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Los Angeles Superior Court

DEC 04 2009

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By SHAUNYA WESLEY, Deputy

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7 Consumer Advocacy Group, Inc.

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

11 **BC 427432**

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

13
14 Plaintiff,

15 v.

16 WOODSTREAM CORPORATION, a
Pennsylvania corporation; DR. T'S
17 NATURE PRODUCTS, INC., a Georgia
18 corporation; BURKARD NURSERIES,
INC., a California corporation; PARKVIEW
19 NURSERY, INC., a California corporation;
and DOES 1-40;

20
21 Defendants.

CASE NO.

COMPLAINT FOR PENALTY,
INJUNCTION, AND RESTITUTION

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

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

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

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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 Woodstream Corporation ("Woodstream") is a Pennsylvania corporation,
8 qualified to do business and doing business in the State of California at all relevant times
9 herein.
- 10 3. Defendant Dr. T's Nature Products ("Dr. T's") is a Georgia corporation, qualified to do
11 business and doing business in the State of California at all relevant times herein.
- 12 4. Defendant Burkard Nurseries, Inc. ("Burkard") is a California corporation, qualified to do
13 business and doing business in the State of California at all relevant times herein.
- 14 5. Defendant Parkview Nursery, Inc. is a California corporation, qualified to do business
15 and doing business in the State of California at all relevant times herein.
- 16 6. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-40,
17 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
18 Complaint to allege their true names and capacities when ascertained. Plaintiff is
19 informed, believes, and thereon alleges that each fictitiously named defendant is
20 responsible in some manner for the occurrences herein alleged and the damages caused
21 thereby.
- 22 7. At all times mentioned herein, the term "Defendants" includes Woodstream, Dr. T's,
23 Burkard, Parkview, and Does 1-40.
- 24 8. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
25 times mentioned herein has conducted business within the State of California.
- 26 9. At all times relevant to this action, each of the Defendants, including Does 1-40, was an
27 agent, servant, or employee of each of the other Defendants. In conducting the activities
28 alleged in this Complaint, each of the Defendants was acting within the course and scope

1 of this agency, service, or employment, and was acting with the consent, permission, and
2 authorization of each of the other Defendants. All actions of each of the Defendants
3 alleged in this Complaint were ratified and approved by every other Defendant or their
4 officers or managing agents. Alternatively, each of the Defendants aided, conspired with
5 and/or facilitated the alleged wrongful conduct of each of the other Defendants.

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

10
11 **JURISDICTION**

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

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

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

1
2 **BACKGROUND AND PRELIMINARY FACTS**

3 14. In 1986, California voters approved an initiative to address growing concerns about
4 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to
5 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
6 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
7 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
8 25249.5, *et seq.* ("Proposition 65"), helps protect California's drinking water sources
9 from contamination, allow consumers to make informed choices about the products they
10 buy, and enable persons to protect themselves from toxic chemicals as they see fit.

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

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

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

1 18. Through research and investigation, Plaintiff identified certain practices of Defendants of
2 exposing, knowingly and intentionally, persons in California to the Proposition 65-listed
3 chemicals of the consumer products discussed below without first providing clear and
4 reasonable warnings of such to the exposed persons prior to the time of exposure.
5

6 **SATISFACTION OF PRIOR NOTICE**

7 19. On or about December 7, 2008, Plaintiff gave notice of alleged violations of Health and
8 Safety Code section 25249.6, concerning consumer products exposures, subject to a
9 private action to Woodstream Corporation, identified in the notice as "Woodstream
10 Corporation," Burkard Nurseries, Inc., identified in the notice as "Burkard Nurseries,
11 Inc.," and to the California Attorney General, County District Attorneys, and City
12 Attorneys for each city containing a population of at least 750,000 people in whose
13 jurisdictions the violations allegedly occurred, concerning the consumer product
14 Concern® Diatomaceous Earth.

15 20. On or about January 21, 2009, Plaintiff gave notice of alleged violations of Health and
16 Safety Code section 25249.6, concerning consumer products exposures, subject to a
17 private action to Woodstream Corporation, identified in the notice as "Woodstream
18 Corporation," Dr. T's Nature Products, Inc., identified in the notice as "Dr. T's Nature
19 Products, Inc.," Parkview Nursery, Inc., identified in the notice as "Parkview Nursery,
20 Inc.," and to the California Attorney General, County District Attorneys, and City
21 Attorneys for each city containing a population of at least 750,000 people in whose
22 jurisdictions the violations allegedly occurred, concerning the consumer product Dr. T's
23 Nature Products® Mole Out Mole Repelling Granules.

24 21. Before sending the notices of alleged violations, Plaintiff investigated the consumer
25 products involved, and the likelihood that such products would cause users to suffer
26 significant exposures to the relevant Proposition 65-listed chemical at issue.

27 22. Plaintiff's notices of alleged violations each included a Certificate of Merit executed by
28 the attorney for the noticing party, CAG. The Certificates of Merit stated that the

1 attorney for Plaintiff who executed the certificate had consulted with at least one person
2 with relevant and appropriate expertise who reviewed data regarding the exposures to
3 Crystalline silica (airborne particles of respirable size), which is the subject Proposition
4 65-listed chemical of this action. Based on that information, the attorney for Plaintiff
5 who executed the Certificates of Merit believed there was a reasonable and meritorious
6 case for this private action. The attorney for Plaintiff attached to the Certificates of Merit
7 served on the Attorney General the confidential factual information sufficient to establish
8 the bases of the Certificates of Merit.

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

12 24. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
13 gave notice of the alleged violations to Defendants and the public prosecutors referenced
14 in Paragraphs 19 & 20.

15 25. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
16 any applicable district attorney or city attorney has commenced and is diligently
17 prosecuting an action against the Defendants.

18
19
20 **FIRST CAUSE OF ACTION**

21 **(By Consumer Advocacy Group, Inc. and against Woodstream Corporation, Dr. T's
22 Nature Products, Inc., Burkard Nurseries, Inc., Parkview Nursery, Inc., and Does 1-40 for
23 Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986
24 (Health & Safety Code, §§ 25249.5, et seq.))**

25 **Concern® Diatomaceous Earth**

26 26. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference
27 paragraphs 1 through 25 of this Complaint as though fully set forth herein.

28 27. Defendants Woodstream and Burkard are, and at all times mentioned herein were,
manufacturers, distributors, promoters, or retailers of Concern® Diatomaceous Earth

1 (hereinafter "Concern®"), a consumer product designed for use to repel and kill various
2 insects.

3 28. Plaintiff is informed, believes, and thereon alleges that Concern® contains Crystalline
4 silica (airborne particles of respirable size).

5 29. On October 1, 1988, the Governor of California added Crystalline silica (airborne
6 particles of respirable size) to the list of chemicals known to the State to cause cancer
7 (*Cal. Code Regs. tit. 27, § 27001(b)*). Pursuant to Health and Safety Code sections
8 25249.9 and 25249.10, twenty (20) months after addition of Crystalline silica (airborne
9 particles of respirable size) to the list of chemicals known to the State to cause cancer,
10 Crystalline silica (airborne particles of respirable size) became fully subject to
11 Proposition 65 warning requirements and discharge prohibitions.

12 30. Defendants Woodstream and Burkard knew or should have known that Crystalline silica
13 (airborne particles of respirable size) has been identified by the State of California as a
14 chemical known to cause cancer and therefore were subject to Proposition 65 warning
15 requirements. Defendants Woodstream and Burkard were also informed of the presence
16 of Crystalline silica (airborne particles of respirable size) in the Concern® within
17 Plaintiff's notice of alleged violation further discussed above at Paragraph 19.

18 31. Plaintiff's allegations regarding Concern® concern "[c]onsumer products exposure[s],"
19 which "is an exposure that results from a person's acquisition, purchase, storage,
20 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
21 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*.
22 Concern® is a consumer product, and, as mentioned in herein, exposures to Crystalline
23 silica (airborne particles of respirable size) took place as a result of such normal and
24 foreseeable consumption and use.

25 32. Plaintiff's allegations regarding Concern® concern "[e]nvironmental exposure[s]," which
26 "is an exposure that may foreseeably occur as the result of contact with an environmental
27 medium, including, but not limited to, ambient air, indoor air, drinking water, standing
28 water, running water, soil vegetation, or manmade or natural substances, either through

1 inhalation, ingestion, skin contact, or otherwise. Environmental exposures include all
2 exposures that are not consumer products exposures or occupational exposures.” *Cal.*
3 *Code Regs.* tit. 27, § 25602(c). As mentioned in herein, exposures to Crystalline silica
4 (airborne particles of respirable size) by way of Concern® took place as a result of such
5 contact with an environmental medium, including but not limited to ambient air and
6 indoor air.

7 33. Plaintiff’s allegations regarding Concern® as to Burkard concern “[o]ccupational
8 exposure[s],” which “means an exposure to any employee in his or her employer’s
9 workplace.” *Cal. Code Regs.* tit. 27, § 25602(f). Exposures to Crystalline silica
10 (airborne particles of respirable size) to Burkard’s employees occurred through their
11 activities and tasks with regard to the sale, distribution, and promotion of Concern®.

12 34. Plaintiff is informed, believes, and thereon alleges that between December 7, 2005 and
13 the present, each of the Defendants Woodstream and Burkard knowingly and
14 intentionally exposed California consumers and users of Concern®, which Defendants
15 Woodstream and Burkard manufactured, distributed, or sold, to Crystalline silica
16 (airborne particles of respirable size), without first providing any type of clear and
17 reasonable warning of such to the exposed persons before the time of exposure.
18 Defendants Woodstream and Burkard have distributed and sold Concern® in California.
19 Defendants know and intend that California consumers will use and consume Concern®
20 thereby exposing them to Crystalline silica (airborne particles of respirable size).
21 Defendants Woodstream and Burkard thereby violated Proposition 65.

22 35. The principal routes of exposure were and are through respiration and inhalation caused
23 when users of Concern® apply and distribute Concern® onto surfaces for insect
24 treatment. The foregoing routes of exposure assume use of the product in accordance
25 with its instructions.

26 36. Plaintiff is informed, believes, and thereon alleges that each of Defendants Woodstream
27 and Burkard’s violations of Proposition 65 as to Concern® have been ongoing and
28 continuous to the date of the signing of this Complaint, as Defendants Woodstream and

1 Burkard engaged and continue to engage in conduct which violates Health and Safety
2 Code section 25249.6, including the manufacture, distribution, promotion, and sale of
3 Concern®, so that a separate and distinct violation of Proposition 65 occurred each and
4 every time a person was exposed to Crystalline silica (airborne particles of respirable
5 size) by Concern® as mentioned herein.

6 37. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
7 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
8 violations alleged herein will continue to occur into the future.

9 38. Based on the allegations herein, Defendants Woodstream and Burkard are liable for civil
10 penalties of up to \$2,500.00 per day per individual exposure to Crystalline silica
11 (airborne particles of respirable size) from Concern®, pursuant to Health and Safety
12 Code section 25249.7(b).

13 39. In the absence of equitable relief, California consumers, the general public, and others
14 will continue to be involuntarily exposed to Crystalline silica (airborne particles of
15 respirable size) that is contained in Concern®, creating a substantial risk of irreparable
16 harm. Thus, by committing the acts alleged herein, Defendants Woodstream and Burkard
17 have caused irreparable harm for which there is no plain, speedy, or adequate remedy at
18 law.

19 40. Plaintiff has engaged in good faith efforts to resolve the claim alleged herein prior to
20 filing this Complaint.

21
22 **Dr. T's Nature Products® Mole Out Mole Repelling Granules**

23 41. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference
24 paragraphs 1 through 40 of this Complaint as though fully set forth herein.

25 42. Defendants Woodstream, Dr. T's, and Parkview are, and at all times mentioned herein
26 were, manufacturers, distributors, promoters, or retailers of Dr. T's Nature Products®
27 Mole Out Mole Repelling Granules (hereinafter "Mole Out Granules"), a consumer
28 product designed for use as a mole repellent for lawns, gardens, and flowerbeds.

1 43. Plaintiff is informed, believes, and thereon alleges that Mole Out Granules contains
2 Crystalline silica (airborne particles of respirable size).

3 44. On October 1, 1988, the Governor of California added Crystalline silica (airborne
4 particles of respirable size) to the list of chemicals known to the State to cause cancer
5 (*Cal. Code Regs.* tit. 27, § 27001(b)). Pursuant to Health and Safety Code sections
6 25249.9 and 25249.10, twenty (20) months after addition of Crystalline silica (airborne
7 particles of respirable size) to the list of chemicals known to the State to cause cancer,
8 Crystalline silica (airborne particles of respirable size) became fully subject to
9 Proposition 65 warning requirements and discharge prohibitions.

10 45. Defendants Woodstream, Dr. T's, and Parkview knew or should have known that
11 Crystalline silica (airborne particles of respirable size) has been identified by the State of
12 California as a chemical known to cause cancer and therefore were subject to Proposition
13 65 warning requirements. Defendants Woodstream, Dr. T's, and Parkview were also
14 informed of the presence of Crystalline silica (airborne particles of respirable size) in the
15 Mole Out Granules within Plaintiff's notice of alleged violation further discussed above
16 at Paragraph 20.

17 46. Plaintiff's allegations regarding Mole Out Granules concern "[c]onsumer products
18 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
19 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
20 exposure that results from receiving a consumer service." *Cal. Code Regs.* tit. 27, §
21 25602(b). Mole Out Granules is a consumer product, and, as mentioned in herein,
22 exposures to Crystalline silica (airborne particles of respirable size) took place as a result
23 of such normal and foreseeable consumption and use.

24 47. Plaintiff's allegations regarding Mole Out Granules concern "[e]nvironmental
25 exposure[s]," which "is an exposure that may foreseeably occur as the result of contact
26 with an environmental medium, including, but not limited to, ambient air, indoor air,
27 drinking water, standing water, running water, soil vegetation, or manmade or natural
28 substances, either through inhalation, ingestion, skin contact, or otherwise.

1 Environmental exposures include all exposures that are not consumer products exposures
2 or occupational exposures.” *Cal. Code Regs. tit. 27, § 25602(c)*. As mentioned in herein,
3 exposures to Crystalline silica (airborne particles of respirable size) by way of Mole Out
4 Granules took place as a result of such contact with an environmental medium, including
5 but not limited to ambient air and indoor air.

6 48. Plaintiff’s allegations regarding Mole Out Granules as to Parkview concern

7 “[o]ccupational exposure[s],” which “means an exposure to any employee in his or her
8 employer’s workplace.” *Cal. Code Regs. tit. 27, § 25602(f)*. Exposures to Crystalline
9 silica (airborne particles of respirable size) to Parkview’s employees occurred through
10 their activities and tasks with regard to the sale, distribution, and promotion of Mole Out
11 Granules.

12 49. Plaintiff is informed, believes, and thereon alleges that between January 21, 2006 and the
13 present, each of the Defendants Woodstream, Dr. T’s, and Parkview knowingly and
14 intentionally exposed California consumers and users of Mole Out Granules, which
15 Defendants Woodstream, Dr. T’s, and Parkview manufactured, distributed, or sold, to
16 Crystalline silica (airborne particles of respirable size), without first providing any type
17 of clear and reasonable warning of such to the exposed persons before the time of
18 exposure. Defendants Woodstream, Dr. T’s, and Parkview have distributed and sold
19 Mole Out Granules in California. Defendants Woodstream, Dr. T’s, and Parkview know
20 and intend that California consumers will use and consume Mole Out Granules thereby
21 exposing them to Crystalline silica (airborne particles of respirable size). Defendants
22 Woodstream, Dr. T’s, and Parkview thereby violated Proposition 65.

23 50. The principal routes of exposure were and are through respiration and inhalation caused
24 when users of Mole Out Granules apply and distribute Mole Out Granules the product to
25 their lawns, gardens, and flowerbeds. The foregoing routes of exposure assume use of the
26 product in accordance with its instructions.

27 51. Plaintiff is informed, believes, and thereon alleges that each of Defendants Woodstream,
28 Dr. T’s, and Parkview’s violations of Proposition 65 as to Mole Out Granules have been

1 ongoing and continuous to the date of the signing of this Complaint, as Defendants
2 Woodstream, Dr. T's, and Parkview engaged and continue to engage in conduct which
3 violates Health and Safety Code section 25249.6, including the manufacture, distribution,
4 promotion, and sale of Mole Out Granules, so that a separate and distinct violation of
5 Proposition 65 occurred each and every time a person was exposed to Crystalline silica
6 (airborne particles of respirable size) by Mole Out Granules as mentioned herein.

7 52. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
8 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
9 violations alleged herein will continue to occur into the future.

10 53. Based on the allegations herein, Defendants Woodstream, Dr. T's, and Parkview are
11 liable for civil penalties of up to \$2,500.00 per day per individual exposure to Crystalline
12 silica (airborne particles of respirable size) from Mole Out Granules, pursuant to Health
13 and Safety Code section 25249.7(b).

14 54. In the absence of equitable relief, California consumers, the general public, and others
15 will continue to be involuntarily exposed to Crystalline silica (airborne particles of
16 respirable size) that is contained in Mole Out Granules, creating a substantial risk of
17 irreparable harm. Thus, by committing the acts alleged herein, Defendants Woodstream,
18 Dr. T's, and Parkview have caused irreparable harm for which there is no plain, speedy,
19 or adequate remedy at law.

20 55. Plaintiff has engaged in good faith efforts to resolve the claim alleged herein prior to
21 filing this Complaint.

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1 **PRAYER FOR RELIEF**

2 Plaintiff demands against each of the Defendants as follows:

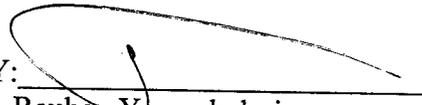
- 3 1. A permanent injunction mandating Proposition 65-compliant warnings;
- 4 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
- 5 3. Costs of suit;
- 6 4. Reasonable attorney fees and costs; and
- 7 5. Any further relief that the court may deem just and equitable.
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- 10

11 Dated: December 4, 2009

YEROUSHALMI & ASSOCIATES

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14 BY: 

15 Reuben Veroushalmi
16 Attorneys for Plaintiff,
17 Consumer Advocacy Group, Inc.

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