



8807085

1 ELLISON FOLK (State Bar No. 149232)
 2 PETER R. MILJANICH (State Bar No. 281826)
 SHUTE, MIHALY & WEINBERGER LLP
 3 396 Hayes Street
 San Francisco, CA 94102
 Telephone: (415) 552-7272
 Facsimile: (415) 552-5816
 4 Folk@smwlaw.com
 Miljanich@smwlaw.com

ENDORSED
 FILED
 ALAMEDA COUNTY

MAY 28 2014

CLERK OF THE SUPERIOR COURT
 By **T. Lopez** Deputy

5 Attorneys for As You Sow

6
 7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 8 COUNTY OF ALAMEDA
 9

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

Case No. RG 13662451

12 Plaintiff,

13 *glt*
 [REDACTED] CONSENT JUDGMENT

13 v.

14 Rust-Oleum Corporation,
 15 Defendant.

Dept: 19
 Action Filed: January 7, 2013

MAR 19 2014

1 This Consent Judgment is entered into by and between Plaintiff AS YOU SOW (“AYS”) and Defendant RUST-OLEUM CORPORATION (“Rust-Oleum”) to resolve all claims raised in
2 the plaintiff’s complaint filed in the above-captioned action. This Consent Judgment shall be
3 effective upon entry. AYS and Rust-Oleum (collectively “the Parties”) agree to the terms and
4 conditions set forth below.
5

6
7 **1. INTRODUCTION**

8 1.1 AYS is a non-profit corporation dedicated to, among other causes, the protection
9 of the environment, the promotion of human health, the improvement of worker and consumer
10 rights, environmental education, and corporate accountability. AYS is based in San Francisco,
11 California and is incorporated under the laws of the State of California.

12 1.2 Rust-Oleum manufactures and distributes paint products including Rust-Oleum
13 Hammered Finish Spray, Rust-Oleum Specialty High Heat Spray, Rust-Oleum Specialty
14 Appliance Epoxy Spray, Rust-Oleum Specialty Chalkboard Spray, Rust-Oleum Professional
15 Primer, Rust-Oleum Painter’s Touch Primer – Ultra Cover 2x, Rust-Oleum Professional High
16 Performance Enamel, Rust-Oleum Stops Rust Clean Metal Primer, Rust-Oleum Specialty
17 Metallic Finish, Rust-Oleum Specialty Camouflage, Rust-Oleum Specialty Ultra High Heat
18 Spray, and Rust-Oleum Rusty Metal Primer Spray (collectively, the “Covered Products”), each
19 of which are alleged to contain ethylbenzene, a chemical regulated by the State of California as
20 known to cause cancer pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986
21 (“Proposition 65”), California Health and Safety Code §25249.5 *et seq.*

22 1.3 On September 14, 2012, AYS sent a 60-day Notice of Violation to Rust-Oleum
23 and to public enforcers as required by Health & Safety Code Section 25249.7, alleging that these
24 entities violated Proposition 65 by failing to provide clear and reasonable warning before
25 exposing users to ethylbenzene in Rust-Oleum Hammered Finish Spray, Rust-Oleum Specialty
26 High Heat Spray, Rust-Oleum Specialty Appliance Epoxy Spray, Rust-Oleum Specialty
27 Chalkboard Spray, and Rust-Oleum Rusty Metal Primer Spray. On February 21, 2013, As You
28

1 Sow sent a second notice to Rust-Oleum for the following products: Rust-Oleum Professional
2 Primer, Rust-Oleum Painter's Touch Primer – Ultra Cover 2x, Rust-Oleum Professional High
3 Performance Enamel, Rust-Oleum Stops Rust Clean Metal Primer, Rust-Oleum Specialty
4 Metallic Finish, Rust-Oleum Specialty Camouflage, and Rust-Oleum Specialty Ultra High Heat.
5 The September 14, 2012, and February 21, 2013, notices are collectively referred to herein as
6 the "Notices."

7 1.4 On January 7, 2013, AYS filed a Complaint against Rust-Oleum in Alameda
8 County Superior Court, No. RG 13-662451, alleging that Rust-Oleum violated Proposition 65
9 due to the alleged failure to provide clear and reasonable warning that users of Covered Products
10 were exposed to ethylbenzene, a chemical known to the state of California to cause cancer.

11 1.5 For purposes of this Consent Judgment only, the Parties stipulate that this Court
12 has jurisdiction over Rust-Oleum as to the allegations contained in the Complaint, that venue is
13 proper in Alameda County, that this Court has jurisdiction to enter this Consent Judgment as a
14 resolution of all claims that were alleged in the Complaint, and that the Court shall retain
15 jurisdiction to implement the Consent Judgment.

16 1.6 The Parties enter into this agreement to settle certain disputed claims as alleged in
17 the Complaint, and to avoid prolonged and costly litigation. By executing and complying with
18 this agreement, neither Party admits any fact or conclusion of law, issue of law, or violation of
19 law including, but not limited to, any fact or conclusion of law regarding any violation of
20 Proposition 65, or any other statutory, common law or equitable claim or requirement relating to
21 or arising from the sale of Covered Products in California. Neither shall this Consent Judgment,
22 nor compliance with its terms, be construed as an admission that any act provided for herein, or
23 any warnings regarding exposure to ethylbenzene from Covered Products are required under
24 Proposition 65 or any other statute, regulation, or common law requirement, or except as
25 provided in Paragraph 4.1 below, be offered or admitted as evidence in any administrative or
26 judicial proceeding or litigation in any court, agency, or forum. Nothing in this Consent
27 Judgment shall prejudice, waive, or impair any right, remedy, or defense that Plaintiff and
28

1 Defendant may have in any other or in future legal proceedings unrelated to these proceedings.
2 However, this paragraph shall not diminish or otherwise affect the obligation, responsibilities,
3 and duties of the Parties under this Consent Judgment.

4 1.1 The term "Effective Date" means the date of entry of this Consent Judgment.

5
6 **2. INJUNCTIVE RELIEF**

7 2.1 Covered Products distributed or sold by Rust-Oleum in the State of California
8 after the Effective Date shall provide the following warning statement:

9 "WARNING: This product contains chemicals known to the State of California to
10 cause cancer and birth defects or other reproductive harm."

11 2.2 The warning statement required in Section 2.1 shall be prominently affixed to or
12 printed on the Covered Product's packaging and labeling by Rust-Oleum and shall be displayed
13 with such conspicuousness, as compared with other words, statements, designs, or devices on
14 the Covered Product, or its packaging or labeling, as to render it likely to be read and understood
15 by an ordinary individual under customary conditions of purchase or use. For purposes of this
16 Section, a warning may be contained in the same section of the packaging and labeling that
17 contains other safety warnings, if any, concerning the use of the Covered Product. The type size
18 of the warning must be legible, but need not be any larger than any other warning provided for
19 the Covered Product.

20
21 **3. SETTLEMENT PAYMENTS**

22 3.1 Within 15 days of the Effective Date, Rust-Oleum shall pay \$47,500 in the form of
23 a check made payable to the Shute, Mihaly & Weinberger trust account as reimbursement for
24 plaintiff's attorneys fees, investigation costs, and other reasonable litigation costs and expenses.

25 3.2 Within 10 days of the Effective Date, Rust-Oleum shall pay \$8,000 in the form of
26 a check made payable to As You Sow as a civil penalty pursuant to Health and Safety Code
27
28

1 Section 25249.7(b). As You Sow shall remit 75% of this amount to the State of California
2 pursuant to Health and Safety Code Section 25249.12(b).

3 3.3 Additional In Lieu Payments: Additionally, within 10 days of the Effective Date,
4 Rust-Oleum shall pay \$19,500 in the form of a check made payable to As You Sow as a
5 payment in lieu of additional civil penalties, with this amount to be used by AYS for grants to
6 California non-profit organizations and by the AYS Environmental Enforcement Fund. These
7 funds shall be used to reduce or remediate exposures to toxic chemicals and to increase
8 consumer, worker and community awareness of the health hazards posed by toxic chemicals in
9 California via its program work, but primarily through grants to other 501(c)(3) non-profit
10 organizations working in toxics reduction, remediation and/or environmental education. In
11 deciding among the grantee proposals, the As You Sow Board of Directors ("Board") takes into
12 consideration a number of important factors, including: (1) the nexus between the harm done in
13 the underlying case(s), and the grant program work; (2) the potential for toxics reduction,
14 prevention, remediation or education benefits to California citizens from the proposal; (3) the
15 budget requirements of the proposed grantee and the alternate funding sources available to it for
16 its project; and (4) the Board's assessment of the grantee's chances for success in its program
17 work. AYS shall ensure that all funds will be disbursed and used in accordance with AYS'
18 mission statement, articles of incorporation, and bylaws and applicable state and federal laws
19 and regulations.

20 4. ENFORCEMENT OF CONSENT JUDGMENT

21
22 4.1 The Parties may, by motion or order to show cause before the Superior Court of
23 the County of San Francisco, enforce the terms and conditions of this Consent Judgment. In the
24 event that a dispute arises with respect to any of the provisions of this Consent Judgment, the
25 Parties shall meet and confer within 10 days after either Party receives written notice of an
26 alleged violation of this Agreement. The prevailing Party in any dispute regarding compliance
27 with the terms of this Consent Judgment shall be awarded any fines, costs, penalties, or remedies
28

1 provided by law for failure to comply with California Health and Safety Code 25249.5 *et seq.*
2 Additionally, the prevailing Party shall be awarded its reasonable attorney's fees and costs.

3
4 **5. CLAIMS COVERED AND RELEASE**

5 5.1 As to the Covered Products, this Consent Judgment is a full, final, and binding
6 resolution between AYS, acting on behalf of itself and, as to those matters raised in AYS's
7 Notices, the public interest pursuant to Health and Safety Code Section 24249.7(d), and Rust-
8 Oleum and its parents, shareholders, divisions, subdivisions, subsidiaries, partners, sister
9 companies, affiliated entities under common ownership, directors, officers, employees,
10 attorneys, and their successors and assigns ("Defendant Releasees"), and all entities to whom
11 they distribute or sell Covered Products, including but not limited to distributors, wholesalers,
12 customers, retailers, franchisees, cooperative members, and licensees, ("Downstream Defendant
13 Releasees"), of any actual and potential claims that were or could have been brought by AYS for
14 the alleged failure to provide clear, reasonable, and lawful warnings of exposure to ethylbenzene
15 used or contained in the Covered Products distributed or sold by Rust-Oleum before the
16 Effective Date, or any alleged harm resulting from the alleged failure to warn, including but not
17 limited to claims that could have been brought pursuant to California's Unfair Competition Law,
18 codified at California Business and Professions Code § 17200 *et seq.*

19 5.2 As to the Covered Products, compliance with the terms of this Consent Judgment
20 by Rust-Oleum resolves any issue from the date of entry of this Consent Judgment into the
21 future concerning compliance by Rust-Oleum, Defendant Releasees, and Downstream
22 Defendant Releasees with regard to Proposition 65 as to the presence of, or exposure to,
23 ethylbenzene in the Covered Products.

24 5.3 Upon entry of the Consent Judgment, the Parties waive their respective rights to a
25 hearing or trial on the allegations of the complaint.

26 5.4 Application. This Consent Judgment shall apply to and be binding upon the
27 Parties hereto and, to the extent allowable by law, on the general public.

1
2 **6. GOVERNING LAW AND CONSTRUCTION**

3 6.1 This agreement shall be governed by, and construed in accordance with, the laws
4 of the State of California.

5 6.2 The Parties, including their counsel, have participated in the preparation of this
6 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.
7 This Consent Judgment was subject to revision and modification by the Parties and has been
8 accepted and approved as to its final form by all Parties and their counsel. Accordingly, any
9 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
10 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
11 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are
12 to be resolved against the drafting Party should not be employed in the interpretation of this
13 Consent Judgment and, in this regard, the Parties hereby waive California Civil Code section
14 1654.

15
16 **7. MODIFICATION OF CONSENT JUDGMENT**

17 7.1 This Consent Judgment may be modified only upon written agreement of the
18 Parties, with approval of the Court, or pursuant to court order issued upon noticed motion of a
19 Party for good cause shown, and upon entry of a modified Consent Judgment by this Court.
20 Any Party seeking to modify this Consent Judgment shall meet and confer with all affected
21 Parties prior to filing a motion to modify the Consent Judgment in a good faith to attempt to
22 resolve any differences. The Attorney General shall be served with notice of any proposed
23 modification to this Consent Judgment at least 15 days in advance of its consideration by the
24 Court.

1 **8. COURT APPROVAL**

2 8.1 The Court shall either approve or disapprove of this Consent Judgment in its
3 entirety, without alteration, deletion or amendment, unless otherwise so stipulated by the Parties
4 and their counsel. Defendant agrees not to oppose this Consent Judgment.

5 8.2 In the event that the Court fails to approve and order entry of the Consent
6 Judgment without any change whatsoever (unless otherwise so stipulated by the Parties), this
7 Consent Judgment shall become null and void upon the election of either Party and upon written
8 notice to all of the Parties to the Action pursuant to the notice provisions herein, and shall not be
9 introduced into evidence or otherwise used in any proceeding for any purpose.

10 **9. ENTIRE AGREEMENT**

11
12 9.1 The Parties declare and represent that no promise, inducement or other agreement
13 has been made conferring any benefit upon any Party except those contained herein and that this
14 agreement contains the entire agreement pertaining to the subject matter hereof. This agreement
15 supersedes any prior or contemporaneous negotiations, representations, agreements and
16 understandings of the Parties with respect to such matters, whether written or oral. Parol
17 evidence shall be inadmissible to show agreement by, between, or among the Parties to any term
18 or condition contrary to or in addition to the terms and conditions contained in this Consent
19 Judgment. The Parties acknowledge that each has not relied on any promise, representation or
20 warranty, expressed or implied, not contained in this agreement.

21 **10. APPLICATION OF CONSENT JUDGMENT**

22
23 This Consent Judgment shall apply to and be binding upon the Parties hereto, their
24 divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

25 The terms of this Consent Judgment shall not apply to Covered Products manufactured,
26 distributed, or sold by Rust-Oleum outside of California.

1 **11. ATTORNEYS' FEES**

2 11.1 Except as specifically provided in this Consent Judgment, each Party shall bear its
3 own attorneys' fees and costs incurred in connection with the 60-day Notice and Plaintiff's
4 complaint.

5
6 **12. COMPLIANCE WITH HEALTH AND SAFETY CODE § 25249.7.**

7 12.1 Plaintiff shall comply with the reporting requirements referred to in Health and
8 Safety Code section 25249.7(f) (and established in Title 11 of the California Code of
9 Regulations sections 3000-3008), and shall move for approval of this consent judgment pursuant
10 to the terms thereof.

11
12 **13. PROVISION OF NOTICE**

13 All correspondence and notices required by this Consent Judgment to the Parties shall be
14 sent:

15 To: Plaintiff As You Sow
16 As You Sow Foundation
17 Attn: Danielle Fugere
18 1611 Telegraph Ave., Suite 1450
19 San Francisco, CA 94612

With a copy to:
Ellison Folk
Shute, Mihaly & Weinberger LLP
396 Hayes St.
San Francisco, CA 94102
Tel: (415) 552-7272
folk@smwlaw.com

20 To: Rust-Oleum
21 Rust-Oleum Corporation
22 Attn: Michael Murphy
23 Corporate Counsel
24 11 Hawthorn Parkway
25 Vernon Hills, IL 60061.

With a copy to:
Meredith Jones-McKeown
Sheppard Mullin Richter & Hampton,
LLP
Four Embarcadero Center, 17th Fl.
San Francisco, CA 94111
Tel: 415-774-3278
mjonesmckeown@sheppardmullin.com

1 **14. EXECUTION AND COUNTERPARTS**

2 14.1 This Consent Judgment may be executed in one or more counterparts and by
3 means of facsimile or portable document format (pdf), which taken together shall be deemed to
4 constitute one document.

5
6 **15. AUTHORIZATION**

7 15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
8 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
9 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.
10 The undersigned have read, understand, and agree to all of the terms and conditions of this
11 Consent Judgment.

12
13 **16. SEVERABILITY**

14 16.1 Except as otherwise provided in Section 8.2, in the event that any of the provisions
15 of this Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
16 provisions shall not be adversely affected.

17 **IT IS SO STIPULATED:**

18 Dated:	AS YOU SOW By  Name: Andrew Behar Title: Chief Executive Officer
23 Dated:	RUST-OLEUM CORPORATION By _____ Name: Michael Murphy Title: Corporate Counsel

28

1 **14. EXECUTION AND COUNTERPARTS**

2 14.1 This Consent Judgment may be executed in one or more counterparts and by
3 means of facsimile or portable document format (pdf), which taken together shall be deemed to
4 constitute one document.

5 **15. AUTHORIZATION**

6
7 15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
8 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
9 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.
10 The undersigned have read, understand, and agree to all of the terms and conditions of this
11 Consent Judgment.

12 **16. SEVERABILITY**

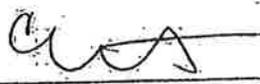
13
14 16.1 Except as otherwise provided in Section 8.2, in the event that any of the provisions
15 of this Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
16 provisions shall not be adversely affected.

17 **IT IS SO STIPULATED:**

18 Dated:	19 AS YOU SOW 20 By _____ 21 Name _____ 22 Title _____
23 Dated: 24 <i>February 14, 2014</i>	25 RUST-OLEUM CORPORATION 26 By  27 Name: Michael Murphy 28 Title: Corporate Counsel

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

APPROVED AS TO FORM:

Dated: February 5, 2014	SHUTE, MIHALY & WEINBERGER By  ELLISON FOLK Attorneys for Plaintiff AS YOU SOW.
Dated: February 5, 2014	SHEPPARD MULLIN RICHTER & HAMPTON, LLP By  MEREDITH JONES-McKEOWN Attorneys for Defendant RUST-OLEUM CORPORATION

IT IS SO ORDERED, ADJUDGED AND DECREED:

The Court hereby incorporates the terms of the Consent Judgment into this Order. If a Party violates the provisions of this Consent Judgment, this Court retains jurisdiction over this matter.

DATED: 5/22/2014

BY: Gail B. Bereola
JUDGE OF THE SUPERIOR COURT

GAIL B. BEREOLA

5621482