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 Attorneys for Plaintiff,
 Consumer Advocacy Group, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

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

Plaintiff,

v.

VIVA BARGAIN CENTER, INC., a
 California Corporation;
 VIVA BARGAIN CENTER VERMONT; a
 Business Entity Form Unknown;
 GEL SPICE COMPANY, INC., a New
 Jersey Corporation;
 and DOES 1-10.

Defendants.

CASE NO.

COMPLAINT FOR PENALTY AND
 INJUNCTION

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)

Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
 defendants VIVA BARGAIN CENTER, INC., VIVA BARGAIN CENTER VERMONT, GEL
 SPICE COMPANY, INC., and DOES 1-10 as follows:

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THE PARTIES

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 VIVA BARGAIN CENTER, INC., ("VIVA BARGAIN") is a California Corporation, qualified to do business and doing business in the State of California at all relevant times herein.
3. Defendant VIVA BARGAIN CENTER VERMONT, ("VIVA VERMONT") is a business entity form unknown doing business in the State of California at all relevant times herein.
4. Defendant GEL SPICE COMPANY, INC., ("GEL SPICE") is a New Jersey Corporation, doing business in the State of California at all relevant times herein.
5. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-10, 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.
6. At all times mentioned herein, the term "Defendants" includes VIVA BARGAIN, VIVA VERMONT, GEL SPICE, and DOES 1-10.
7. 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.
8. Upon information and belief, at all times relevant to this action, each of the Defendants, including DOES 1-10, was an agent, servant, or employee of each of the other Defendants. In conducting the activities alleged in this Complaint, each of the

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

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

11 JURISDICTION

- 12 10. 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 11. 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 12. 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
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1 because Defendants conducted, and continue to conduct, business in the County of Los
2 Angeles with respect to the consumer product that is the subject of this action.

3 **BACKGROUND AND PRELIMINARY FACTS**

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

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

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

24 16. Proposition 65 provides that any person "violating or threatening to violate" the statute
25 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.
26 "Threaten to violate" means "to create a condition in which there is a substantial
27 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).

1 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
2 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

3 17. On February 27, 1987, the Governor of California added Lead and Lead Compounds
4 ("LEAD") to the list of chemicals known to the State to cause developmental, female,
5 and male reproductive toxicity, and on October 1, 1992, the Governor added LEAD to
6 the list of chemicals known to the State to cause cancer. Pursuant to Health and Safety
7 Code sections 25249.9 and 25249.10, twenty (20) months after addition of LEAD to the
8 list of chemicals known to the State to cause reproductive toxicity and cancer, LEAD
9 became fully subject to Proposition 65 warning requirements and discharge prohibitions.

10 18. On February 27, 1987, the Governor of California added Inorganic Arsenic Compounds
11 ("ARSENIC COMPOUNDS") to the list of chemicals known to the State to cause cancer.
12 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
13 after addition of ARSENIC COMPOUNDS to the list of chemicals known to the State to
14 cause cancer, ARSENIC COMPOUNDS became fully subject to Proposition 65 warning
15 requirements and discharge prohibitions.

16 19. On May 1, 1997, the Governor of California added Inorganic Arsenic Oxides
17 ("ARSENIC OXIDES") to the list of chemicals known to the State to cause
18 developmental toxicity. Pursuant to Health and Safety Code sections 25249.9 and
19 25249.10, twenty (20) months after addition of ARSENIC OXIDES to the list of
20 chemicals known to the State to cause developmental toxicity, ARSENIC OXIDES
21 became fully subject to Proposition 65 warning requirements and discharge prohibitions.
22 ARSENIC OXIDES and ARSENIC COMPOUNDS shall henceforth be collectively
23 known as "ARSENIC".

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

3 **SATISFACTION OF PRIOR NOTICE**

4 21. On or about October 29, 2018, Plaintiff gave notice of alleged violations of Health and
5 Safety Code section 25249.6, concerning consumer products exposures, subject to a
6 private action to VIVA BARGAIN, VIVA VERMONT, GEL SPICE, and to the
7 California Attorney General, County District Attorneys, and City Attorneys for each city
8 containing a population of at least 750,000 people in whose jurisdictions the violations
9 allegedly occurred, concerning the GROUND SAGE.

10 22. 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 LEAD and ARSENIC, and the corporate structure of each of the
13 Defendants.

14 23. 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 LEAD and
18 ARSENIC, the subject Proposition 65-listed chemical of this action. Based on that
19 information, the attorney for Plaintiff who executed the Certificate of Merit believed
20 there was a reasonable and meritorious case for this private action. The attorney for
21 Plaintiff attached to the Certificate of Merit served on the Attorney General the
22 confidential factual information sufficient to establish the basis of the Certificate of
23 Merit.

24 24. 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 25. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
2 gave notices of the alleged violations to VIVA BARGAIN, VIVA VERMONT, GEL
3 SPICE, and the public prosecutors referenced in Paragraph 21.

4 26. 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.

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8 **FIRST CAUSE OF ACTION**

9 (By CONSUMER ADVOCACY GROUP, INC. and against VIVA BARGAIN,
10 VIVA VERMONT, GEL SPICE, and DOES 1-10 for Violations of Proposition 65,
The Safe Drinking Water and Toxic Enforcement Act of 1986 (*Health & Safety*
Code, §§ 25249.5, *et seq.*))

11 **Ground Spices**

12 27. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
13 reference paragraphs 1 through 26 of this complaint as though fully set forth herein.
14 Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
15 distributor, promoter, or retailer of GROUND SAGE, identified as: "Spice Time®";
16 "Naturally Pure GROUND SAGE"; "NET WT 2 OZ (57g)"; "INGREDIENTS: SAGE";
17 "PACKED IN THE USA BY GELSPICE CO. INC. BAYONNE, NJ 07002";
18 "www.gelspice.com"; "BEST BY 10/30/20 00:23"; "079679004206" ("GROUND
19 SAGE").

20 28. The scope of the First Cause of Action as to GROUND SAGE is limited to the specific
21 UPC Number "079679004206 Best By 10/30/20 00:23" and limited to the specific lot
22 number and/or batch number of GROUND SAGE.

23 29. GROUND SAGE contains LEAD and ARSENIC.

24 30. Defendants knew or should have known that LEAD and ARSENIC have been identified
25 by the State of California as chemicals known to cause cancer, developmental, and
26 reproductive toxicity and therefore was subject to Proposition 65 warning requirements.
27 Defendants were also informed of the presence of the relevant chemicals in GROUND
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1 SAGE within Plaintiff's notice of alleged violations further discussed above at Paragraph
2 21.

3 31. Plaintiff's allegations regarding GROUND SAGE concerns "[c]onsumer products
4 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
5 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
6 exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, §*
7 *25602(b)*. GROUND SAGE is a consumer product, and, as mentioned herein, exposures
8 to LEAD and ARSENIC took place as a result of such normal and foreseeable
9 consumption and use.

10 32. Plaintiff is informed, believes, and thereon alleges that between October 29, 2015 and the
11 present, each of the Defendants knowingly and intentionally exposed their employees and
12 California consumers and users of GROUND SAGE, which Defendants manufactured,
13 distributed, or sold as mentioned above, to LEAD and ARSENIC, without first providing
14 any type of clear and reasonable warning of such to the exposed persons before the time
15 of exposure. Defendants have distributed and sold GROUND SAGE in California.
16 Defendants know and intend that California consumers will use and consume GROUND
17 SAGE, thereby exposing them to LEAD and ARSENIC. Defendants thereby violated
18 Proposition 65.

19 33. The principal routes of exposure are and were through ingestion, especially direct (oral)
20 ingestion, hand to mouth pathways, inhalation, and trans-dermal absorption. Persons
21 sustain exposures primarily by eating and consuming GROUND SAGE, and additionally
22 by handling GROUND SAGE without wearing gloves or any other personal protective
23 equipment, or by touching bare skin or mucous membranes with gloves after handling
24 GROUND SAGE as well as through direct and indirect hand to mouth contact, hand to
25 mucous membrane, or even breathing in particulate matter dispersed from GROUND
26 SAGE.

1 34. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
2 Proposition 65 as to GROUND SAGE have been ongoing and continuous to the date of
3 the signing of this Complaint, as Defendants engaged and continue to engage in conduct
4 which violates Health and Safety Code section 25249.6, including the manufacture,
5 distribution, promotion, and sale of GROUND SAGE, so that a separate and distinct
6 violation of Proposition 65 occurred each and every time a person was exposed to LEAD
7 and ARSENIC by GROUND SAGE as mentioned herein.

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

11 36. Based on the allegations herein, Defendants are liable for civil penalties of up to
12 \$2,500.00 per day per individual exposure to LEAD and ARSENIC from GROUND
13 SAGE, pursuant to Health and Safety Code section 25249.7(b).

14 37. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
15 filing this Complaint.

16 **PRAYER FOR RELIEF**

17 Plaintiff demands against each of the Defendants as follows:

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

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1 Dated: July 10, 2019

YEROUSHALMI & YEROUSHALMI

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4 BY: 

5 Reuben Yeroushalmi
6 Attorneys for Plaintiff,
7 Consumer Advocacy Group, Inc.
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