

U.S. District Court
Northern District of California
JUN 28 2012
CLERK OF SUPERIOR COURT
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7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **COUNTY OF ALAMEDA**

9 **R G 1 2 6 3 7 2 1 4**

10 AS YOU SOW,

11 Plaintiff,

12 v.

13 THE QUIKRETE COMPANIES, INC.; QUIKRETE
INTERNATIONAL, INC.; QUIKRETE CALIFORNIA
14 LLC; and DOES 1-10,

15 Defendants.

) Case No. _____

) **COMPLAINT FOR DAMAGES**
) **AND INJUNCTIVE RELIEF**

1 **INTRODUCTION**

2 1. California’s Safe Drinking Water and Toxic Enforcement Act (“Proposition 65” or “the
3 Act”), Health & Safety Code §25249.5 *et seq.*, prohibits any person in the course of doing business from
4 knowingly and intentionally exposing any individual to a chemical known to the State of California to
5 cause cancer or reproductive toxicity, without first giving clear and reasonable warning of such
6 exposure. Health & Safety Code §25249.6. This prohibition applies with equal force against business
7 entities that manufacture, distribute, or sell consumer products, where the reasonable intended use of
8 such products would result in an exposure to a known carcinogen.

9 2. The State of California listed arsenic (inorganic compounds, including inorganic oxides)
10 (hereinafter, “arsenic”) as a chemical known to the State to cause cancer on February 27, 1987, and
11 listed it as a chemical known to the State to cause reproductive toxicity on May 1, 1997.

12 3. The State of California listed chromium (hexavalent compounds) (hereinafter,
13 “chromium”) as a chemical known to the State to cause cancer on February 27, 1987, and listed it as a
14 chemical known to the State to cause reproductive toxicity on December 19, 2008.

15 4. Defendants The Quikrete Companies, Inc., Quikrete International, Inc., and Quikrete
16 California LLC (collectively, “Defendants”) manufacture, distribute, and/or sell in California ready-mix
17 dry Portland cement products, including Quikrete™ Ready to Use Concrete Mix and Quikrete™ Green
18 Concrete Mix.

19 5. Arsenic and chromium are both used in Defendants’ ready-mix dry Portland cement
20 products. Humans are exposed to these compounds through a variety of means, including inhalation
21 when consumers breathe near the product, including when the products are transferred from their
22 packaging into containers and then mixed with water, and when the products are used by persons indoors
23 and/or outdoors; dermal absorption during use of the products; and ingestion, including as a result of
24 hand-to-mouth contact following dermal contact. These exposures to hazardous arsenic and chromium
25 result from the reasonably foreseeable use of Defendants’ products.

26 6. Defendants have failed to provide a clear and reasonable warning that the use of the
27 ready-mix dry Portland cement products that they have manufactured, distributed, and/or sold will result
28 in exposure to arsenic and chromium, chemicals known to the State of California to cause cancer and

1 reproductive toxicity. Accordingly, Plaintiff As You Sow seeks an order requiring that Defendants
2 either discontinue any manufacture, distribution, and/or sale of their ready-mix dry Portland cement
3 products or provide a clear and reasonable warning that use of these products will result in exposure to
4 chemicals known to the State of California to cause cancer and reproductive toxicity, and/or civil
5 penalties as provided for under the Act.

6 PARTIES

7 7. Plaintiff AS YOU SOW ("Plaintiff") is a San Francisco-based non-profit corporation
8 dedicated to, among other causes, the protection of the environment, toxics reduction, the promotion of
9 and improvement of human health, the improvement of worker and consumer rights, environmental
10 education, and corporate accountability. As You Sow brings this action on its own behalf pursuant to
11 Health and Safety Code §25249.7(d).

12 8. Defendant THE QUIKRETE COMPANIES, INC is a business entity with ten or more
13 employees that has manufactured, distributed, and/or sold for sale or use in California ready-mix dry
14 Portland cement products which contain arsenic and chromium.

15 9. Defendant QUIKRETE INTERNATIONAL, INC. is a business entity with ten or more
16 employees that has manufactured, distributed, and/or sold for sale or use in California ready-mix dry
17 Portland cement products which contain arsenic and chromium.

18 10. Defendant QUIKRETE CALIFORNIA LLC is a business entity with ten or more
19 employees that has manufactured, distributed, and/or sold for sale or use in California ready-mix dry
20 Portland cement products which contain arsenic and chromium. Upon information and belief, Quikrete
21 California LLC is an agent of defendants The Quikrete Companies, Inc. and Quikrete International, Inc.;
22 and defendants The Quikrete Companies, Inc. and Quikrete International, Inc. exercise control over
23 Quikrete California LLC's day-to-day operations.

24 11. Plaintiff As You Sow does not know the true names and capacities of Doe Defendants 1-
25 10 and therefore sues said defendants by such fictitious names. As You Sow will amend this Complaint
26 to show the Doe Defendants' true names and capacities when they have been ascertained. Plaintiff is
27 informed and believes, and on the basis of that belief alleges, that each of these Doe Defendants is in
28 some manner legally responsible for the violations of Health & Safety Code §25249.7 alleged herein.

1 **JURISDICTION AND VENUE**

2 12. This Court has jurisdiction over this action pursuant to Article VI, §10 of the California
3 Constitution because this case is not a cause given by statute to other trial courts.

4 13. This Court has jurisdiction over each Defendant named above because each is a business
5 entity that conducts sufficient business, has sufficient minimum contacts in, or otherwise intentionally
6 avails itself of the market in California.

7 14. Venue is proper in this Court because the obligation or liability arises in the County of
8 Alameda.

9 **STATUTORY BACKGROUND**

10 15. In 1986, the voters of California overwhelmingly enacted Proposition 65.

11 16. Among other requirements, Proposition 65 provides that “[n]o person in the course of
12 doing business shall knowingly and intentionally expose any individual to a chemical known to the state
13 to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such
14 individual, except as provided in Section 25249.10.” Health & Safety Code §25249.6.

15 17. An exposure to a chemical in a consumer product is one that “results from a person’s
16 acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good, or
17 any exposure that results from receiving a consumer service.” Code Regs., tit. 27, §25602(b).

18 18. An exposure is knowing if the person or entity responsible for the exposure had or has
19 “knowledge of the fact that . . . exposure to the chemical listed pursuant to Section 24249.8(a) of the Act
20 is occurring.” Code Regs., tit. 27, §25102(n).

21 19. “Whenever a clear and reasonable warning is required under Section 25249.6 of the Act,
22 the method employed to transmit the warning must be reasonably calculated, considering the alternative
23 methods available under the circumstances, to make the warning message available to the individual
24 prior to exposure.” Code Regs., tit. 27, §25601.

25 20. Pursuant to Health & Safety Code §25249.7, this Court has authority to enjoin “[a]ny
26 person that violates or threatens to violate [§25249.6]” and to impose civil penalties “not to exceed two
27 thousand five hundred dollars (\$2500) per day for each violation in addition to any other penalty
28 established by law.”

1 21. Private parties are entitled to bring an action to enforce the Act under Health and Safety
2 Code §25249.7(d).

3 **FACTS**

4 22. Pursuant to their authority under Health & Safety Code §25249.8 and Code of
5 Regulations, tit. 27, §§25302 and 25305, the Science Advisory Board placed arsenic on the list of
6 chemicals known to cause cancer on February 27, 1987, and the Developmental and Reproductive
7 Toxicant Identification Committee placed arsenic on the list of chemicals known to cause reproductive
8 toxicity on May 1, 1997.

9 23. Pursuant to their authority under Health & Safety Code §25249.8 and Code of
10 Regulations, tit. 27, §§25302 and 25305, the Science Advisory Board placed chromium on the list of
11 chemicals known to cause cancer on February 27, 1987, and the Developmental and Reproductive
12 Toxicant Identification Committee placed chromium on the list of chemicals known to cause
13 reproductive toxicity on December 19, 2008.

14 24. Defendants have manufactured, distributed, and/or sold for sale or use within the State of
15 California ready-mix dry Portland cement products, including Quikrete™ Ready to Use Concrete Mix
16 and Quikrete™ Green Concrete Mix (collectively “ready-mix dry Portland cement products”),
17 containing arsenic and chromium, without clear and reasonable warnings that the intended and
18 reasonably foreseeable use of the products will result in exposure to chemicals known to the State of
19 California to cause cancer and reproductive toxicity. Specifically:

20 a. The products have not provided and/or do not provide any warning of the
21 reproductive hazards associated with the arsenic and chromium contained therein; and

22 b. The products do not provide a reasonable warning of the reproductive and
23 carcinogenic hazards associated with arsenic and chromium in a manner that effectively will reach
24 consumers before they are exposed.

25 25. On information and belief, Defendants have manufactured, distributed, and/or sold for
26 sale or use within the State of California their ready-mix dry Portland cement products, without adequate
27 and reasonable warnings as required by Proposition 65 since at least January 27, 2010, as well as every
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1 day since the products were introduced in the California marketplace and following the one-year
2 anniversary dates of the listings at issue, and continuing through the present.

3 26. Humans are exposed to arsenic and chromium when using Defendants' products through
4 a variety of means, including: inhalation when consumers breathe near the product, including when the
5 products are transferred from their packaging into containers and then mixed with water, and when the
6 products are used by persons indoors and/or outdoors; dermal absorption during use of the products; and
7 ingestion, including as a result of hand-to-mouth contact following dermal contact. These exposures to
8 hazardous arsenic and chromium result from the reasonably foreseeable use of Defendants' ready-mix
9 dry Portland cement products.

10 27. Each Defendant has had knowledge that the ready-mix dry Portland cement products they
11 manufacture, distribute, and/or sell contain arsenic and chromium.

12 28. Each Defendant has intended that consumers use these ready-mix dry Portland cement
13 products in a manner consistent with the instructions printed on the product packaging.

14 29. Each Defendant knowingly and intentionally has exposed consumers to arsenic and
15 chromium. The exposure is knowing and intentional because it results from Defendants' manufacture,
16 distribution, and/or sale of ready-mix dry Portland cement products that contain arsenic and chromium,
17 with knowledge that reasonably foreseeable use of these products will result in consumers' exposure to
18 arsenic and chromium.

19 30. Defendants The Quikrete Companies, Inc. and Quikrete International, Inc. have received
20 a written notice of violation stating that they have violated Proposition 65 by exposing individuals to
21 arsenic and chromium in their ready-mix dry Portland cement products without providing a clear and
22 reasonable warning. Defendant Quikrete California, LLC, as an agent of The Quikrete Companies, Inc.
23 and Quikrete International, Inc., is deemed to have received such notice.

24 31. In accordance with Health & Safety Code §25249.7(d), this action is being commenced
25 more than 60 days from the date that As You Sow provided notice of the violations of §25249.6 alleged
26 herein to the Attorney General and the district attorneys and city attorneys in whose jurisdiction the
27 violations are alleged to have occurred, and to Defendants. The notice provided included a certificate of
28 merit that complied with the requirements of Health & Safety Code §25249.7(d)(1). Factual information

1 sufficient to establish the basis of the certificate of merit was attached to the certificate of merit served
2 on the Attorney General.

3 32. Neither the Attorney General, any district attorney, any city attorney, nor any other public
4 prosecutor has commenced and is diligently prosecuting an action against the violations alleged herein.

5 **FIRST CAUSE OF ACTION**

6 **(Against Each Defendant For Violation Of Proposition 65)**

7 33. Paragraphs 1 through 32 are realleged as if fully set forth herein.

8 34. By committing the acts alleged above, each Defendant has, since at least January 27,
9 2010, in the course of doing business, knowingly and intentionally exposed individuals to chemicals
10 known to the State of California to cause reproductive toxicity without first giving clear and reasonable
11 warning to such individuals.

12 35. By committing the acts alleged above, each Defendant has, since at least January 27,
13 2010, in the course of doing business, knowingly and intentionally exposed individuals to chemicals
14 known to the State of California to cause cancer without first giving clear and reasonable warning to
15 such individuals.

16 36. These actions violate Health & Safety Code §25249.6. These violations render each
17 Defendant liable for civil penalties up to \$2,500 per day for each violation occurring within the year
18 prior to the date of the filing of this action, as well as other remedies.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiff pray that the Court:

21 A. Grant civil penalties to be paid by each Defendant for each violation of Health &
22 Safety Code §25249.6 occurring within the year prior to the date of the filing of this action;

23 B. Pursuant to Health and Safety Code §25249.7, enter such injunctions or other
24 orders as are necessary to prevent Defendants from exposing persons within the State of California to
25 known reproductive toxins and cancer-causing chemicals resulting from the reasonably foreseeable use
26 of Defendants' products without providing clear and reasonable warnings calculated to ensure that the
27 warning message is available to individuals prior to exposure;

28 C. Award Plaintiff reasonable attorneys' fees and costs; and

1 D. Grant such other and further relief as the Court deems just and proper.

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3 Dated: June 29, 2012

Respectfully submitted,

4 BARBARA J. CHISHOLM
5 ANNE ARKUSH
6 Altshuler Berzon LLP

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Barbara J. Chisholm