

ENDORSED
FILED
SAN FRANCISCO COUNTY
SUPERIOR COURT

2012 APR 26 AM 1:10

CLERK OF THE COURT
BY: ELIAS RUIZ
DEPUTY CLERK

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Daniel D. Cho (SBN 105409)
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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

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

13
14 Plaintiff,

15 v.

16 GRO-POWER, INC., a California
17 Corporation and DOES 1-20;

18 Defendants.

CASE NO. **CGC-12-520303**

COMPLAINT FOR PENALTY,
INJUNCTION, AND RESTITUTION

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

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

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21 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
22 defendants GRO-POWER, INC. and DOES 1-20, as follows:

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BY FAX

THE PARTIES

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1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an organization qualified to do business in the State of California. CAG is a person within the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting as a private attorney general, brings this action in the public interest as defined under Health and Safety Code section 25249.7, subdivision (d).
2. Defendant GRO-POWER, INC. ("GRO-POWER") is a business entity form unknown, qualified to do business and doing business in the State of California at all relevant times herein.
3. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed, believes, and thereon alleges that each fictitiously named defendant is responsible in some manner for the occurrences herein alleged and the damages caused thereby.
4. At all times mentioned herein, the term "Defendants" includes GRO-POWER, and DOES 1-20.
5. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all times mentioned herein have conducted business within the State of California.
6. At all times relevant to this action, each of the Defendants, including DOES 1-20, was an agent, servant, or employee of each of the other Defendants. In conducting the activities alleged in this Complaint, each of the Defendants was acting within the course and scope of this agency, service, or employment, and was acting with the consent, permission, and authorization of each of the other Defendants. All actions of each of the Defendants alleged in this Complaint were ratified and approved by every other Defendant or their officers or managing agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged wrongful conduct of each of the other Defendants.

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

5 **JURISDICTION**

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

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 Prop.,
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. Plaintiff identified certain practices of manufacturers and distributors of Cadmium-
23 bearing products of exposing, knowingly and intentionally, persons in California to the
24 Proposition 65-listed chemicals of such products without first providing clear and
25 reasonable warnings of such to the exposed persons prior to the time of exposure.
26 Plaintiff later discerned that Defendants engaged in such practice.

27 16. On October 1, 1987, the Governor added Cadmium and Cadmium Compounds to the list
28 of chemicals known to the State to cause cancer, and on May 1, 1997, the Governor

1 added Cadmium to the list of chemicals known to the State to cause reproductive toxicity,
2 developmental, male. Both additions took place more than twenty (20) months before
3 CAG served this Notice.

4 **SATISFACTION OF PRIOR NOTICE**

5 17. On or about July 19, 2011, Plaintiff gave notice of alleged violations of Health and Safety
6 Code section 25249.6, concerning consumer products exposures, subject to a private
7 action to Defendants and to the California Attorney General, County District Attorneys,
8 and City Attorneys for each city containing a population of at least 750,000 people in
9 whose jurisdictions the violations allegedly occurred, concerning the product Fertilizers.

10 18. Before sending the notices of alleged violation, Plaintiff investigated the consumer
11 products involved, the likelihood that such products would cause users to suffer
12 significant exposures to Cadmium and Cadmium Compounds, and the corporate structure
13 of each of the Defendants.

14 19. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
15 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
16 Plaintiff who executed the certificate had consulted with at least one person with relevant
17 and appropriate expertise who reviewed data regarding the exposures to Cadmium and
18 Cadmium Compounds, which is the subject of the Proposition 65-listed chemicals of this
19 action. Based on that information, the attorney for Plaintiff who executed the Certificate
20 of Merit believed there was a reasonable and meritorious case for this private action. The
21 attorney for Plaintiff attached to the Certificate of Merit served on the Attorney General
22 the confidential factual information sufficient to establish the basis of the Certificate of
23 Merit.

24 20. Plaintiff's notices of alleged violations also included a Certificate of Service and a
25 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
26 (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 notices of the alleged violations to Defendants, and the public prosecutors
3 referenced in Paragraph 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 GRO-POWER, INC. and Does 1-20 for**
10 **Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986**
11 **(Health & Safety Code, §§ 25249.5, et seq.))**

12 **Fertilizers**

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. Each of the Defendants are, and at all times mentioned herein were, a manufacturer,
16 distributor, promoter, or retailer of Fertilizers, an exemplar of which includes but is not
17 limited to "Gro-Power Flower 'n' Bloom® 3-12-12, 8.8 lbs.", a consumer product
18 specially designed for growing plants.

19 25. Plaintiff is informed, believes, and thereon alleges that Fertilizers contain Cadmium and
20 Cadmium Compounds.

21 26. Defendants knew or should have known that Cadmium and Cadmium Compounds have
22 been identified by the State of California as a chemical known to cause cancer and
23 reproductive toxicity and therefore was subject to Proposition 65 warning requirements.
24 Defendants were also informed of the presence of Cadmium and Cadmium Compounds
25 in Fertilizers within Plaintiff's notice of alleged violations further discussed above at
26 Paragraph 17.

27 27. Plaintiff's allegations regarding Fertilizers concern "[c]onsumer products exposure[s],"
28 which "is an exposure that results from a person's acquisition, purchase, storage,
consumption, or other reasonably foreseeable use of a consumer good, or any exposure

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that results from receiving a consumer service.” *Cal. Code Regs.* tit. 27, § 25602(b).
Fertilizers are a consumer product, and, as mentioned herein, exposures to Cadmium and
Cadmium Compounds took place as a result of such normal and foreseeable consumption
and use.

28. Plaintiff’s allegations regarding Fertilizers also concern Occupational Exposures, which
“means an exposure to any employee in his or her employer’s workplace.” *Cal. Code
Regs.* tit. 27, § 25602(f). Exposures of Cadmium and Cadmium Compounds to
Defendants’ employees occurred through the course of their employment in their
employers’ workplaces.

29. Plaintiff’s allegations regarding Fertilizers also concern Environmental Exposures. An
“[e]nvironmental exposure’ is an exposure which may foreseeably occur as the result of
contact with an environmental medium, including, but not limited to, ambient air, indoor
air, drinking water, standing water, running water, soil, vegetation, or manmade or
natural substances, either through inhalation, ingestion, skin contact or otherwise.
Environmental exposures include all exposures which are not consumer products
exposures, or occupational exposure.” *Cal. Code Regs.* tit. 27, § 25602(c). Defendants
failed to provide clear and reasonable Proposition 65-compliant warnings to exposed
persons prior to the knowing and intentional exposures to Cadmium and Cadmium
Compounds as described herein, and thereby violated Proposition 65.

30. Plaintiff is informed, believes, and thereon alleges that between July 19, 2008 and the
present, each of the Defendants knowingly and intentionally exposed their employees and
California consumers and users of Fertilizers, which Defendants manufactured,
distributed, or sold as mentioned above, to Cadmium and Cadmium Compounds, without
first providing any type of clear and reasonable warning of such to the exposed persons
before the time of exposure. Defendants have distributed and sold Fertilizers in
California. Defendants know and intend that California consumers will use and consume
Fertilizers thereby exposing them to Cadmium and Cadmium Compounds. Defendants
thereby violated Proposition 65.

1 31. The principal routes of exposure are through dermal contact, ingestion and inhalation.
2 Persons sustain exposures, including but not limited to handling Fertilizers without
3 wearing gloves or any other personal protective equipment, or by touching bare skin or
4 mucous membranes with gloves after handling Fertilizers, as well as through hand to
5 mouth contact, hand to mucous membrane, or breathing in particulate matter dispersed
6 from Fertilizers.

7 32. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
8 Proposition 65 as to Fertilizers have been ongoing and continuous to the date of the
9 signing of this complaint, as Defendants engaged and continue to engage in conduct
10 which violates Health and Safety Code section 25249.6, including the manufacture,
11 distribution, promotion, and sale of Fertilizers, so that a separate and distinct violation of
12 Proposition 65 occurred each and every time a person was exposed to Cadmium and
13 Cadmium Compounds by Fertilizers as mentioned herein.

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

17 34. Based on the allegations herein, Defendants are liable for civil penalties of up to
18 \$2,500.00 per day per individual exposure to Cadmium and Cadmium Compounds from
19 Fertilizers, pursuant to Health and Safety Code section 25249.7(b).

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

22 **PRAYER FOR RELIEF**

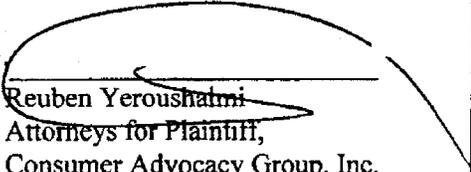
23 Plaintiff demands against each of the Defendants as follows:

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

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Dated: April 25/12, 2012

YEROUSHALMI & ASSOCIATES

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