline silica (airborne particles of
22 respirable size) that is contained in Insect Dust DE, creating a substantial risk of
23 irreparable harm. Thus, by committing the acts alleged herein, Defendants have caused
24 irreparable harm for which there is no plain, speedy, or adequate remedy at law.

25 34. Plaintiff has engaged in good faith efforts to resolve the claim alleged herein prior to
26 filing this Complaint.

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PRAYER FOR RELIEF

Plaintiff demands against each of the Defendants as follows:

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

Dated: December 4, 2009

YEROUSHALMI & ASSOCIATES

BY: 

Reuben Yeroushalmi
Attorneys for Plaintiff,
Consumer Advocacy Group, Inc.