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ENDORSED FILED
SUPERIOR COURT
COUNTY OF SAN FRANCISCO
APR 26 2012
CLERK OF THE COURT
DENNIS TOYAMA
BY: _____ Deputy Clerk

7 Attorneys for As You Sow

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

11 AS YOU SOW, a California Non-Profit
12 Public Benefit Corporation
13 Plaintiff,
14 v.
15 DYNAMIC BRIDGE, INC. dba
16 IBUYHERB.COM, and DOES 1 through 10,
inclusive,
17 Defendant.

Case No. CGC 12-520319
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 **INTRODUCTION**

3 1. This complaint seeks civil penalties and an injunction to remedy the
4 continuing failure of Dynamic Bridge, Inc. doing business as iBuyHerb.com, and Does 1
5 through 10 (collectively, "Defendants") to give clear and reasonable warnings to residents of
6 California prior to exposing those residents to reproductive toxins and carcinogens found in
7 American Consumer Products, LLC Baby's Butt Aid Zinc Oxide Powder ("baby powder").
8 This product contains lead and lead compounds, chemicals listed by the State of California as
9 known reproductive toxins and carcinogens. Under the Safe Drinking Water and Toxic
10 Enforcement Act of 1986, California Health and Safety Code section 25249.5 et seq., also
11 known as "Proposition 65," businesses must provide individuals with a clear and reasonable
12 warning before exposing such individuals to a chemical known to the State of California to
13 cause cancer or reproductive toxicity. Plaintiff seeks injunctive relief and civil penalties to
14 remedy these violations of Proposition 65.

15 **PARTIES**

16 2. Plaintiff As You Sow is a 501 (c) (3) non-profit corporation dedicated to,
17 among other causes, the protection of the environment, toxics reduction, the promotion of and
18 improvement of human health, the improvement of worker and consumer rights, environmental
19 education, and corporate accountability. As You Sow is based in San Francisco, California and
20 was incorporated in 1992 under the laws of the State of California. As You Sow is a "person"
21 pursuant to section 25249.11(a) of the California Health and Safety Code. As You Sow brings
22 this action in the interest of the general public pursuant to section 25249.7(d) of the California
23 Health and Safety Code.

24 3. Defendant Dynamic Bridge, Inc. dba iBuyHerb.com, is a business entity
25 with more than ten employees that manufactures, distributes, markets, and/or sells baby powder
26 containing lead and lead compounds in California, including in the City and County of San
27 Francisco.

28 4. The true names and capacities of the defendants sued as Does 1 through 10

1 are unknown to Plaintiff, who therefore sues them by fictitious names. Plaintiff will amend this
2 complaint to allege the true names and capacities of these defendants when they have been
3 determined. Each of the fictitiously named defendants is responsible for the manufacture,
4 distribution, marketing, and/or sale of baby powder containing lead and lead compounds in
5 California.

6 5. Wherever reference is made to "Defendants," such reference includes the
7 defendant named in paragraph 3 and Does 1 through 10.

8 JURISDICTION AND VENUE

9 6. This Court has jurisdiction pursuant to California Constitution Article VI,
10 section 10, because this case is not a cause given by statute to other trial courts.

11 7. This Court has jurisdiction over each Defendant named above, because
12 each is a business entity that does sufficient business in California, has sufficient minimum
13 contacts in California, or otherwise intentionally avails itself of the California market, through
14 the distribution, sale, marketing, and use of its products in California, to render the exercise of
15 jurisdiction over it by the California courts consistent with traditional notions of fair play and
16 substantial justice.

17 8. Venue is proper in this Court because Defendants' manufacturing,
18 distribution, marketing, and/or sales of baby powder containing lead and lead compounds has
19 occurred in San Francisco County and/or to people who live in San Francisco County, which
20 causes people to be exposed to lead and lead compounds while they are physically present in
21 San Francisco County.

22 9. On February 7, 2012 Plaintiff provided a Notice of Violation of Proposition
23 65 to the California Attorney General, the District Attorney of each county in California, the
24 City Attorney of each city in California with a population over 750,000 persons, and each
25 named Defendant, pursuant to section 25249.7(d) of the California Health and Safety Code. As
26 You Sow sent Defendant a Notice of Violation of Proposition 65 via certified mail on February
27 7, 2012.

28 10. Each Notice of Violation included a Certificate of Merit that Plaintiff's

1 attorneys had consulted with one or more persons with relevant and appropriate experience or
2 expertise who has reviewed facts, studies, or other data regarding exposure to lead and lead
3 compounds from the baby powder manufactured, distributed, marketed, and/or sold by
4 Defendants and that, based on that information, such attorneys believe that there is a reasonable
5 and meritorious case for this private action. Each Notice of Violation also included a Certificate
6 of Service. The Notice of Violation mailed to each Defendant included a document entitled
7 “The Safe Drinking Water and Toxic Enforcement Act of 1986: A Summary.” In compliance
8 with California Health and Safety Code section 25249.7(d) and title 11, section 3102 of the
9 California Code of Regulations, the Attorney General was served with a Notice of Violation and
10 Certificate of Merit that included confidential factual information sufficient to establish the basis
11 of the Certificate of Merit, including the identify of individual(s) with whom Plaintiff consulted
12 and the facts, studies, or other data that was reviewed by such individual(s).

13 11. None of the public prosecutors that received the Notice of Violation has
14 commenced and is diligently prosecuting an action against these named Defendants for the
15 violations alleged in this complaint, although the notice period established in section 25249.7(d)
16 of the California Health and Safety Code has elapsed since the Notice of Violation was served
17 by mail.

18 STATUTORY BACKGROUND

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

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

23 No person in the course of doing business shall knowingly and
24 intentionally expose any individual to a chemical known to the state
25 to cause cancer or reproductive toxicity without first giving clear and
26 reasonable warning to such individual, except as provided in Section
27 25249.10.

28 14. An exposure to a chemical in a consumer product is one that “results from a

1 person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a
2 consumer good, or any exposure which results from receiving a consumer service." Cal. Code
3 Regs., tit. 27, § 25602(b).

4 15. Proposition 65 establishes a procedure by which the State of California is to
5 develop a list of chemicals "known to the State to cause cancer or reproductive toxicity." Health
6 & Saf. Code § 25249.8. No warning need be given concerning a listed chemical until one year
7 after the chemical first appears on this list.

8 16. Any person "violating or threatening to violate" Proposition 65 may be
9 enjoined in any court of competent jurisdiction. Health & Saf. Code § 25249.7. To "threaten to
10 violate" is defined to mean "to create a condition in which there is a substantial probability that
11 a violation will occur." *Id.* § 25249.11(e).

12 17. Violators of Proposition 65 are liable for civil penalties of up to \$2,500 per
13 day for each violation, recoverable in a civil action. *Id.* § 25249.7(b).

14 18. Private parties may bring suit to enforce Proposition 65 "in the public
15 interest," but only if the private party first provides written notice of the violation to the alleged
16 violator, the Attorney General, every District Attorney in whose jurisdiction the violation is
17 alleged to have occurred, and every City Attorney of a city having a population in excess of
18 750,000 where a violation is alleged to have occurred. If no public prosecutors commence
19 enforcement within sixty days, then the private party may sue. *Id.* § 25249.7(d).

20 **FACTS**

21 19. These violations involve exposures to lead and lead compounds from the
22 products listed below. On February 27, 1987, the State of California officially listed lead as a
23 chemical known to cause reproductive toxicity. Cal. Code Regs., tit. 27, § 27001(c). On
24 October 1, 1992, the State of California officially listed lead and lead compounds as chemicals
25 known to cause cancer. Cal. Code Regs., tit. 27, § 27001(b).

26 20. Each Defendant manufactures, distributes, imports, markets, and/or sells
27 baby powder that contains lead and lead compounds for sale or use in the State of California.

28 21. Individuals who handle or use the baby powder are exposed to lead and

1 lead compounds. The routes of exposure include ingestion via hand to mouth contact after
2 adults and infants touch or handle the product; dermal absorption directly through the skin and
3 eyes when adults and infants touch or handle the product or apply it to the skin; direct
4 absorption into the bloodstream when the product is applied to broken skin; inhalation when
5 adults and infants breathe near the product; and direct ingestion if adults and infants put the
6 product in their mouth. As the product is designed to be applied to the area around the anus and
7 genitals, where the skin is particularly sensitive and highly permeable, exposure of infants and
8 small children to lead from the product is greater than that associated with other areas of the
9 skin. Adults, children, and infants handle or use this baby powder and are exposed to lead and
10 lead compounds that is released from the baby powder in the course of its reasonable and
11 foreseeable use.

12 22. Each Defendant knew or reasonably should have known that the baby
13 powder it manufactured, distributed, marketed, and/or sold contained lead and lead compounds.
14 Each Defendant has intended that individuals use and handle the baby powder. Each Defendant
15 has had knowledge that individuals, including both adults and children, use and handle the baby
16 powder it manufactured, distributed, marketed, and/or sold. Each Defendant has knowingly and
17 intentionally exposed individuals to lead and lead compounds through their deliberate act(s) of
18 manufacturing, distributing, marketing, and/or selling baby powder made with materials that
19 contain lead and lead compounds.

20 23. Each Defendant has failed to provide clear and reasonable warnings that the
21 use of the products in question results in exposure to chemicals known to the State of California
22 to cause cancer and reproductive toxicity, and no such warning was provided to those
23 individuals by any other person.

24 **FIRST CAUSE OF ACTION**
25 **(VIOLATION OF PROPOSITION 65)**

26 24. Plaintiff hereby realleges and incorporates the allegations set forth in
27 paragraphs 1 through 23, inclusive, as if set forth fully here.

28 25. By committing the acts alleged above, each Defendant has, within the

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

5 26. Said violations render each Defendant liable to Plaintiff for civil penalties
6 not to exceed \$2,500 per day for each violation, as well as other remedies.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiff prays for relief as follows:

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

12 2. Pursuant to California Health and Safety Code section 25249.7, enter such
13 temporary restraining orders, preliminary injunctions, permanent injunctions, or other orders
14 prohibiting Defendants from exposing persons within the State of California to lead and lead
15 compounds caused by the use of this baby powder without providing a clear and reasonable
16 warning, as Plaintiff shall specify in further application to the Court;


17 3. Award Plaintiff its costs of suit;

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

21 5. Grant such other relief that the Court deems just and proper.

22 DATED: April 26, 2012

SHUTE, MIHALY & WEINBERGER LLP

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24 By: 
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