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SAN FRANCISCO COUNTY
SUPERIOR COURT

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CLERK OF THE COURT
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

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11 AS YOU SOW, a California Non-Profit
Public Benefit Corporation,

12 Plaintiff,

13 v.

14 THE VALSPAR CORPORATION, and
15 DOES 1 through 10, inclusive,;

16 Defendants.

Case No. **CGC-11-514882**

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

1 Plaintiff AS YOU SOW alleges as follows:

2 **I. INTRODUCTION**

3 1. This complaint seeks an injunction and civil penalties to remedy the continuing
4 failure of The Valspar Corporation (“Defendant”) to give clear and reasonable warnings to
5 residents of California prior to exposing those residents to varnishes containing ethylbenzene,
6 which is a chemical known to the State of California to cause cancer. Under the Safe Drinking
7 Water and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.6, also
8 known as “Proposition 65,” businesses must provide persons with a “clear and reasonable
9 warning” before exposing them to such chemicals.

10 **II. PARTIES**

11 2. Plaintiff, AS YOU SOW, is a 501(c)(3) nonprofit organization based in San
12 Francisco, California, and incorporated under the laws of the State of California. AS YOU
13 SOW is dedicated to, among other causes, the protection of the environment, the promotion of
14 human health, the improvement of worker and consumer safety, and environmental education.
15 AS YOU SOW is a “person” pursuant to Health and Safety Code section 25249.11(a). AS YOU
16 SOW brings this action in the interest of the general public pursuant to Health and Safety Code
17 section 25249.7.

18 3. Defendant The Valspar Corporation is a business entity that manufactures,
19 distributes, and/or sells varnishes, including McCloskey Man-O-War Spar Varnish Semi-Gloss
20 7557; McCloskey Man-O-War Spar Varnish Gloss 7559; and McCloskey Man-O-War Spar
21 Varnish Satin 7555, all of which contain ethylbenzene, to consumers within the State of
22 California.

23 4. The true names and capacities of Defendants sued herein as Does 1 through 10 are
24 unknown to plaintiff, who therefore sues them by fictitious names. Plaintiff will amend this
25 complaint to allege the true names and capacities of these Defendants when they have been
26 determined. Each of the fictitiously named Defendants is responsible for the manufacture,
27 distribution, marketing, and/or sale of varnishes containing ethylbenzene to consumers in
28 California.

1 Violation mailed to Defendant, Valspar Corporation, included a document entitled "The Safe
2 Drinking Water and Toxic Enforcement Act of 1986: A Summary." In compliance with Health
3 and Safety Code section 25249.7(d) and title 11, section 3102 of the California Code of
4 Regulations, the Attorney General was served with Notices of Violation and Certificates of
5 Merit that included confidential factual information sufficient to establish the basis of the
6 Certificates of Merit, including the identify of individual(s) with whom Plaintiff consulted and
7 the facts, studies, or other data that was reviewed by such person(s).

8 11. None of the public prosecutors that received the Notices of Violation has
9 commenced and is diligently prosecuting an action against the named Defendant, Valspar
10 Corporation, for the violations alleged in this complaint, although the notice period established
11 in Health and Safety Code section 25249.7(d) has elapsed since the Notices of Violation were
12 served by mail.

13 12. Because AS YOU SOW has fully complied with the requirements of Health &
14 Safety Code section 25249.7(d), and neither the Attorney General, nor any district attorney, city
15 attorney, or prosecutor has commenced and is diligently pursuing an action against the
16 violations alleged herein, Plaintiff has standing to bring this Complaint.

17 IV. STATUTORY BACKGROUND

18 **Proposition 65**

19 13. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative
20 statute passed as "Proposition 65" by a vote of the People in November of 1986.

21 14. The warning requirement of Proposition 65 is contained in Health and Safety Code
22 section 25249.6, which provides:

23 No person in the course of doing business shall knowingly and intentionally expose any
24 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
25 giving clear and reasonable warning to such individual, except as provided in Health and Safety
26 Code section 25249.10.

27 15. Regulations promulgated to implement Proposition 65 provide that the warning
28 method "must be reasonably calculated, considering the alternative methods available under the

1 circumstances, to make the warning message available to the individual prior to exposure.” 27
2 Cal. Code Regs. § 25601(a).

3 16. The regulations prescribe certain types of warnings that are considered valid,
4 including: (A) warnings on labels, (B) identification at the retail outlet through “shelf labeling,
5 signs, menus, or a combination thereof,” and (C) “a system of signs, public advertising
6 identifying the system and toll-free information services . . . that provides clear and reasonable
7 warnings.” 27 Cal. Code Regs. § 25603.1.

8 17. Proposition 65 also establishes a procedure by which the state is to develop a list
9 of chemicals “known to the State to cause cancer or reproductive toxicity.” Health & Saf. Code
10 § 25249.8. No warning need be given concerning a listed chemical until one year after the
11 chemical first appears on the list.

12 18. Proposition 65 provides that any person “violating or threatening to violate” the
13 statute may be enjoined in any court of competent jurisdiction. Health & Saf. Code § 25249.7.
14 To “threaten to violate” is defined to mean “to create a condition in which there is a substantial
15 probability that a violation will occur.” Health & Saf. Code § 25249.11(e). In addition,
16 violators are liable for civil penalties of up to \$2,500 per day for each violation, recoverable in a
17 civil action. Health & Saf. Code § 25249.7(b).

18 19. Private actions to enforce Proposition 65 “may be brought by any person in the
19 public interest” if the action is commenced more than sixty days from the date that the person
20 has given notice of an alleged violation of Health and Safety Code sections 25249.5 or 25249.6
21 to the Attorney General, and the district attorney, city attorney, or prosecutor in whose
22 jurisdiction the violation occurred and to the alleged violator. A certificate of merit shall be
23 included with the notification to the Attorney General, district attorney, city attorney, or
24 prosecutor in each jurisdiction where the violation occurred. If no public prosecutors commence
25 enforcement within sixty days, then the person giving notice may sue.

26 V. FACTS

27 20. Ethylbenzene was listed under Proposition 65 as a chemical known to the State of
28 California to cause cancer on June 1, 2004.

1 5. Grant such other and further relief as the court deems just and proper.

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3 DATED: October 4, 2011

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6 By: 

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