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As You Sow

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

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

11 Plaintiff,

12 v.

13 J. R. CARLSON LABORATORIES, INC.,  
14 and DOES 1 through 10, inclusive,

15 Defendants.

Case No.

**CGC-14-543102**

**COMPLAINT FOR INJUNCTIVE  
RELIEF AND CIVIL PENALTIES**

California Health and Safety Code  
§ 25249.5 et seq.

ENDORSED  
FILED  
Superior Court of California  
County of San Francisco  
DEC 08 2014  
CLERK OF THE COURT  
BY: ROSSALY DELAVEGA-NAVARRO  
Deputy Clerk

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 J. R. Carlson Laboratories, Inc. (“Defendant”) to give clear and reasonable warnings to  
5 residents of California prior to exposing those residents to products containing retinol/retinyl  
6 esters (specifically, retinyl palmitate). The State of California has listed retinol/retinyl esters as  
7 a chemical known to cause reproductive harm when taken in daily dosages in excess of 10,000  
8 international units (“IU”). Under the Safe Drinking Water and Toxic Enforcement Act of 1986 –  
9 also known as “Proposition 65” – businesses must provide persons with a “clear and reasonable  
10 warning” before exposing them to such chemicals. Health & Saf. Code § 25249.6.

11 **II. PARTIES**

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

18 3. Defendant J. R. Carlson Laboratories, Inc. is a business entity that manufactures,  
19 distributes, markets, and/or sells vitamin A supplements, which contain retinol/retinyl esters  
20 (specifically, retinyl palmitate), to consumers within the State of California.

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

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

### III. JURISDICTION AND VENUE

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

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

8. Venue is proper in this Court because Defendant's manufacturing, distributing, marketing, and/or sales of products containing retinol/retinyl esters has occurred in the County of San Francisco, and/or Defendant sold the products containing retinol/retinyl esters to people who live in the County of San Francisco, which causes people to be exposed to retinol/retinyl esters while they are physically present in the County of San Francisco.

9. On April 25, 2014, Plaintiff provided a Notice of Violation of Proposition 65 to the California Attorney General, the District Attorney of each county in California, the City Attorney of each California city with a population over 750,000 persons, and Defendant, pursuant to Health and Safety Code section 25249.7(d). This Notice of Violation included the following products manufactured, distributed, marketed, and/or sold by Defendant:

- Carlson Vitamin A 15,000 IU Palmitate Soft Gels
- Carlson Vitamin A 25,000 IU Natural Soft Gels

10. The Notice of Violation included a Certificate of Merit stating that Plaintiff's attorneys had consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding exposure to retinol/retinyl esters from the products manufactured, distributed, marketed, and/or sold by Defendant. The Certificate of Merit confirms that, based on that information, Plaintiff's attorneys believe that there is a reasonable and meritorious case for this private action. The Notice of Violation also included a Certificate of Service. The Notice of Violation mailed to Defendant included a document entitled "The Safe Drinking Water and Toxic Enforcement Act of 1986: A

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

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

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

#### 14 **IV. STATUTORY BACKGROUND**

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

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

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

22 15. Regulations promulgated to implement Proposition 65 provide that the warning  
23 method “must be reasonably calculated, considering the alternative methods available under the  
24 circumstances, to make the warning message available to the individual prior to exposure.”  
25 27 Cal. Code Regs. § 25601(a).

26 17. Proposition 65 also establishes a procedure by which the state is to develop a list  
27 of chemicals “known to the State to cause cancer or reproductive toxicity.” Health & Saf. Code  
28 § 25249.8. No warning need be given concerning a listed chemical until one year after the

1 chemical first appears on the list.

2 18. Proposition 65 provides that any person “violat[ing] or threaten[ing] to violate”  
3 the statute may be enjoined in any court of competent jurisdiction. Health & Saf. Code §  
4 25249.7. To “threaten to violate” is defined to mean “to create a condition in which there is a  
5 substantial probability that a violation will occur.” Health & Saf. Code § 25249.11(e). In  
6 addition, violators are liable for civil penalties of up to \$2,500 per day for each violation,  
7 recoverable in a civil action. Health & Saf. Code § 25249.7(b).

8 19. Private actions to enforce Proposition 65 “may be brought by a person in the  
9 public interest” if the action is commenced more than sixty days from the date that the person  
10 has given notice of an alleged violation of Health and Safety Code section 25249.5 or 25249.6 to  
11 the Attorney General; to the District Attorney, City Attorney, or prosecutor in whose jurisdiction  
12 the violation occurred; and to the alleged violator. Health & Saf. Code § 25249.7(d). A  
13 certificate of merit shall be included with the notification to the Attorney General, District  
14 Attorney, City Attorney, or prosecutor in each jurisdiction where the violation occurred. *Id.* If  
15 no public prosecutors commence enforcement within sixty days, then the person giving notice  
16 may sue. *Id.*

## 17 V. FACTS

18 20. Retinol/retinyl esters is listed under Proposition 65 as a chemical known to the  
19 State of California to cause reproductive harm when taken in daily doses in excess of 10,000 IU.

20 21. Defendant manufactures, distributes, markets, and/or sells products that contain  
21 retinol/retinyl esters for sale or use in the State of California. Specifically, Defendant sold to  
22 consumers in the State of California the following products containing retinol/retinyl esters  
23 (specifically, retinyl palmitate):

- 24 • Carlson Vitamin A 15,000 IU Palmitate Soft Gels
- 25 • Carlson Vitamin A 25,000 IU Natural Soft Gels

26 22. Use of the products identified in Paragraph 21 results in human exposure to  
27 retinol/retinyl esters in excess of 10,000 IU per day through ingestion when consumers use the  
28 products as directed on the label.

1 23. Defendant knew or reasonably should have known that the products that it  
2 manufactured, distributed, marketed, and/or sold contained retinol/retinyl esters. Defendant has  
3 intended that individuals use and ingest these products. Defendant knows that individuals use  
4 the products that Defendant has manufactured, distributed, marketed, and/or sold. Defendant  
5 has knowingly and intentionally exposed individuals to retinol/retinyl esters in excess of 10,000  
6 IU per day through its deliberate act(s) of manufacturing, distributing, marketing, and/or selling  
7 the products.

8 24. The products described in this complaint were tested in a certified laboratory and  
9 were found to contain sufficiently high levels of retinol/retinyl esters to necessitate clear and  
10 reasonable warnings under Proposition 65 that use of the products results in exposure to a  
11 chemical known to the State of California to cause reproductive harm.

12 25. Defendant has failed to provide clear and reasonable warnings that the use of the  
13 products described above results in exposure to a chemical known to the State of California to  
14 cause reproductive harm, and no such warning was provided to consumers using those products.

## 15 VI. FIRST CAUSE OF ACTION

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

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

19 28. By committing the acts alleged above, Defendant has, within the previous twelve  
20 months and in the course of doing business, knowingly and intentionally exposed individuals in  
21 the State of California to retinol/retinyl esters, a chemical known to the State of California to  
22 cause reproductive harm, without first giving clear and reasonable warning to such individuals  
23 within the meaning of Health and Safety Code section 25249.6.

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

## 26 PRAYER FOR RELIEF

27 WHEREFORE, Plaintiff prays that the Court:

28 1. Pursuant to the First Cause of Action, assess civil penalties against Defendant in

1 the amount of up to \$2,500 per day for each violation of Proposition 65;

2 2. Pursuant to Health and Safety Code section 25249.7, enter such temporary  
3 restraining orders, preliminary injunctions, permanent injunctions, or other orders prohibiting  
4 Defendant from exposing persons within the State of California to retinol/retinyl esters by use of  
5 their products without providing clear and reasonable warnings, as Plaintiff shall specify in  
6 further application to the court;

7 3. Award Plaintiff its costs of suit;

8 4. Pursuant to section 1021.5 of the Code of Civil Procedure and any other applicable  
9 provision of law, order Defendant to pay Plaintiff such attorneys' fees and costs as Plaintiff  
10 incurs in bringing this enforcement action; and

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

12 DATED: December 8, 2014

SHUTE, MIHALY & WEINBERGER LLP

13  
14 By: 

15 \_\_\_\_\_  
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