

ENDORSED  
FILED  
ALAMEDA COUNTY

JAN 27 2012

CLERK OF THE SUPERIOR COURT  
By Barbara LaMotte Deputy

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF ALAMEDA

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11 As You Sow, a California Non-Profit Public  
Benefit Corporation,

12 Plaintiff,

13 v.

14 Actuant Corporation dba Gardner Bender, and  
15 DOES 1 through 10, inclusive,

16 Defendants.

Case No. **RG12614554**

**COMPLAINT FOR INJUNCTIVE  
RELIEF AND CIVIL PENALTIES**

California Health and Safety Code § 25249.5  
et seq.

**BY FAX**

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 Actuant Corporation, doing business as Gardner Bender (“Defendant”) to give clear  
5 and reasonable warnings to residents of California prior to exposing those residents to liquid  
6 electrical tape containing ethylbenzene, which is a chemical known to the State of California to  
7 cause cancer. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and  
8 Safety Code section 25249.6, also known as “Proposition 65,” businesses must provide persons  
9 with a “clear and reasonable 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 Sow is  
13 dedicated to, among other causes, the protection of the environment, the promotion of human  
14 health, the improvement of worker and consumer safety, and environmental education. As You  
15 Sow is a “person” pursuant to Health and Safety Code section 25249.11(a). As You Sow brings  
16 this action in the interest of the general public pursuant to Health and Safety Code section  
17 25249.7.

18 3. Defendant Actuant Corporation, doing business as Gardner Bender is a business  
19 entity that manufactures, distributes, markets, and/or sells liquid electrical tape, including  
20 Gardner Bender Liquid Electrical Tape - Green, which contains ethylbenzene, to consumers  
21 within the State of California.

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

28 5. Wherever reference is made to “Defendant” in this complaint, such reference

1 includes the Defendant named in Paragraph 3 and Does 1 through 10, inclusive.

2 **III. JURISDICTION AND VENUE**

3 6. This court has jurisdiction pursuant to California Constitution Article VI, Section  
4 10, because this case is a cause not given by statute to other trial courts.

5 7. This court has jurisdiction over Defendant named above because it does sufficient  
6 business in California, has sufficient minimum contacts in California, or otherwise intentionally  
7 avails itself of the California market, through the manufacture, distribution, sale, marketing,  
8 and/or use of its products in California, to render the exercise of jurisdiction over Defendant by  
9 the California courts consistent with traditional notions of fair play and substantial justice.

10 8. Venue is proper in this Court because Defendant's manufacturing, distributing,  
11 marketing, and/or sales of liquid electrical tape containing ethylbenzene has occurred in the  
12 County of Alameda and/or to people who live in the County of Alameda, which causes people to  
13 be exposed to ethylbenzene while they are physically present in Alameda County.

14 9. On November 3, 2011, Plaintiff provided a Notice of Violation of Proposition 65  
15 to the California Attorney General, the District Attorney of each county in California, the City  
16 Attorney of each California city with a population over 750,000 persons, and Defendant Actuant  
17 Corporation, doing business as Gardner Bender, pursuant to Health and Safety Code section  
18 25249.7(d). This Notice of Violation included the following products manufactured, distributed,  
19 marketed, and/or sold by Defendant Actuant Corporation, doing business as Gardner Bender:  
20 Gardner Bender Liquid Electrical Tape - Green.

21 10. The Notice of Violation included a Certificate of Merit that Plaintiff's attorneys  
22 had consulted with one or more persons with relevant and appropriate experience or expertise  
23 who has reviewed facts, studies, or other data regarding exposure to ethylbenzene from the  
24 liquid electrical tape manufactured, distributed, marketed, and/or sold by Defendant and that,  
25 based on that information, such attorneys believe that there is a reasonable and meritorious case  
26 for this private action. The Notice of Violation also included a Certificate of Service. The  
27 Notices of Violation mailed to Defendant, Actuant Corporation, doing business as Gardner  
28 Bender, included a document entitled "The Safe Drinking Water and Toxic Enforcement Act of

1 1986: A Summary.” In compliance with Health and Safety Code section 25249.7(d) and title  
2 11, section 3102 of the California Code of Regulations, the Attorney General was served with  
3 Notices of Violation and Certificates of Merit that included confidential factual information  
4 sufficient to establish the basis of the Certificates of Merit, including the identify of  
5 individual(s) with whom Plaintiff consulted and the facts, studies, or other data that was  
6 reviewed by such person(s).

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

12 12. Because As You Sow has fully complied with the requirements of Health & Safety  
13 Code section 25249.7(d), and neither the Attorney General, nor any District Attorney, City  
14 Attorney, or prosecutor has commenced and is diligently pursuing an action against the  
15 violations alleged herein, Plaintiff has standing to bring this Complaint.

#### 16 IV. STATUTORY BACKGROUND

##### 17 **Proposition 65**

18 13. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative  
19 statute passed as “Proposition 65” by a vote of the people in November of 1986.

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

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

26 15. Regulations promulgated to implement Proposition 65 provide that the warning  
27 method “must be reasonably calculated, considering the alternative methods available under the  
28 circumstances, to make the warning message available to the individual prior to exposure.” 27

1 Cal. Code Regs. § 25601(a).

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

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

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

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

## 25 V. FACTS

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

28 21. Defendant manufactures, distributes, markets, and/or sells liquid electrical tape



1 months and in the course of doing business, knowingly and intentionally exposed individuals in  
2 the State of California to ethylbenzene, a chemical known to the State of California to cause  
3 cancer, without first giving clear and reasonable warning to such individuals within the meaning  
4 of Health and Safety Code section 25249.6.

5 29. Said violations render Defendant liable to Plaintiff for civil penalties of up to  
6 \$2,500 per day for each violation, as well as other remedies.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, plaintiff prays that the Court:

9 1. Pursuant to the First Cause of Action, assess civil penalties against Defendant in  
10 the amount of \$2,500 per day for each violation of Proposition 65, according to proof;

11 2. Pursuant to Health and Safety Code section 25249.7, enter such temporary  
12 restraining orders, preliminary injunctions, permanent injunctions, or other orders prohibiting  
13 Defendant from exposing persons within the State of California to ethylbenzene by use of their  
14 liquid electrical tape without providing clear and reasonable warnings, as Plaintiff shall specify  
15 in further application to the court;

16 3. Award plaintiff its costs of suit;

17 4. Pursuant to section 1021.5 of the Code of Civil Procedure and any other applicable  
18 provision of law, order Defendant to pay Plaintiff such attorney's fees and costs as Plaintiff  
19 incurs in bringing this enforcement action; and

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

21  
22 DATED: January 27, 2012

SHUTE, MIHALY & WEINBERGER LLP

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