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BY MARY GARCIA, Deputy

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Attorneys for Plaintiffs,
Consumer Advocacy Group, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – UNLIMITED

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

Plaintiff,

v.

PERMA-GUARD, INC. a New Mexico
corporation; MODESTO MILLING, a
California corporation; and DOES 1-20;

Defendants.

CASE NO.

BC 429132

COMPLAINT FOR PENALTY, AND
INJUNCTION

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)

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

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THE PARTIES

1. Plaintiff Consumer Advocacy Group, Inc. ("Plaintiff" OR "CAG") is a non-profit corporation 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 Perma-Guard, Inc. is a New Mexico corporation, qualified to do business and doing business in the State of California at all relevant times herein.
3. Defendant Modesto Milling is a California corporation, qualified to do business and doing business in the State of California at all relevant times herein.
4. 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.
5. At all times mentioned herein, the term "Defendants" includes Perma-Guard, Inc., Modesto Milling, and Does 1-20.
6. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all times mentioned herein has conducted business within the State of California.
7. 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 8. 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 6 **JURISDICTION**

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

24 25 **BACKGROUND AND PRELIMINARY FACTS**

- 26 12. In 1986, California voters approved an initiative to address growing concerns about
27 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to
28 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,

1 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
2 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
3 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
4 from contamination, to allow consumers to make informed choices about the products
5 they buy, and to enable persons to protect themselves from toxic chemicals as they see
6 fit.

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

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

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

24 16. Through research and investigation, Plaintiff identified certain practices of Defendants of
25 exposing, knowingly and intentionally, persons in California to the Proposition 65-listed
26 chemicals of the consumer products discussed below without first providing clear and
27 reasonable warnings of such to the exposed persons prior to the time of exposure.
28

SATISFACTION OF PRIOR NOTICE

17. On or about January 7, 2009, Plaintiff gave notice of alleged violations of Health and Safety Code section 25249.6, concerning consumer products and environmental exposures, subject to a private action to Perma-Guard, Inc., identified in the notice by its trade name "Perma Guard, Inc." and to the California Attorney General, County District Attorneys, and City Attorneys for each city containing a population of at least 750,000 people in whose jurisdictions the violations allegedly occurred, concerning the consumer product Perma Guard™ Fossil Shell Flour™ Amorphous Silica Anti-Caking Agent.
18. On or about December 4, 2008, December 16, 2008, December 23, 2008, and January 7, 2009, Plaintiff gave notice of alleged violations of Health and Safety Code section 25249.6, concerning consumer products and environmental exposures, subject to a private action to Modesto Milling, identified in the notice as "Modesto Milling" and to the California Attorney General, County District Attorneys, and City Attorneys for each city containing a population of at least 750,000 people in whose jurisdictions the violations allegedly occurred, concerning the consumer product Perma Guard™ Fossil Shell Flour™ Amorphous Silica Anti-Caking Agent.
19. Plaintiff's notices of alleged violations each included a Certificate of Merit executed by the attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for Plaintiff who executed the certificate had consulted with at least one person with relevant and appropriate expertise who reviewed data regarding the exposures to crystalline silica (airborne particles of respirable size), which is the subject Proposition 65-listed chemical of this action. Based on that information, the attorney for Plaintiff who executed the Certificate of Merit believed there was a reasonable and meritorious case for this private action. The attorney for Plaintiff attached to the Certificate of Merit served on the Attorney General the confidential factual information sufficient to establish the bases of the Certificate of Merit.

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

4 21. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
5 gave notice of the alleged violations to Perma-Guard, Inc., Modesto Milling, and the
6 public prosecutors referenced in Paragraphs 17 & 18.

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

10
11 **FIRST CAUSE OF ACTION**

12 **(By Consumer Advocacy Group, Inc. and against Perma-Guard, Inc., Modesto Milling,**
13 **and Does 1-20 for Violations of Proposition 65, The Safe Drinking Water and Toxic**
14 **Enforcement Act of 1986 (*Health & Safety Code*, § 25249.6))**

15 **Perma Guard™ Fossil Shell Flour™ Amorphous Silica Anti-Caking Agent**

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

18 24. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
19 distributor, promoter, or retailer of Perma Guard™ Fossil Shell Flour™ Amorphous
20 Silica Anti-Caking Agent (hereinafter "Anti-Caking Agent"), a consumer product
21 designed for use in agriculture and gardening applications.

22 25. Plaintiff is informed, believes, and thereon alleges that Anti-Caking Agent contains
23 Crystalline silica (airborne particles of respirable size).

24 26. On October 1, 1988, the Governor of California added crystalline silica (airborne
25 particles of respirable size) to the list of chemicals known to the State to cause cancer
26 (*Cal. Code Regs.* tit. 27, § 27001(b)). Pursuant to Health and Safety Code sections
27 25249.9 and 25249.10, twenty (20) months after addition of Crystalline silica (airborne
28 particles of respirable size) to the list of chemicals known to the State to cause cancer,

Crystalline silica (airborne particles of respirable size) became fully subject to Proposition 65 warning requirements and discharge prohibitions.

27. Defendants knew or should have known that Crystalline silica (airborne particles of respirable size) has been identified by the State of California as a chemical known to cause cancer and reproductive toxicity and therefore were subject to Proposition 65 warning requirements. Defendants were also informed of the presence of Crystalline silica (airborne particles of respirable size) in the Anti-Caking Agent within Plaintiff's notices of alleged violation further discussed above at Paragraphs 17 & 18.

28. Plaintiff's allegations regarding Anti-Caking Agent concern "[c]onsumer products exposure[s]," 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 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*. Anti-Caking Agent is a consumer product, and, as mentioned in herein, exposures to Crystalline silica (airborne particles of respirable size) took place as a result of such normal and foreseeable consumption and use.

29. Plaintiff's allegations regarding Anti-Caking Agent concern "[e]nvironmental exposure[s]," which "is an exposure that 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 that are not consumer products exposures or occupational exposures." *Cal. Code Regs. tit. 27, § 25602(c)*. As mentioned in herein, exposures to Crystalline silica (airborne particles of respirable size) by way of Anti-Caking Agent took place as a result of such contact with an environmental medium, including but not limited to ambient and indoor air.

30. Plaintiff's allegations regarding Anti-Caking Agent as to Modesto Milling concern "[o]ccupational exposure[s]," which is "an exposure to any employee in his or her employer's workplace." *Cal. Code Regs. tit. 27, § 25602(f)*. Exposures to Crystalline

1 silica (airborne particles of respirable size) to Modesto Milling's employees occurred and
2 occur when these employees handle Anti-Caking Agent, in the course of distribution,
3 shipping, promoting, or selling Anti-Caking Agent in the course of their employment.

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

13 32. The principal routes of exposure were and are through respiration and inhalation.

14 Persons sustain exposures by breathing in airborne silica particles as part of the process
15 of applying Anti-Caking Agent to their lawns, gardens, flowerbeds, as well as handling
16 Anti-Caking Agent. Further, exposures to Crystalline silica (airborne particles of
17 respirable size) occurred and occur to Modesto Milling's employees when they handle
18 Anti-Caking Agent, in the course of distribution, shipping, promoting, or selling Anti-
19 Caking Agent in the course of their employment. The foregoing routes of exposure
20 assume use of the product in accordance with its instructions.

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

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

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

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

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

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 30, 2009

YEROUSHALMI & ASSOCIATES

BY: 

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