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CLERK OF THE SUPERIOR COURT
By Cheryl Clark Deputy

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

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

13 Plaintiff,

14 v.

15 Rust-Oleum Corporation, and DOES 1
through 10, inclusive,

16 Defendants.

Case No.

PL 13662451

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 Rust-Oleum Corporation ("Defendant") to give clear and reasonable warnings to
5 residents of California prior to exposing those residents to coatings 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 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 Rust-Oleum Corporation is a business entity that manufactures,
19 distributes, markets, and/or sells coatings, including Rust-Oleum Hammered Finish Spray
20 (Gold), Rust-Oleum Specialty High Heat Spray (White), Rust-Oleum Specialty Appliance
21 Epoxy Spray (Almond), and Rust-Oleum Specialty Chalkboard Spray (Black), which contain
22 ethylbenzene, to consumers within the State of 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 coatings containing ethylbenzene to consumers in
28 California.

1 5. Wherever reference is made to "Defendant" in this complaint, such reference
2 includes the Defendant named in Paragraph 3 and Does 1 through 10, inclusive.

3 **III. JURISDICTION AND VENUE**

4 6. This court has jurisdiction pursuant to California Constitution Article VI, Section
5 10, because this case is a cause not given by statute to other trial courts.

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

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

15 9. On September 14, 2012, Plaintiff provided a Notice of Violation of Proposition 65
16 to the California Attorney General, the District Attorney of each county in California, the City
17 Attorney of each California city with a population over 750,000 persons, and Defendant Rust-
18 Oleum Corporation, pursuant to Health and Safety Code section 25249.7(d). This Notice of
19 Violation included the following products manufactured, distributed, marketed, and/or sold by
20 Defendant Rust-Oleum Corporation: Rust-Oleum Hammered Finish Spray (Gold), Rust-Oleum
21 Specialty High Heat Spray (White), Rust-Oleum Specialty Appliance Epoxy Spray (Almond),
22 and Rust-Oleum Specialty Chalkboard Spray (Black).

23 10. The Notice of Violation included a Certificate of Merit that Plaintiff's attorneys
24 had consulted with one or more persons with relevant and appropriate experience or expertise
25 who has reviewed facts, studies, or other data regarding exposure to ethylbenzene from the
26 coatings manufactured, distributed, marketed, and/or sold by Defendant and that, based on that
27 information, such attorneys believe that there is a reasonable and meritorious case for this
28 private action. The Notice of Violation also included a Certificate of Service. The Notices of

1 Violation mailed to Defendant, Rust-Oleum Corporation, included a document entitled "The
2 Safe Drinking Water and Toxic Enforcement Act of 1986: A Summary." In compliance with
3 Health 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, Rust-Oleum
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 & 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 17. Proposition 65 also establishes a procedure by which the state is to develop a list
4 of chemicals “known to the State to cause cancer or reproductive toxicity.” Health & Saf. Code
5 § 25249.8. No warning need be given concerning a listed chemical until one year after the
6 chemical first appears on the list.

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

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

21 V. FACTS

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

24 21. Defendant manufactures, distributes, markets, and/or sells coatings that contain
25 ethylbenzene for sale or use in the State of California. Specifically, Defendant sold to
26 consumers in the State of California the following products containing ethylbenzene: Rust-
27 Oleum Hammered Finish Spray (Gold), Rust-Oleum Specialty High Heat Spray (White), Rust-
28

1 Oleum Specialty Appliance Epoxy Spray (Almond), and Rust-Oleum Specialty Chalkboard
2 Spray (Black).

3 22. Use of the products identified in Paragraph 21, above, results in human exposure
4 to ethylbenzene. The routes of exposure include ingestion via hand to mouth contact when
5 consumers touch or handle the products; dermal absorption directly through the skin and eyes
6 when consumers touch or handle the products; inhalation when consumers breathe near the
7 products; and direct ingestion.

8 23. Defendant knew or reasonably should have known that the coatings that it
9 manufactured, distributed, marketed, and/or sold contained ethylbenzene. Defendant has
10 intended that individuals use and handle these products. Defendant has had knowledge that
11 individuals use and handle the coatings that Defendant has manufactured, distributed, marketed,
12 and/or sold. Defendant has knowingly and intentionally exposed individuals to ethylbenzene
13 through its deliberate act(s) of manufacturing, distributing, marketing, and/or selling coatings
14 containing ethylbenzene.

15 24. The coatings described in this complaint were tested in a certified laboratory, and
16 found to contain sufficiently high levels of ethylbenzene to necessitate clear and reasonable
17 warnings, under Proposition 65, that use of the product results in exposure to a chemical known
18 to the State of California to cause cancer.

19 25. Defendant has failed to provide clear and reasonable warnings that the use of the
20 coatings described above results in exposure to a chemical known to the State of California to
21 cause cancer, and no such warning was provided to consumers using those products.

22 **VI. FIRST CAUSE OF ACTION**

23 26. Paragraphs 1 through 25 are realleged as if fully set forth herein.

24 27. Plaintiff is informed and believes, and based on such information and belief,
25 alleges that Defendant employs ten or more persons.

26 28. By committing the acts alleged above, Defendant has, within the previous twelve
27 months and in the course of doing business, knowingly and intentionally exposed individuals in
28 the State of California to ethylbenzene, a chemical known to the State of California to cause

1 cancer, without first giving clear and reasonable warning to such individuals within the meaning
2 of Health and Safety Code section 25249.6.

3 29. Said violations render Defendant liable to Plaintiff for civil penalties of up to
4 \$2,500 per day for each violation, as well as other remedies.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, plaintiff prays that the Court:

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

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

14 3. Award plaintiff its costs of suit;

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

18 5. Grant such other and further relief as the court deems just and proper.
19

20 DATED: January 3, 2013

SHUTE, MIHALY & WEINBERGER LLP

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22 By: 

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