

1 ELLISON FOLK (State Bar No. 149232)  
LAURA D. BEATON (State Bar No. 294466)  
2 SHUTE, MIHALY & WEINBERGER LLP  
396 Hayes Street  
3 San Francisco, California 94102  
Telephone: (415) 552-7272  
4 Facsimile: (415) 552-5816  
Folk@smwlaw.com  
5 Beaton@smwlaw.com

6 Attorneys for Plaintiff  
AS YOU SOW  
7

ENDORSED  
FILED  
Superior Court of California  
County of San Francisco  
APR 15 2016  
CLERK OF THE COURT  
By: ROSSALY LA VEGA  
Deputy Clerk

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

11 AS YOU SOW,  
12 Plaintiff,  
13 v.  
14 RAINBOW LIGHT NUTRITIONAL  
SYSTEMS, INC., and DOES 1 through 10,  
15 inclusive,  
16 Defendants.

Case No. CGC 15-551517  
COMPLAINT FOR INJUNCTIVE  
RELIEF AND CIVIL PENALTIES

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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 Rainbow Light Nutritional Systems, Inc. (“Defendant”) to give clear and reasonable  
5 warnings to residents of California prior to exposing those residents to a product containing  
6 cadmium. The State of California has listed cadmium as a chemical known to cause  
7 reproductive harm. Under the Safe Drinking Water and Toxic Enforcement Act of 1986 – also  
8 known as “Proposition 65” – businesses must provide persons with a “clear and reasonable  
9 warning” before exposing them to potentially harmful chemicals like cadmium. Health & Saf.  
10 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 Rainbow Light Nutritional Systems, Inc. is a business entity that  
19 manufactures, distributes, markets, and/or sells products that contain cadmium to consumers  
20 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 cadmium to consumers in California.

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

28 ///

1 **III. JURISDICTION AND VENUE**

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

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

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

14 9. On September 17, 2014, 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,  
17 pursuant to Health and Safety Code section 25249.7(d). This Notice of Violation involved the  
18 following product manufactured, distributed, marketed, and/or sold by Defendant: Rainbow  
19 Light Creamy Vanilla Protein Energizer.

20 10. On February 5, 2016, Plaintiff provided a Notice of Violation of Proposition 65 to  
21 the California Attorney General, the District Attorney of each county in California, the City  
22 Attorney of each California city with a population over 750,000 persons, and Defendant,  
23 pursuant to Health and Safety Code section 25249.7(d). This Notice of Violation involved the  
24 following products, which are manufactured, distributed, marketed, and/or sold by Defendant in  
25 California, and which expose users to cadmium: Rainbow Light Chocolate Protein Energizer,  
26 and other similar products.

27 11. The Notices of Violation included Certificates of Merit that Plaintiff's attorneys  
28 had consulted with one or more persons with relevant and appropriate experience or expertise

1 who has reviewed facts, studies, or other data regarding exposure to cadmium from the products  
2 manufactured, distributed, marketed, and/or sold by Defendant. The Certificates of Merit  
3 confirm that, based on that information, Plaintiff's attorneys believe that there is a reasonable  
4 and meritorious case for this private action. The Notices of Violation also included Certificates  
5 of Service. The Notices of Violation mailed to Defendant each included a document entitled  
6 "The Safe Drinking Water and Toxic Enforcement Act of 1986: A Summary." In compliance  
7 with Health and Safety Code section 25249.7(d) and title 11, section 3102 of the California  
8 Code of Regulations, the Attorney General was served with Notices of Violation and  
9 Certificates of Merit that included confidential factual information sufficient to establish the  
10 basis of each Certificate of Merit, including the identity of individual(s) with whom Plaintiff  
11 consulted and the facts, studies, or other data that was reviewed by such person(s).

12 12. None of the public prosecutors that received the Notices of Violation has  
13 commenced and is diligently prosecuting an action against the named Defendant for the  
14 violations alleged in this Complaint, although the notice periods established in Health and  
15 Safety Code section 25249.7(d) has elapsed since both Notices of Violation was served by mail.

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

#### 20 IV. STATUTORY BACKGROUND

21 14. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative  
22 statute passed as "Proposition 65" by a vote of the people in November of 1986.

23 15. The warning requirement of Proposition 65 is contained in Health and Safety Code  
24 section 25249.6, which provides:

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

28 16. Regulations promulgated to implement Proposition 65 provide that the warning

1 method “must be reasonably calculated, considering the alternative methods available under the  
2 circumstances, to make the warning message available to the individual prior to exposure.” Cal.  
3 Code Regs., tit. 27, § 25601.

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

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

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

## 23 V. FACTS

24 20. Cadmium is listed under Proposition 65 as a chemical known to the State of  
25 California to cause reproductive harm.

26 21. Defendant manufactures, distributes, markets, and/or sells products for sale or use  
27 in the State of California that contain cadmium. Specifically, Defendant sold to consumers in  
28 the State of California the following product containing cadmium: Rainbow Light Creamy

1 Vanilla Protein Energizer, Rainbow Light Chocolate Protein Energizer, and other similar  
2 products.

3 22. Use of the products identified in Paragraph 21 results in human exposure to  
4 cadmium when consumers use the products as directed on the labels.

5 23. Defendant knew or reasonably should have known that the products that it  
6 manufactured, distributed, marketed, and/or sold contained cadmium. Defendant has intended  
7 that individuals use these products. Defendant knows that individuals use the products that  
8 Defendant has manufactured, distributed, marketed, and/or sold. Defendant has knowingly and  
9 intentionally exposed individuals to cadmium through its deliberate act(s) of manufacturing,  
10 distributing, marketing, and/or selling the products.

11 24. The products described in this Complaint were tested in a certified laboratory and  
12 were found to contain sufficiently high levels of cadmium to necessitate clear and reasonable  
13 warnings under Proposition 65 that use of the products results in exposure to a chemical known  
14 to the State of California to cause reproductive harm.

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

## 18 VI. FIRST CAUSE OF ACTION

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

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

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

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

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff prays that the Court:

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

5 2. Pursuant to Health and Safety Code section 25249.7, enter such temporary  
6 restraining orders, preliminary injunctions, permanent injunctions, or other orders prohibiting  
7 Defendant from exposing persons within the State of California to cadmium by use of its  
8 products without providing clear and reasonable warnings, as Plaintiff shall specify in further  
9 application to the Court;

10 3. Award Plaintiff its costs of suit;

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

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

15 DATED: April 15, 2016

SHUTE, MIHALY & WEINBERGER LLP

17 By:   
18 \_\_\_\_\_  
19 ELLISON FOLK  
LAURA D. BEATON

20 Attorneys for Plaintiff  
21 AS YOU SOW

22 670308.1