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ENDORSED  
FILED  
ALAMEDA COUNTY

JAN 27 2009

CLERK OF THE SUPERIOR COURT  
By S. Haicrombo  
Deputy

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 COUNTY OF ALAMEDA  
12 (Unlimited Jurisdiction)

13 AS YOU SOW,

14 Plaintiff,

15 v.

16 X I M PRODUCTS, INCORPORATED,  
17 BENJAMIN MOORE & COMPANY; MARK'S  
18 PAINT MART and DOES 1  
19 through 100 INCLUSIVE,

20 Defendants.

CASE NO.

RC 09431708

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF AND CIVIL  
PENALTIES

TOXIC TORT/ENVIRONMENTAL

BY FAX

21 AS YOU SOW alleges as follows:

22 INTRODUCTION

23 1. This Complaint seeks civil penalties and an injunction to remedy the continuing  
24 failure of Defendants to give clear and reasonable warnings to residents of California, who apply,  
25 use, pour, handle, touch, ingest and/or inhale X I M 900 Clear Coat (hereinafter "the product") that  
26 are manufactured, distributed, marketed and/or sold by Defendants and which contain Ethylbenzene  
27 at levels above the stated Proposition 65 limits.

28 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,  
which has been listed under Proposition 65 since June 11, 2004 as a chemical known to the State  
of California to cause cancer.





1 violations related to manufacture, sale, distribution and marketing of X I M 900 Clear Coat  
2 containing Ethylbenzene to Defendants X I M'S PRODUCTS INC., BENJAMIN MOORE &  
3 COMPANY and MARK'S PAINT MART, to California's Attorney General, to every District  
4 Attorney in the State, and to the City Attorneys of every California city with a population greater  
5 than 750,000.

6 18. The 60-Day Notice of Proposition 65 violations was issued pursuant to, and in  
7 compliance with, the requirements of Health & Safety Code section 25249.7(d) and the statute's  
8 implementing regulations regarding the notice of the violations to be given to certain public  
9 enforcement agencies and to the violator. Attached to each 60-Day Notice Letters sent to each  
10 Defendant was a summary of Proposition 65 that was prepared by California's Office of  
11 Environmental Health Hazard Assessment. Each 60-Day Notice Letter was accompanied by a  
12 Certificate of Service and a Certificate of Merit. In addition, the 60-Day Notice Letter which  
13 Plaintiff sent to California's Attorney General dated June 27, 2008 was accompanied by the  
14 information required by California Code of Regulations, title 11, section 3102.

15 19. On the date this Complaint is filed, over 70 days have elapsed since June 27, 2008  
16 in compliance with Health & Safety Code section 25249.7(d)(1).

17 VENUE

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

25 FIRST CAUSE OF ACTION  
26 (Claim for Injunctive Relief)

27 21. Plaintiff realleges and incorporates by reference the allegations contained in the  
28 preceding paragraphs.

1           22.     The People of the State of California have declared by referendum under Proposition  
2 65 their right "[t]o be informed about exposures to chemicals that cause cancer."

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

7           24.     Since at least June 11, 2005, each and every Defendant has engaged in conduct which  
8 violates Health and Safety Code section 25249.6 et seq. This conduct includes Defendants and each  
9 of them knowingly and intentionally exposing California residents who apply, use, pour, handle,  
10 touch, ingest and/or inhale the products to Ethylbenzene.

11          25.     The normally intended use of the products causes exposure to Ethylbenzene, which  
12 is a chemical known to the State of California to cause cancer. Defendants have not provided clear  
13 and reasonable warnings, within the meaning of Health & Safety Code sections 25249.6 and  
14 25249.11.

15          26.     At all times relevant to this action, Defendants and each of them knew that the  
16 products they manufactured, distributed, sold and/or marketed were causing exposures to  
17 Ethylbenzene. Defendants intended that residents of California apply, use, pour, handle, touch,  
18 ingest and/or inhale the products in such ways as would result in significant exposures to  
19 Ethylbenzene.

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

26          28.     By the above described acts, each Defendant has violated Health & Safety Code  
27 section 25249.6 and are therefore subject to an injunction ordering Defendants to stop violating  
28

1 Proposition 65 and requiring Defendants to provide warnings to its past customers who purchased  
2 Defendants' products without receiving a clear and reasonable warning.

3 SECOND CAUSE OF ACTION  
4 (Claim for Civil Penalties)

5 29. Plaintiff realleges and incorporates by reference the allegations contained in the  
6 preceding paragraphs.

7 30. By the above described acts, each Defendant is liable and should be liable,  
8 pursuant to Health & Safety Code section 25249.7(b), for a civil penalty of \$2,500.00 per day for  
9 each individual exposed without proper warning to Ethylbenzene from applying, using, handling,  
10 pouring, touching, inhaling, and/or ingesting Defendants' products.

11 THIRD CAUSE OF ACTION  
12 Declaratory Relief Regarding Actual and Present Controversy over  
13 Defendant's Compliance with Proposition 65  
14 (Code of Civil Procedure section 1060)

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

17 32. An actual and present controversy exists between Plaintiff and Defendants as to  
18 whether Defendants are fully complying with Proposition 65.

19 33. Plaintiff contends that Defendants have failed to fully comply with Proposition 65  
20 as alleged in this Complaint.

21 34. Defendants deny each of Plaintiff's contentions.

22 35. Plaintiff seeks a judicial determination and declaration that Defendants have an  
23 obligation to fully comply with Proposition 65.

24 36. Such a declaration is necessary and appropriate at this time in order that Plaintiff  
25 may ascertain the right to have Defendants act in accordance with the obligations under  
26 Proposition 65.

27 37. Unless restrained by this Court, Defendants will continue to violate Proposition  
28 65.

38. Said course of conduct by Defendants irreparably harms and will continue to  
irreparably harm the people of California in whose interest this suit is filed - in that Defendants'

1 actions knowingly and intentionally expose individuals to chemicals known to the State of  
2 California to cause cancer without first providing a clear and reasonable warning to such  
3 individuals prior to the exposure.

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

6  
7 PRAYER FOR RELIEF

8 Wherefore, Plaintiff prays for the following relief against Defendants:

9 1. Pursuant to the First Cause of Action, a preliminary and permanent injunction  
10 enjoining, restraining, and ordering all Defendants to comply with the provisions of Section  
11 25249.6 of the California Health & Safety Code;

12 2. Pursuant to the First Cause of Action, a preliminary and permanent injunction  
13 enjoining, restraining, and ordering all Defendants to identify and locate each individual who  
14 purchased X I M 900 Clear Coat products from June 11, 2005 to the present and notify all such  
15 individuals that 1) the products cause an exposure to Ethylbenzene, which is a chemical known  
16 to the State of California to cause cancer; 2) certain actions can be taken to minimize that  
17 exposure; and 3) they may return any such purchase of the products for a full refund;

18 3. Pursuant to the Second Cause of Action, that each Defendant be assessed a civil  
19 penalty in an amount equal to \$2,500.00 per day per individual exposed to Ethylbenzene from  
20 June 27, 2007 to the present for violation of Section 25249.6 of the California Health & Safety  
21 Code, as the result of Defendants' manufacturing, distributing, selling and/or marketing of the  
22 products in California without the proper clear and reasonable warning;

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

25 5. For costs of the suit incurred herein;

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

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