

ENDORSED  
FILED  
ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT

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AS YOU SOW

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA  
(Unlimited Jurisdiction)

AS YOU SOW,

Plaintiff,

v.

HOMAX PRODUCTS INC; HOMAX  
HOLDINGS, INC.; JASCO-CHEMICAL  
CORPORATION; FLUID ENTERPRISES, INC.;  
OLYMPUS PARTNERS; ACE HARDWARE  
CORPORATION; KELLY-MOORE PAINT  
COMPANY, INC.; and DOES 1 through 100  
INCLUSIVE,

Defendants.

CASE NO. RG 08404572

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF AND CIVIL  
PENALTIES

BY FAX

TOXIC TORT/ENVIRONMENTAL

AS YOU SOW alleges as follows:

INTRODUCTION

1. This Complaint seeks civil penalties and an injunction to remedy the continuing failure of Defendants to give clear and reasonable warnings to residents of California, who apply, use, pour, handle, touch, ingest and/or inhale Oops Multi Purpose Remover 4.5 fluid ounce, Oops Multi Purpose Remover 1 pint, and Jasco Brush Cleaner 1 quart products (collectively hereinafter "products") that are manufactured, distributed, marketed and/or sold by Defendants and which contain Ethylbenzene at levels above the stated Proposition 65 limits.

2. The application, handling, pouring, touching, and/or other use of Defendants' products causes residents of California and the County of Alameda to be exposed to Ethylbenzene,

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND CIVIL PENALTIES

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1 which has been listed under Proposition 65 since June 11, 2004 as a chemical known to the State  
2 of California to cause cancer.

3 3. Defendants intend that residents of California use the Products that Defendants  
4 manufacture, market, sell and/or distribute. When these products are used in their normally intended  
5 manner, they expose people to Ethylbenzene via the dermal, ingestion, inhalation and subcutaneous  
6 routes. In spite of knowing that residents of California were and are being exposed to Ethylbenzene  
7 when they apply, use, pour, handle, touch, ingest and/or inhale these Products, Defendants do not  
8 and did not provide clear and reasonable warning that these products cause exposure to chemicals  
9 known to cause cancer.

10 4. Plaintiff seeks injunctive relief pursuant to Health & Safety Code section 25249.7  
11 to compel Defendants to bring their business practices into compliance with Health & Safety Code  
12 sections 25249.5 et seq. ("Proposition 65") by providing a clear and reasonable warning to each  
13 Californian who has been, or in the future may be, exposed to the above-mentioned toxic chemical  
14 from the use of Defendants' products.

15 5. In addition to injunctive relief, Plaintiff seeks civil penalties to remedy Defendants'  
16 continuing failure to provide clear and reasonable warnings to individuals that have been and  
17 continue to be exposed to chemicals known to cause cancer.

#### 18 PARTIES

19 6. Plaintiff AS YOU SOW ("AYS") is a non-profit foundation organized under  
20 California's Non-Profit Public Benefit Corporation Law. AYS is dedicated to, among other causes,  
21 the protection of the environment, the promotion of human health, the improvement of worker and  
22 consumer safety, environmental education and corporate accountability.

23 7. AYS is a "person" pursuant to Health & Safety Code section 25118. AYS is located  
24 at 311 California Street, Suite 510, San Francisco, CA 94104. AYS brings this enforcement action  
25 in the public interest pursuant to Health & Safety Code section 25249.7(d). Residents of California  
26 are exposed to Ethylbenzene from Products manufactured, distributed, sold and/or marketed by  
27 Defendants without a clear and reasonable Proposition 65 warning.  
28

8. Defendant HOMAX PRODUCTS INC. is a person doing business in California within the meaning of Health & Safety Code section 25249.11.

9. Defendant HOMAX HOLDINGS, INC. Is a person doing business in California within the meaning of Health & Safety Code section 25249.11.

10. Defendant JASCO CHEMICAL CORPORATION is a person doing business in California within the meaning of Health & Safety Code section 25249.11.

11. Defendant FLUID ENTERPRISES, INCORPORATED is a person doing business in California within the meaning of Health & Safety Code section 25249.11.

12. Defendant OLYMPUS PARTNERS is a person doing business in California within the meaning of Health & Safety Code section 25249.11.

13. Defendant ACE HARDWARE CORPORATION is a person doing business in California within the meaning of Health & Safety Code section 25249.11.

14. Defendant KELLY-MOORE PAINT COMPANY, INC. is a person doing business in California within the meaning of Health & Safety Code section 25249.11.

15. Unless otherwise noted, Defendants are collectively referred to herein as Defendants.

16. Each and every Defendant is a business that manufactures, distributes, sells and/or markets Products in California, including the County of Alameda. Manufacture, distribution, sale and/or marketing of these products in the County of Alameda causes people to be exposed to Ethylbenzene while they are physically present in the County of Alameda.

17. Each and every Defendant is a business that employs ten or more people.

18. AYS is unaware of the true names or capacities of the Defendants sued herein under the fictitious names DOES 1 through 100, inclusive. Defendants DOES 1 through 100 inclusive are therefore sued herein pursuant to Cal. Code Civ. Proc. section 474. When AYS learns their identities, it will amend the complaint.

## JURISDICTION

19. The Court has jurisdiction over this action pursuant to California Health & Safety Code section 25249.7 which allows enforcement in any court of competent jurisdiction. California Constitution Article VI, Section 10 grants the Superior Court "original jurisdiction in all causes

1 except those given by statute to other trial courts." Chapter 6.6 of the Health & Safety Code, which  
2 contains the statute under which this action is brought, does not grant jurisdiction to any other trial  
3 court.

4 20. This Court also has jurisdiction over Defendants because they are businesses that  
5 have sufficient minimum contacts in California and within the County of Alameda. Defendants  
6 intentionally and knowingly availed themselves of the California and Alameda County market for  
7 Products. It is thus consistent with traditional notions of fair play and substantial justice for the  
8 Alameda Superior Court to exercise jurisdiction over Defendants.

9 21. Plaintiff brings this enforcement action against Defendants pursuant to Health &  
10 Safety Code section 25249.7(d). On June 3, 2008, AYS sent a 60-Day Notice of Proposition 65  
11 violations related to manufacture, sale, distribution and marketing of Oops Multi Purpose Remover  
12 4.5 fluid ounce products and Oops Multi Purpose Remover 1 pint products containing Ethylbenzene  
13 to Defendants HOMAX PRODUCTS INC., HOMAX HOLDINGS, INC., OLYMPUS PARTNERS,  
14 and ACE HARDWARE CORPORATION. The June 3, 2008 AYS 60-Day Notice of Proposition  
15 65 violations was also related to manufacture, sale, distribution and marketing of Jasco Brush  
16 Cleaner 1 quart products containing Ethylbenzene to JASCO CHEMICAL CORPORATION,  
17 FLUID ENTERPRISES, INC., OLYMPUS PARTNERS, and KELLY-MOORE PAINT  
18 COMPANY, INC. The June 3, 2008 AYS 60-Day Notice of Proposition 65 violations was also sent  
19 to California's Attorney General, to every District Attorney in the State, and to the City Attorneys  
20 of every California city with a population greater than 750,000.

21 22. The 60-Day Notice of Proposition 65 violations was issued pursuant to, and in  
22 compliance with, the requirements of Health & Safety Code section 25249.7(d) and the statute's  
23 implementing regulations regarding the notice of the violations to be given to certain public  
24 enforcement agencies and to the violator. Attached to each 60-Day Notice Letters sent to each  
25 Defendant was a summary of Proposition 65 that was prepared by California's Office of  
26 Environmental Health Hazard Assessment. Each 60-Day Notice Letter was accompanied by a  
27 Certificate of Service and a Certificate of Merit. In addition, the 60-Day Notice Letter which  
28

1 Plaintiff sent to California's Attorney General dated June 3, 2008 was accompanied by the  
2 information required by California Code of Regulations, title 11, section 3102.

3 23. On the date this Complaint is filed, over 70 days have elapsed since June 3, 2008 in  
4 compliance with Health & Safety Code section 25249.7(d)(1).

5 VENUE

6 24. Venue is proper in the Northern Division of the Alameda Superior Court because the  
7 products at issue were purchased in the cities of Oakland and Berkeley in Alameda County. Venue  
8 is also proper in this Court because Defendants manufacture, market, sell and/or distribute their  
9 products in and around Alameda County, have violated one or more of the California laws specified  
10 herein in Alameda County, and have caused people to be exposed to Ethylbenzene while those  
11 people are physically present in Alameda County. Liability for Plaintiff's causes of action, or some  
12 parts thereof, has accordingly arisen in Alameda County during the times relevant to this Complaint.

13 FIRST CAUSE OF ACTION  
14 (Claim for Injunctive Relief)

15 25. Plaintiff realleges and incorporates by reference the allegations contained in the  
16 preceding paragraphs.

17 26. The People of the State of California have declared by referendum under Proposition  
18 65 their right "[t]o be informed about exposures to chemicals that cause cancer."

19 27. To effectuate this goal, Section 25249.6 of the Health and Safety Code mandates that  
20 persons who, in the course of doing business in California, knowingly and intentionally expose any  
21 individual to a chemical known to the State of California to cause cancer must first provide a clear  
22 and reasonable warning to such individual(s) prior to the exposure.

23 28. Since at least June 11, 2005, each and every Defendant has engaged in conduct which  
24 violates Health and Safety Code section 25249.6 et seq. This conduct includes Defendants HOMAX  
25 PRODUCTS INC., HOMAX HOLDINGS, INC., OLYMPUS PARTNERS, and ACE HARDWARE  
26 CORPORATION knowingly and intentionally exposing California residents who apply, use, pour,  
27 handle, touch, ingest and/or inhale Oops Multi Purpose Remover 4.5 fluid ounce products and  
28 Oops Multi Purpose Remover 1 pint products to Ethylbenzene. This conduct also includes  
Defendants JASCO CHEMICAL CORPORATION, FLUID ENTERPRISES, INC., OLYMPUS

1 PARTNERS, and KELLY-MOORE PAINT COMPANY, INC knowingly and intentionally  
2 exposing California residents who apply, use, pour, handle, touch, ingest and/or inhale Jasco Brush  
3 Cleaner 1 quart products to Ethylbenzene.

4 29. The normally intended use of the products causes exposure to Ethylbenzene, which  
5 is a chemical known to the State of California to cause cancer. Defendants have not provided clear  
6 and reasonable warnings, within the meaning of Health & Safety Code sections 25249.6 and  
7 25249.11.

8 30. At all times relevant to this action, Defendants and each of them knew that the  
9 products they manufactured, distributed, sold and/or marketed were causing exposures to  
10 Ethylbenzene. Defendants intended that residents of California apply, use, pour, handle, touch,  
11 ingest and/or inhale the products in such ways as would result in significant exposures to  
12 Ethylbenzene.

13 31. Defendants actions and inactions irreparably harm and will continue to irreparably  
14 harm the people of California in whose interest this suit is filed - in that Defendants' actions  
15 knowingly and intentionally expose individuals to chemicals known to the State of California to  
16 cause cancer without first providing a clear and reasonable warning to such individuals prior to the  
17 exposure. Plaintiff has no adequate remedy in the ordinary course of law to obtain relief from the  
18 consequences of said actions by Defendants for the harms alleged herein.

19 32. By the above described acts, each Defendant has violated Health & Safety Code  
20 section 25249.6 and are therefore subject to an injunction ordering Defendants to stop violating  
21 Proposition 65 and requiring Defendants to provide warnings to its past customers who purchased  
22 Defendants' products without receiving a clear and reasonable warning.

23 SECOND CAUSE OF ACTION  
24 (Claim for Civil Penalties)

25 33. Plaintiff realleges and incorporates by reference the allegations contained in the  
26 preceding paragraphs.

27 34. By the above described acts, each Defendant is liable and should be liable,  
28 pursuant to Health & Safety Code section 25249.7(b), for a civil penalty of \$2,500.00 per day for

1 each individual exposed without proper warning to Ethylbenzene from applying, using, handling,  
2 pouring, touching, inhaling, and/or ingesting Defendants' Products.

3 THIRD CAUSE OF ACTION  
4 Declaratory Relief Regarding Actual and Present Controversy over  
5 Defendant's Compliance with Proposition 65  
6 (Code of Civil Procedure section 1060)

7 35. Plaintiff hereby realleges and incorporates by reference the allegations contained  
8 in the preceding paragraphs.

9 36. An actual and present controversy exists between Plaintiff and Defendants as to  
10 whether Defendants are fully complying with Proposition 65.

11 37. Plaintiff contends that Defendants have failed to fully comply with Proposition 65  
12 as alleged in this Complaint.

13 38. Defendants deny each of Plaintiff's contentions.

14 39. Plaintiff seeks a judicial determination and declaration that Defendants have an  
15 obligation to fully comply with Proposition 65.

16 40. Such a declaration is necessary and appropriate at this time in order that Plaintiff  
17 may ascertain the right to have Defendants act in accordance with the obligations under  
18 Proposition 65.

19 41. Unless restrained by this Court, Defendants will continue to violate Proposition  
20 65.

21 42. Said course of conduct by Defendants irreparably harms and will continue to  
22 irreparably harm the people of California in whose interest this suit is filed - in that Defendants'  
23 actions knowingly and intentionally expose individuals to chemicals known to the State of  
24 California to cause cancer without first providing a clear and reasonable warning to such  
25 individuals prior to the exposure.

26 43. Plaintiff has no adequate remedy in the ordinary course of law to obtain relief  
27 from the consequences of said actions by Defendants for the harms alleged herein.

28 PRAYER FOR RELIEF

Wherefore, Plaintiff prays for the following relief against Defendants:

1           1.       Pursuant to the First Cause of Action, a preliminary and permanent injunction  
2       enjoining, restraining, and ordering all Defendants to comply with the provisions of Section  
3       25249.6 of the California Health & Safety Code;

4           2.       Pursuant to the First Cause of Action, a preliminary and permanent injunction  
5       enjoining, restraining, and ordering all Defendants to identify and locate each individual who  
6       purchased Oops Multi Purpose Remover, 4.5 fl oz & 1 pint products, and Jasco Brush Cleaner, 1  
7       quart products from June 11, 2005 to the present and notify all such individuals that 1) the  
8       products cause an exposure to Ethylbenzene, which is a chemical known to the State of  
9       California to cause cancer; 2) certain actions can be taken to minimize that exposure; and 3) they  
10      may return any such purchase of the products for a full refund;

11          3.       Pursuant to the Second Cause of Action, that Defendants HOMAX PRODUCTS  
12      INC., HOMAX HOLDINGS, INC., OLYMPUS PARTNERS, and ACE HARDWARE  
13      CORPORATION be assessed a civil penalty in an amount equal to \$2,500.00 per day per  
14      individual exposed to Ethylbenzene from June 3, 2007 to the present for violation of Section  
15      25249.6 of the California Health & Safety Code, as the result of Defendants' manufacturing,  
16      distributing, selling and/or marketing of Oops Multi Purpose Remover 4.5 fluid ounce products  
17      in California without the proper clear and reasonable warning;

18          4.       Pursuant to the Second Cause of Action, that Defendants HOMAX PRODUCTS  
19      INC., HOMAX HOLDINGS, INC., OLYMPUS PARTNERS, and ACE HARDWARE  
20      CORPORATION be assessed a civil penalty in an amount equal to \$2,500.00 per day per  
21      individual exposed to Ethylbenzene from June 3, 2007 to the present for violation of Section  
22      25249.6 of the California Health & Safety Code, as the result of Defendants' manufacturing,  
23      distributing, selling and/or marketing of Oops Multi Purpose Remover 1 pint ounce products in  
24      California without the proper clear and reasonable warnings;

25          5.       Pursuant to the Second Cause of Action, that Defendants JASCO CHEMICAL  
26      CORPORATION, FLUID ENTERPRISES, INC., OLYMPUS PARTNERS, and KELLY-  
27      MOORE PAINT COMPANY, INC be assessed a civil penalty in an amount equal to \$2,500.00  
28      per day per individual exposed to Ethylbenzene from June 3, 2007 to the present for violation of

1 Section 25249.6 of the California Health & Safety Code, as the result of Defendants'  
2 manufacturing, distributing, selling and/or marketing of Jasco Brush Cleaner 1 quart products in  
3 California without the proper clear and reasonable warning;

4 6. Pursuant to the Third Cause of Action, for a judicial determination and  
5 declaration that Defendants are obliged to comply with Proposition 65;

6 7. For costs of the suit incurred herein;

7 8. For attorneys' fees pursuant to section 1021.5 of the Code of Civil Procedure; and

8 9. For such other relief as this Court deems just and proper.

9 Dated: August 18, 2008

LAW OFFICES OF BRIAN GAFFNEY

11 /S/ Brian Gaffney  
12 Brian Gaffney

13 Attorney for AS YOU SOW  
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