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**ENDORSED
FILED**
San Francisco County Superior Court

MAY 1 - 2007

GORDON PARK-LI, Clerk
BY: ~~CRISTINA E. BAUTISTA~~
CASE MANAGEMENT CONFERENCE SET

SEP 28 2007 9:00 AM

DEPARTMENT 212

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO

12 AS YOU SOW, a non-profit corporation,
13 Plaintiff,

14 vs.

15 QUABAUG CORPORATION, INC., a
16 corporation,
17 Defendant.

Case No. 0307-202930

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

Health & Safety Code §25249.5, *et seq.*;

JURY TRIAL REQUESTED

19
20 Plaintiff AS YOU SOW ("AYS") brings this action in the interests of the general public
21 and, on information and belief, hereby alleges:

22 **INTRODUCTION**

23 1. This action seeks to remedy Defendant's continuing failure to warn consumers
24 in California that they are being exposed to chemicals known to the State of California to cause
25 cancer and/or reproductive toxicity. Defendant manufactures, packages, distributes, markets
26 and/or sells "Barge All-Purpose Cement" (referred to collectively hereinafter as the
"PRODUCT").

1 2. The PRODUCT contains toluene. Toluene is a chemical known to the State of
2 California to cause reproductive toxicity.

3 3. The normal, intended use of the PRODUCT causes exposures to toluene at
4 levels requiring a "clear and reasonable warning" under California's Safe Drinking Water and
5 Toxic Enforcement Act of 1986, Health & Safety Code ("H&S Code") §25249.5, *et seq.* (also
6 referred to herein as "Proposition 65").¹ Exposures have occurred and continue to occur
7 primarily through inhalation, but also may occur through dermal contact and ingestion.
8 Defendant has failed to provide these health hazard warnings as required by Proposition 65.

9 4. By this action Plaintiff seeks appropriate relief:

10 a. prohibiting the continued manufacture, packaging, distribution,
11 marketing, or sale of the PRODUCT in California by Defendant without
12 provision of clear and reasonable warnings regarding the risks of cancer
13 and/or reproductive toxicity posed by exposure to toluene through the
14 use of the PRODUCT; and

15 b. assessing civil penalties in the amount of \$2,500 per day per violation to
16 remedy Defendant's ongoing failure to provide clear and reasonable
17 warnings to consumers that they are being exposed and continue to be
18 exposed to toluene when using the PRODUCT.

19 **JURISDICTION AND VENUE**

20 5. This Court has jurisdiction over this action pursuant to California Constitution
21 Article VI, Section 10, which grants the Superior Court "original jurisdiction in all causes
22 except those given by statute to other trial courts." The statutes under which this action is
23 brought do not specify any other basis for jurisdiction.

24 6. This Court has jurisdiction over Defendant because, based on information and
25 belief, Defendant is a corporation organized under the laws of the State of California or doing
26 _____

¹ All statutory and regulatory references herein are to California law, unless otherwise specified.

1 sufficient business in, and having sufficient minimum contacts with, California, or otherwise
2 intentionally availing itself of the California market through the manufacture, packaging,
3 distribution, marketing and/or sale of the PRODUCT in the State of California to render the
4 exercise of jurisdiction over it by the California courts consistent with traditional notions of
5 fair play and substantial justice.

6 7. Venue in this action is proper in the San Francisco Superior Court because
7 Defendant has violated one or more of the California laws specified herein in the City and
8 County of San Francisco.

9 **PARTIES**

10 8. Plaintiff AS YOU SOW ("AYS") is a non-profit foundation organized under the
11 State of California's Non-Profit Public Benefit Corporation Law. AYS is dedicated to, among
12 other causes, the protection of the environment, the promotion of human health, the
13 improvement of worker and consumer safety, and environmental education. AYS is based in
14 San Francisco, California.

15 9. AYS brings this enforcement action in the public interest pursuant to H&S Code
16 §25249.7(d).

17 10. Defendant QUABAUG CORPORATION, INC. (hereafter "QUABAUG") is a
18 person doing business within the meaning of H&S Code §25249.11.

19 11. QUABAUG manufactures, packages, distributes, markets and/or sells the
20 PRODUCT for sale or use in California.

21 **STATUTORY BACKGROUND**

22 12. The People of the State of California have declared in Proposition 65 their right
23 "[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other
24 reproductive harm." (Section 1(b) of Initiative Measure, Proposition 65).

25 13. To effect this goal, Proposition 65 requires that individuals be provided with a
26 "clear and reasonable warning" before being exposed to chemicals listed by the State of
California as causing cancer or reproductive toxicity. H&S Code § 25249.6 states, in pertinent

1 part:

2 No person in the course of doing business shall knowingly and intentionally
3 expose any individual to a chemical known to the state to cause cancer or
4 reproductive toxicity without first giving clear and reasonable warning to such
individual....

5 14. Proposition 65 provides that any person "violating or threatening to violate" the
6 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The
7 phrase "threaten to violate" is defined to mean, "to create a condition in which there is a
8 substantial likelihood that a violation will occur." (H&S Code § 25249.11(e).) Violators are
9 liable for civil penalties of up to \$2,500 per day for each such violation." (H&S Code §
10 25249.7.)

11 FACTUAL BACKGROUND

12 15. On January 1, 1991, the State of California officially listed the chemical toluene
13 as a chemical known to cause reproductive toxicity. Toluene became subject to the warning
14 requirement one year later and was therefore subject to the "clear and reasonable" warning
15 requirements of Proposition 65 beginning on January 1, 1992. (22 California Code of
16 Regulations ("CCR") § 12000, *et seq.*; H&S Code § 25249.5, *et seq.*)

17 16. On October 30 1992, AYS served QUABAUG with a document entitled "60-
18 Day Notice" which provided QUABAUG with notice that it was in violation of Health &
19 Safety Code § 25249.6 for failing to warn purchasers that certain products it sells in California
20 expose users to toluene.

21 17. On August 31, 1993, AYS filed a complaint in San Francisco Superior Court on
22 behalf of California consumers of spray paint and adhesive products entitled *As You Sow v. The*
23 *Sherwin-Williams Company, et al.* (SFSC Case No. 954568) alleging violations of Business &
24 Professions Code and Health & Safety Code 525249.6 by, inter alia, QUABAUG.

25 18. After extensive settlement discussions, this Court entered a consent judgment on
26 January 25, 1994 in *As You Sow v. Quabaug Corporation, Inc.*, San Francisco Superior Court
Case No. 954568, wherein QUABAUG agreed to cease sales of the PRODUCT unless the

1 packaging of the PRODUCT contained the following label: "WARNING: This product
2 contains toluene, a chemical known to the State of California to cause birth defects or other
3 reproductive harm." AYS' continuing investigation has revealed that QUABAUG continues to
4 sell the PRODUCT without the warnings despite the fact that that the PRODUCT continues to
5 expose users to toluene at levels in excess of the levels determined to cause "no observable
6 effect" or "no significant risk", as applicable, within the meaning of H&S Code § 25249.10(c).

7 19. On December 20, 2006, AYS filed a motion to enforce the prior Consent
8 Judgment but later withdrew the motion to facilitate settlement discussions between the parties.

9 20. Despite having been provided notice of its violations of the prior Consent
10 Judgment on or about December 20, 2006, and despite having been provided formal notice of
11 its violations of California law on or about February 16, 2007, Defendants continue to sell the
12 PRODUCT throughout California without the health hazard warnings required by law.

13 21. Plaintiff is informed and believes, and based on such information and belief
14 alleges, that the PRODUCT has been sold to and/or used by individuals in California without
15 clear and reasonable warning for over a year. The PRODUCT continues to be offered for sale
16 in California without the requisite warning information.

17 22. As a proximate result of acts by Defendant, as persons in the course of doing
18 business within the meaning of Health & Safety Code § 25249.11, individuals throughout the
19 State of California, including in the County of San Francisco, have been exposed to toluene
20 without clear and reasonable warning. The individuals subject to the violative exposures
21 include normal and foreseeable users of the PRODUCT, as well as all other persons exposed to
22 the PRODUCT.

23 23. At all times relevant to this action, Defendant knowingly and intentionally
24 exposed the users of the PRODUCT to toluene without first providing clear and reasonable
25 warnings to such individuals.

26 24. Individuals using the PRODUCT are exposed to toluene in excess of the levels
determined to cause "no observable effect" or "no significant risk", as applicable, within the

1 meaning of H&S Code § 25249.10(c).

2 25. At all times relevant to this action, Defendant has, in the course of doing
3 business, failed to provide individuals using the PRODUCT with a clear and reasonable
4 warning that the PRODUCT exposes individuals to toluene.

5 26. The PRODUCT continues to be offered for sale in California without the
6 requisite clear and reasonable warnings.

7 27. Beginning on February 16, 2007, AYS sent 60-Day Notices of Proposition 65
8 violations to the requisite public enforcement agencies and to Defendant. These notices were
9 issued pursuant to, and in compliance with, the requirements of H&S Code § 25249.7(d) and the
10 statute's implementing regulations regarding the notice of the violations to be given to certain
11 public enforcement agencies and to the violator. The notice given included, *inter alia*, the
12 following information: the name, address, and telephone number of the noticing individual; the
13 name of the alleged violator; the statute violated; the approximate time period during which
14 violations occurred; and descriptions of the violations, including the chemicals involved, the
15 routes of toxic exposure, and the specific product or type of product causing the violations.
16 Defendant and the California Attorney General were provided copies of the 60-Day Notice by
17 certified mail. Additionally, Defendant was provided a copy of a document entitled "The Safe
18 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary," which is
19 also known as Appendix A to Title 22 of CCR § 12903.

20 28. The appropriate public enforcement agencies have not commenced and
21 diligently prosecuted a cause of action under H&S Code § 25249.5, *et seq.* against Defendant
22 based on the allegations herein.

23 **FIRST CAUSE OF ACTION**
24 **(Violations of Health and Safety Code § 25249.6, *et seq.*)**

25 29. Plaintiff realleges and incorporates by reference Paragraphs 1 through 28,
26 inclusive, as if specifically set forth herein.

30. By committing the acts alleged in this Complaint, Defendant, at all times relevant

1 to this action, and continuing through the present, has violated H&S Code § 25249.6 by, in the
2 course of doing business, knowingly and intentionally exposing individuals purchasing or using
3 the PRODUCT to toluene, without first providing a clear and reasonable warning to such
4 individuals pursuant to H&S Code §§ 25249.6 and 25249.11(f).

5 31. By the above-described acts, Defendant is liable, pursuant to H&S Code
6 § 25249.7(b), for a civil penalty of up to \$2,500 per day for each unlawful exposure to toluene
7 from the PRODUCT.

8 32. An action for injunctive relief under Proposition 65 is specifically authorized by
9 Health & Safety Code §25249.7(a).

10 33. Continuing commission by Defendant, of the acts alleged above will irreparably
11 harm the citizens of the State of California, for which harm they have no plain, speedy, or
12 adequate remedy at law.

13 Wherefore, plaintiff prays judgment against Defendant, as set forth hereafter.

14 **INJUNCTIVE RELIEF**

15 34. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 33,
16 as if specifically set forth herein.

17 35. By committing the acts alleged in this Complaint, Defendant has caused
18 irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence
19 of equitable relief, Defendant will continue to create a substantial risk of irreparable injury by:

- 20 a. continuing to cause consumers to be involuntarily and unwittingly exposed
- 21 to toluene through the use of the PRODUCT; and,
- 22 b. preventing consumers from distinguishing products that cause exposures to
- 23 toluene from similar products that do not cause such exposures.
- 24

25 **DEMAND FOR JURY TRIAL**

26 36. Plaintiff demands a jury trial.

1 **PRAYER FOR RELIEF**

2 Wherefore, Plaintiff accordingly prays for the following relief:

3 A. a preliminary and permanent injunction, pursuant to H&S Code § 25249.7(b)
4 enjoining Defendant, its agents, employees, assigns and all persons acting in concert or
5 participating with Defendant from manufacturing, packaging, distributing, marketing or selling
6 the PRODUCT in California without first providing a clear and reasonable warning that the
7 users of the PRODUCT are exposed, within the meaning of Proposition 65, to toluene.

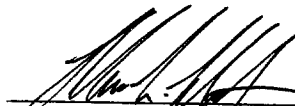
8 B. an assessment of civil penalties pursuant to Health & Safety Code § 25249.7(b),
9 against Defendant in the amount of \$2,500 per day for each violation of Proposition 65;

10 C. an award to Plaintiff of its reasonable attorneys fees and costs of suit pursuant to
11 California Code of Civil Procedure §1021.5 as Plaintiff shall specify in further application to
12 the Court; and,

13 D. such other and further relief as may be just and proper.

14
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16 DATED: May 1, 2007

17 Respectfully Submitted,
18 LAW OFFICES OF ANDREW L. PACKARD

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20 
21 Andrew L. Packard
22 Attorneys for Plaintiff
23 AS YOU SOW
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