

ENDORSED
FILED
SAN FRANCISCO COUNTY
SUPERIOR COURT

2012 MAR 19 AM 1:10

CLERK OF THE COURT
BY: **ELIAS BOUTZ**
DEPUTY CLERK

1 ELLISON FOLK (State Bar No. 149232)
2 ROBERT S. PERLMUTTER (State Bar No. 183333)
3 SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, CA 94102
Telephone: (415) 552-7272
4 Facsimile: (415) 552-5816
Folk@smwlaw.com
5 Perlmutter@smwlaw.com

6 Attorneys for As You Sow

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

10
11 As You Sow, a California Non-Profit Public
Benefit Corporation,

12 Plaintiff,

13 v.

14 Ocean Bio-Chem, Inc., dba Star brite and
15 DOES 1 through 10, inclusive, ,

16 Defendants.

Case No.

CGC-12-519280

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

California Health and Safety Code § 25249.5
et seq.

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 Ocean Bio-Chem, Inc., doing business as Star brite (“Defendant”) to give clear and
5 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 Ocean Bio-Chem, Inc., doing business as Star brite is a business entity
19 that manufactures, distributes, markets, and/or sells liquid electrical tape, including Star brite
20 Liquid Electrical Tape (Black), which contains ethylbenzene, to consumers within the State of
21 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.

1 Notices of Violation mailed to Defendant, Ocean Bio-Chem, Inc., doing business as Star brite,
2 included a document entitled "The Safe Drinking Water and Toxic Enforcement Act of 1986: A
3 Summary." In compliance with Health and Safety Code section 25249.7(d) and title 11, section
4 3102 of the California Code of Regulations, the Attorney General was served with Notices of
5 Violation and Certificates of Merit that included confidential factual information sufficient to
6 establish the basis of the Certificates of Merit, including the identify of individual(s) with whom
7 Plaintiff consulted and 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, Ocean Bio-
10 Chem, Inc., doing business as Star brite, for the violations alleged in this complaint, although
11 the notice period established in Health and Safety Code section 25249.7(d) has elapsed since the
12 Notices of Violation were served by mail.

13 12. Because As You Sow has fully complied with the requirements of Health & Safety
14 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 27. Plaintiff is informed and believes, and based on such information and belief,
2 alleges that Defendant employs ten or more persons.

3 28. By committing the acts alleged above, Defendant has, within the previous twelve
4 months and in the course of doing business, knowingly and intentionally exposed individuals in
5 the State of California to ethylbenzene, a chemical known to the State of California to cause
6 cancer, without first giving clear and reasonable warning to such individuals within the meaning
7 of Health and Safety Code section 25249.6.

8 29. Said violations render Defendant liable to Plaintiff for civil penalties of up to
9 \$2,500 per day for each violation, as well as other remedies.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, plaintiff prays that the Court:

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

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

19 3. Award plaintiff its costs of suit;

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

23 //

24 //

25 //

26 //

27 //

28 //

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

DATED: March 19, 2012

SHUTE, MIHALY & WEINBERGER LLP

By:



ELLISON FOLK

ROBERT S. PERLMUTTER

Attorneys for As You Sow

320273.1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28