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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

AS YOU SOW,)
)
 Plaintiff,)
)
 v.)
)
 THE VALSPAR CORPORATION; TRUE)
)
 VALUE COMPANY; ACE HARDWARE)
)
 CORPORATION; HOME DEPOT U.S.A., INC.;)
)
 KELLY-MOORE PAINT CO., INC.;)
)
 DRUGSTORE.COM, INC.; LILY INDUSTRIES)
)
 (U.S.A.), INC.; INDIANA LILLY INDUSTRIES)
)
 (U.S.A.), INC. and DOES 1 through 100)
)
 INCLUSIVE,,)
)
 Defendants.

Case No. RG 07-356151
Assigned For All Purposes To The
Honorable Bonnie L. Sabraw
CONSENT JUDGMENT

This Consent Judgment is entered into by and between Plaintiff AS YOU SOW(“AYS”) and Defendant THE VALSPAR CORPORATION (on its own behalf and erroneously sued and served herein as Lily Industries (U.S.A.), Inc. and Indiana Lilly Industries (U.S.A.), Inc.) (“Valspar”) to resolve all claims raised in the plaintiff’s complaint filed in the above-captioned action. This Consent Judgment shall be effective upon entry. AYS and Valspar (collectively “the Parties”) agree to the terms and conditions set forth below.

1. INTRODUCTION

1.1 AYS is a non-profit foundation dedicated to, among other causes, the protection of the environment, the promotion of human health, the improvement of worker and consumer

1 rights, environmental education, and corporate accountability. AYS is based in San Francisco,
2 California and is incorporated under the laws of the State of California.

3 1.2 Valspar manufactures and distributes Goof Off, a cleaning product, in various
4 sizes that are offered for sale in California by various retailers. Goof Off products that are
5 manufactured with xylene contain ethylbenzene, a chemical regulated by the State of California
6 as known to cause cancer pursuant to the Safe Drinking Water and Toxic Enforcement Act of
7 1986 (“Proposition 65”), California Health and Safety Code §25249.5 et seq.; Title 22, California
8 Code of Regulations, §12000 et seq.

9 1.3 On July 20, 2007 AYS sent a 60-day Notice of Violation to Valspar and True
10 Value Company, Ace Hardware Corporation, drugstore.com, inc., Home Depot U.S.A., Inc., and
11 Kelly-Moore Paint Co., Inc., and to public enforcers as required by Health & Safety Code Section
12 25249.7, alleging that these entities violated Proposition 65 by failing to provide clear and
13 reasonable warning before exposing users to ethylbenzene in Goof Off (specifically Goof Off 4.5
14 fl. oz. products).

15 1.4 On August 31, 2007 AYS sent a 60-day Notice of Violation to Valspar and True
16 Value Company, Home Depot U.S.A., Inc., and Kelly-Moore Paint Co., Inc., and to public
17 enforcers as required by Health & Safety Code Section 25249.7, alleging that these entities
18 violated Proposition 65 by failing to provide clear and reasonable warning before exposing users
19 to ethylbenzene in Goof Off (specifically Goof Off 12 oz. aerosol products, Goof Off 16 fl. oz.
20 products, and Goof Off 1 gallon products).

21 1.5 On November 14, 2007 AYS filed a Complaint against Valspar and Defendants
22 Ace Hardware Corporation, drugstore.com, inc., Home Depot U.S.A., Inc., Kelly-Moore Paint
23 Co., Inc., and True Value Company (the “Retailer Defendants”) in the Alameda Superior Court,
24 No. RG07-356151, alleging that Defendants violated Proposition 65 due to the alleged failure to
25 provide clear and reasonable warning that users of the Goof Off products identified in the July 20,
26 2007 and August 31, 2007 60-day Notices were exposed to ethylbenzene, a chemical known to
27 the state of California to cause cancer.

28

1 1.6 On February 1, 2008, AYS sent a 60-day Notice of Violation to Valspar, Ace
2 Hardware Corporation, Benjamin Moore & Co., and Mark's Paint Mart, and to public enforcers
3 as required by Health & Safety Code Section 25249.7, alleging that these entities violated
4 Proposition 65 by failing to provide clear and reasonable warning before exposing users to
5 ethylbenzene in Goof Off (specifically Goof Off The Ultimate Remover 1 qt. size and Goof Off
6 Graffiti Remover 16 oz. aerosol spray). AYS' Notices of Violation dated July 20, 2007, August
7 31, 2007 and February 1, 2008 are collectively referred to herein as "Plaintiff's 60-day Notices".
8 To the extent that the allegations in the February 1, 2008 60-Day Notice are not otherwise
9 subsumed within the allegations of the July 20, 2007 and August 31, 2007 60-Day Notices, and
10 upon the expiration of 60 days if no public prosecutor has commenced and is diligently
11 prosecuting the violations alleged in the February 1, 2008 60-Day Notice, the Complaint shall be
12 deemed amended to include allegations against Valspar based on the February 1, 2008 60-Day
13 Notice.

14 1.7 For purposes of this Consent Judgment only, the Parties stipulate that this Court
15 has jurisdiction over Valspar as to the allegations contained in the Complaint, that venue is proper
16 in Alameda County, that this Court has jurisdiction to enter this Consent Judgment as a resolution
17 of all claims that were alleged in the Complaint, and that the Court shall retain jurisdiction to
18 implement the Consent Judgment.

19 1.8 The Parties enter into this agreement to settle certain disputed claims as alleged in
20 the complaint, and to avoid prolonged and costly litigation. By executing and complying with
21 this agreement, neither Party admits any facts or conclusions of law including, but not limited to,
22 any facts or conclusions of law regarding any violations of Proposition 65, or any other statutory,
23 common law or equitable claim or requirement relating to or arising from the sale of Goof Off
24 products in California. Neither shall this Consent Judgment be construed as an admission that
25 any act provided for herein, or any warnings regarding exposure to ethylbenzene from Goof Off
26 products are required under Proposition 65 or any other statute, regulation, or common law
27 requirement. Nothing in this Consent Judgment shall prejudice, waive, or impair any right,
28 remedy, or defense that Plaintiff and Defendants may have in any other or in future legal

1 proceedings unrelated to these proceedings. However, this paragraph shall not diminish or
2 otherwise affect the obligation, responsibilities, and duties of the Parties under this Consent
3 Judgment.

4 1.9 The term “Covered Products” means Goof Off products that contain ethylbenzene.

5 1.10 The term “Effective Date” means the date of entry of this Consent Judgment.

6 **2. INJUNCTIVE RELIEF**

7 2.1 Covered Products distributed or sold by Valspar after the Effective Date for sale or
8 use in the State of California shall provide the following warning statement:

9 “**WARNING:** This product contains a chemical known to the State of California
10 to cause cancer.”

11 2.2 If a Covered Product subject to the requirement of Section 2.1 contains a chemical
12 listed under Proposition 65 as a reproductive toxin, the following warning shall be provided:

13 “**WARNING:** This product contains chemicals known to the State of California to
14 cause cancer and birth defects and other reproductive harm.”

15 2.3 The warning statements required in Section 2.1 and 2.2 shall be prominently
16 affixed to or printed on the Covered Product’s packaging and labeling by Valspar and shall be
17 displayed with such conspicuousness, as compared with other words, statements, designs, or
18 devices on the Covered Product, or its packaging or labeling, as to render it likely to be read and
19 understood by an ordinary individual under customary conditions of purchase or use. For
20 purposes of this Section, a warning may be contained in the same section of the packaging and
21 labeling that contains other safety warnings, if any, concerning the use of the Covered Product.
22 The type size of the warning must be legible, but need not be any larger than any other warning
23 provided for the Covered Product, and its relative size may take into account the nature,
24 immediacy, and acuteness of the risks for which other warnings are provided.

25 **3. SETTLEMENT PAYMENTS**

26 3.1 Within 15 days following the parties’ execution of this Consent Judgment, Valspar
27 shall pay \$57,000 in the form of a check made payable to “Brian Gaffney, Attorney Client Trust
28 Account” as reimbursement for plaintiff’s attorneys fees, investigation costs, and other reasonable

1 litigation costs and expenses. The check shall be delivered by overnight delivery to Brian
2 Gaffney, LAW OFFICES OF BRIAN GAFFNEY, 605 Market St., Suite 505, San Francisco, CA
3 94105. In the event this Consent Judgment becomes null and void under Paragraph 8 infra,
4 Plaintiff shall, within fifteen days, return the payment made under this paragraph to Valspar.

5 3.2 Within 15 days following the parties' execution of this Consent Judgment, Valspar
6 shall pay \$23,000.00 in the form of a check made payable to "Brian Gaffney, Attorney Client
7 Trust Account" as a civil penalty pursuant to Health and Safety Code Section 25249.7(b). As
8 You Sow shall remit 75% of this amount to the State of California pursuant to Health and Safety
9 Code Section 25249.12(b). The check shall be delivered by overnight delivery to Brian Gaffney,
10 LAW OFFICES OF BRIAN GAFFNEY, 605 Market St., Suite 505, San Francisco, CA 94105.
11 In the event this Consent Judgment becomes null and void under Paragraph 8 infra, Plaintiff shall,
12 within fifteen days, return the payment made under this paragraph to Valspar.

13 3.3 Additional In Lieu Payments: Additionally, within 15 days following the parties'
14 execution of this Consent Judgment, Valspar shall pay \$150,000 in the form of a check made
15 payable to "Brian Gaffney, Attorney Client Trust Account" in lieu of additional civil penalties.
16 No later than February 1, 2009, unless the conditions of Section 3.4 are met, Valspar shall pay an
17 additional \$250,000 in the form of a check made payable to "Brian Gaffney, Attorney Client
18 Trust Account" in lieu of additional civil penalties. The checks shall be delivered by overnight
19 delivery to Brian Gaffney, LAW OFFICES OF BRIAN GAFFNEY, 605 Market St., Suite 505,
20 San Francisco, CA 94105. In the event this Consent Judgment becomes null and void under
21 Paragraph 8 infra, Plaintiff shall, within fifteen days, return the payments made under this
22 paragraph to Valspar. These funds shall be used by As You Sow to reduce or remediate
23 exposures to toxic chemicals and to increase consumer, worker and community awareness of the
24 health hazards posed by toxic chemicals in California via its program work, but primarily through
25 grants to other 501(c)(3) non-profit organizations working in toxics reduction, remediation and/or
26 environmental education. In deciding among the grantee proposals, the As You Sow Board of
27 Directors ("Board") takes into consideration a number of important factors, including: (1) the
28 nexus between the harm done in the underlying case(s), and the grant program work; (2) the

1 potential for toxics reduction, prevention, remediation or education benefits to California citizens
2 from the proposal; (3) the budget requirements of the proposed grantee and the alternate funding
3 sources available to it for its project; and (4) the Board's assessment of the grantee's chances for
4 success in its program work. AYS shall ensure that all funds will be disbursed and used in
5 accordance with AYS' mission statement, articles of incorporation, and bylaws and applicable
6 state and federal laws and regulations. These payments shall not be construed as a credit against
7 the personal claims of absent third parties for restitution against Defendants.

8 3.4 Waiver of Future In Lieu Payments. Valspar shall not be required to pay the
9 second payment of \$250,000 specified in Section 3.3 if Valspar has both 1) as of November 1,
10 2008, ceased to manufacture for sale in California all Goof Off products that contain
11 ethylbenzene, toluene, or any other chemical listed as a carcinogen or reproductive toxin under
12 Health & Safety Code § 25249.8 and has provided notice to AYS no later than November 1, 2008
13 of its reformulation pursuant to this section and 2) as of February 1, 2009, Valspar has ceased to
14 ship for sale in California all Goof Off products that contain ethylbenzene, toluene, or any other
15 chemical listed as a carcinogen or reproductive toxin under Health & Safety Code § 25249.8 and
16 has provided notice to AYS as of that date that it has ceased all such shipments to California. For
17 purposes of determining that Valspar is not manufacturing for sale in California Goof Off
18 products that contain listed chemicals, Valspar may rely upon the material safety data sheets
19 provided by its raw materials suppliers, so long as such reliance is in good faith.

20 **4. ENFORCEMENT OF CONSENT JUDGMENT**

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

1 **5. CLAIMS COVERED AND RELEASE**

2 5.1 As to the Covered Products, this Consent Judgment is a full, final, and binding
3 resolution between AYS and Valspar and its parents, shareholders, divisions, subdivisions,
4 subsidiaries, partners, sister companies and their successors and assigns (“Defendant Releasees”),
5 and all entities to whom they distribute or sell Covered Products, including but not limited to the
6 Retailer Defendants and parties identified in the February 1, 2008 notice, and all other
7 distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees,
8 (“Downstream Defendant Releasees”), of any actual and potential claims that were or could have
9 been brought by AYS for the alleged failure to provide clear, reasonable, and lawful warnings of
10 exposure to ethylbenzene used or contained in the Covered Products.

11 5.2 As to the Covered Products, compliance with the terms of this Consent Judgment
12 by Valspar resolves any issue from the date of entry of this Consent Judgment into the future
13 concerning compliance by Valspar, Defendant Releasees and Downstream Defendant Releasees
14 with regard to Proposition 65 as to the presence of, or exposure to, ethylbenzene in the Covered
15 Products.

16 5.3 Upon entry of the Consent Judgment, the Parties waive their respective rights to a
17 hearing or trial on the allegations of the complaint, and AYS shall file a dismissal of the
18 complaint with prejudice as to the Retailer Defendants.

19 **6. GOVERNING LAW AND CONSTRUCTION**

20 6.1 This agreement shall be governed by, and construed in accordance with, the laws
21 of the State of California.

22 6.2 The Parties, including their counsel, have participated in the preparation of this
23 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties as
24 achieved through formal mediation. This Consent Judgment was subject to revision and
25 modification by the Parties and has been accepted and approved as to its final form by all Parties
26 and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent Judgment
27 shall not be interpreted against any Party as a result of the manner of the preparation of this
28 Consent Judgment. Each Party to this Consent Judgment agrees that any statute or rule of

1 construction providing that ambiguities are to be resolved against the drafting Party should not be
2 employed in the interpretation of this Consent Judgment and, in this regard, the Parties hereby
3 waive California Civil Code section 1654.

4 6.3 As to those claims arising out of Plaintiff's 60-day Notices and/or the Action
5 regarding Covered Products, no claim is reserved as between the Parties hereto, and each Party
6 expressly waives any and all rights which it may have under the provisions of Section 1542 of the
7 Civil Code of the State of California, which provides:

8 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
9 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT
10 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
11 MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
12 DEBTOR.

11 **7. MODIFICATION OF CONSENT JUDGMENT**

12 7.1 This Consent Judgment may be modified only upon written agreement of the
13 Parties, with approval of the Court, or pursuant to court order issued upon noticed motion of a
14 Party for good cause shown, and upon entry of a modified Consent Judgment by this Court. Any
15 Party seeking to modify this Consent Judgment shall meet and confer with all affected Parties
16 prior to filing a motion to modify the Consent Judgment in a good faith to attempt to resolve any
17 differences.

18 **8. COURT APPROVAL**

19 8.1 The Court shall either approve or disapprove of this Consent Judgment in its
20 entirety, without alteration, deletion or amendment, unless otherwise so stipulated by the Parties
21 and their counsel. Defendants agree not to oppose this Consent Judgment.

22 8.2 In the event that the Court fails to approve and order entry of the Consent
23 Judgment without any change whatsoever (unless otherwise so stipulated by the Parties), this
24 Consent Judgment shall become null and void upon the election of either Party and upon written
25 notice to all of the Parties to the Action pursuant to the notice provisions herein, and shall not be
26 introduced into evidence or otherwise used in any proceeding for any purpose.

27 **9. ENTIRE AGREEMENT**

1 9.1 The Parties declare and represent that no promise, inducement or other agreement
2 has been made conferring any benefit upon any Party except those contained herein and that this
3 agreement contains the entire agreement pertaining to the subject matter hereof. This agreement
4 supersedes any prior or contemporaneous negotiations, representations, agreements and
5 understandings of the Parties with respect to such matters, whether written or oral. Parol
6 evidence shall be inadmissible to show agreement by, between, or among the Parties to any term
7 or condition contrary to or in addition to the terms and conditions contained in this Consent
8 Judgment. The Parties acknowledge that each has not relied on any promise, representation or
9 warranty, expressed or implied, not contained in this agreement.

10 **10. APPLICATION OF CONSENT JUDGMENT**

11 10.1 This Consent Judgment shall apply to and be binding upon the Parties hereto, their
12 divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

13 10.2 The terms of this Consent Judgment shall not apply to Covered Products
14 manufactured, distributed, or sold by Valspar for use outside of California.

15 **11. ATTORNEYS' FEES**

16 11.1 Except as specifically provided in this Consent Judgment, each Party shall bear its
17 own attorney's fees and costs incurred in connection with the 60-day Notices and Plaintiff's
18 complaint.

19 **12. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7.**

20 12.1 Plaintiff shall comply with the reporting requirements referred to in Health and
21 Safety Code section 25249.7(f) (and established in Title 11 of the California Code of Regulations
22 sections 3000-3008), and shall move for approval of this consent judgment pursuant to the terms
23 thereof.

24 **13. PROVISION OF NOTICE**

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

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To Plaintiff As You Sow

As You Sow Foundation
Attn: Kara Buchner / Larry Fahn
311 California Street, Suite 510
San Francisco, CA 94104

With a copy to:

Brian Gaffney
LAW OFFICES OF BRIAN GAFFNEY
605 Market Street, Suite 505
San Francisco, CA 94105

To Valspar

Ms. Ronda P. Bayer
Associate General Counsel
Valspar Corporation
1101 S. Third St.
Minneapolis, Minnesota 55415

With a copy to:

Jeffrey B. Margulies, Esq.
Fulbright & Jaworski L.L.P.
555 S. Flower Street, 41st Floor
Los Angeles, California 90071
Tel: (213) 892-8986
Fax: (213) 892-9494
E-mail: jmargulies@fulbright.com

14. EXECUTION AND COUNTERPARTS

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

15. AUTHORIZATION

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

APPROVED AS TO FORM:

Dated: _____, 2008

LAW OFFICES OF BRIAN GAFFNEY

By: _____
Brian Gaffney

Attorney for Plaintiff
AS YOU SOW

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Dated: _____, 2008

FULBRIGHT & JAWORSKI L.L.P.

By: _____
Jeffrey B. Margulies

Attorney for Defendants
THE VALSPAR CORPORATION;
TRUE VALUE COMPANY;
ACE HARDWARE CORPORATION;
HOME DEPOT U.S.A., INC.;
KELLY-MOORE PAINT CO., INC.;
DRUGSTORE.COM, INC.

IT IS SO STIPULATED:

DATED: _____

AS YOU SOW

BY: _____

ITS: _____

DATED: _____

THE VALSPAR CORPORATION

BY: _____

ITS: _____

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: _____

JUDGE OF THE SUPERIOR COURT