

AUG 14 2009

John A. Clarke, Executive Officer/Clerk
By SHAUNYA WESLEY, Deputy

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2 DANIEL D. CHO (SBN 105409)
3 BEN YEROUSHALMI (SBN 232540)
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9 Attorneys for Plaintiffs,
10 Consumer Advocacy Group, Inc

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF LOS ANGELES – UNLIMITED

13 CONSUMER ADVOCACY GROUP, INC.,
14 in the public interest,

15 Plaintiff,

16 v.

17 BENJAMIN MOORE & CO., a New Jersey
18 Corporation, and DOES 1-50;

19 Defendants.

CASE NO.

BC 419855

COMPLAINT FOR PENALTY,
INJUNCTION, AND RESTITUTION

Violation of Proposition 65, the Safe
Drinking Water and Toxic Enforcement
Act of 1986 (Health & Safety Code., §§
25249.5, et seq.)

ACTION IS AN UNLIMITED CIVIL
CASE (exceeds \$25,000)

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25 Plaintiff Consumer Advocacy Group, Inc. alleges, based on information and belief, a
26 cause of action against defendants as follows:

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1 **BACKGROUND AND PRELIMINARY FACTS**

- 2 8. In 1986, California voters approved an initiative to address growing concerns about
3 exposure to toxic chemicals. The initiative, The Safe Drinking Water and Toxic
4 Enforcement Act of 1986, codified at Health and Safety Code sections 25249.5, *et seq.*
5 (“Proposition 65”), helps to protect California’s drinking water sources from
6 contamination, to allow consumers to make informed choices about the products they
7 buy, and to enable persons to protect themselves from toxic chemicals as they see fit.
- 8 9. Proposition 65 requires the Governor of California to publish a list of chemicals known to
9 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety*
10 *Code*, § 25249.8. The list, which the Governor updates at least once a year, contains over
11 800 chemicals and chemical families. Proposition 65 imposes warning requirements and
12 other controls that apply to Proposition 65-listed chemicals.
- 13 10. All businesses with ten or more employees that operate or sell products in California
14 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
15 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
16 water (*Health & Safety Code*, § 25249.5), and (2) required to provide “clear and
17 reasonable” warnings before exposing a person, knowingly and intentionally, to a
18 Proposition 65-listed chemical (*Health & Safety Code*, § 25249.6).
- 19 11. Plaintiff conducted research, from which it identified instances of manufacturers and
20 distributors, including Defendant, of exposing, knowingly and intentionally, persons in
21 California to Proposition 65-listed chemicals without providing clear and reasonable
22 warnings of such to the exposed persons prior to exposure.

23 **FIRST CAUSE OF ACTION**

24 **(By Consumer Advocacy Group, Inc. and against Benjamin Moore & Co. and Does 1-50**
25 **For Violation Of Proposition 65, The Safe Drinking Water And Toxic Enforcement Act Of**
26 **1986 (*Health & Safety Code*, §§ 25249.5, *et seq.*))**
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1 **Benjamin Moore® Moorlastic® Painters Caulk commercial formula 15 year durability**

2 12. Plaintiff, Consumer Advocacy Group, Inc. repeats and incorporates by reference
3 paragraphs 1 through 11 of this complaint as though fully set forth herein.

4 13. Each of the Defendants is, and at all times mentioned herein, was a manufacturer or
5 distributor of Benjamin Moore® Moorlastic® Painters Caulk commercial formula 15
6 year durability (“15 Year Caulk”), a consumer product designed as a protective sealant in
7 window, door frames, and other home applications.

8 14. Plaintiff is informed, believes, and thereon alleges that 15 Year Caulk contains Butyl
9 benzyl phthalate (BBP) (hereinafter “BBP”).

10 15. On December 2, 2005, the Governor of California added BBP to the list of chemicals
11 known to the State to cause reproductive toxicity, developmental (*Cal. Code Regs. 27 §*
12 *25001(c)*). Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty
13 (20) months after addition of BBP to the list of chemicals known to the State to cause
14 reproductive toxicity, BBP became fully subject to Proposition 65 warning requirements
15 and discharge prohibitions.

16 16. Plaintiff is informed, believes, and thereon alleges that between July 3, 2005, and the
17 present, each of the Defendants knowingly and intentionally exposed California
18 consumers and users of 15 Year Caulk, which it manufactured or distributed as
19 mentioned above, to BBP without first giving clear and reasonable warning of such to the
20 exposed persons before the time of exposure. Defendants have distributed 15 Year Caulk
21 in California. Defendants thereby violated Proposition 65.

22 17. The principal, but not exclusive, routes of exposure are through dermal contact and
23 inhalation when users of 15 Year Caulk apply the product as a sealant in and around the
24 home environment, with or without the use of personal protective equipment, and the
25 users or others in temporal or physical proximity purposely or inadvertently come into
26 dermal contact with 15 Year Caulk. Users and others in temporal and physical proximity
27 of applications of the product also suffered a principal route of exposure through
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1 inhalation by breathing in fumes or other airborne matter from the product. Lastly, users
2 and others in temporal and physical proximity to applications of 15 Year Caulk are
3 further exposed through ingestion of 15 Year Caulk. Such exposure assumes use of 15
4 Year Caulk in accordance with its instructions.

5 18. Plaintiff's allegations regarding 15 Year Caulk concern a "[c]onsumer products
6 exposure," which "is an exposure that results from a person's acquisition, purchase,
7 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
8 exposure that results from receiving a consumer service." *Cal. Code Regs. 27 §*
9 *25602(b)*. 15 Year Caulk is a consumer product, and exposures to BBP took place as a
10 result of such consumption and foreseeable use as is described herein.

11 19. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
12 Proposition 65 as to 15 Year Caulk have been ongoing and continuous to the date of the
13 signing of this complaint, so that a separate and distinct violation of Proposition 65
14 occurred each and every time a consumer was exposed to BBP by using 15 Year Caulk as
15 mentioned herein.

16 20. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
17 mentioned herein is ever continuing.

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19 **Benjamin Moore® Moorlastic® Silconized Caulk versatile use 35 year durability**

20 21. Plaintiff, Consumer Advocacy Group, Inc. repeats and incorporates by reference
21 paragraphs 1 through 11 of this complaint as though fully set forth herein.

22 22. Each of the Defendants is, and at all times mentioned herein, was a manufacturer or
23 distributor of Benjamin Moore® Moorlastic® Silconized Caulk versatile use 35 year
24 durability ("35 Year Caulk"), a consumer product designed as a protective sealant in
25 window, door frames, and other home applications.

26 23. Plaintiff is informed, believes, and thereon alleges that 35 Year Caulk contains Butyl
27 benzyl phthalate (BBP) (hereinafter "BBP").

1 24. On December 2, 2005, the Governor of California added BBP to the list of chemicals
2 known to the State to cause reproductive toxicity, developmental (*Cal. Code Regs. 27 §*
3 *25001(c)*). Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty
4 (20) months after addition of BBP to the list of chemicals known to the State to cause
5 reproductive toxicity, BBP became fully subject to Proposition 65 warning requirements
6 and discharge prohibitions.

7 25. Plaintiff is informed, believes, and thereon alleges that between July 3, 2005, and the
8 present, each of the Defendants knowingly and intentionally exposed California
9 consumers and users of 35 Year Caulk, which it manufactured or distributed as
10 mentioned above, to BBP without first giving clear and reasonable warning of such to the
11 exposed persons before the time of exposure. Defendants have distributed 35 Year Caulk
12 in California. Defendants thereby violated Proposition 65.

13 26. The principal, but not exclusive, routes of exposure are through dermal contact and
14 inhalation when users of 35 Year Caulk apply the product as a sealant in and around the
15 home environment, with or without the use of personal protective equipment, and the
16 users or others in temporal or physical proximity purposely or inadvertently come into
17 dermal contact with 35 Year Caulk. Users and others in temporal and physical proximity
18 of applications of the product also suffered a principal route of exposure through
19 inhalation by breathing in fumes or other airborne matter from the product. Lastly, users
20 and others in temporal and physical proximity to applications of 35 Year Caulk are
21 further exposed through oral ingestion of 35 Year Caulk. Such exposure assumes use of
22 35 Year Caulk in accordance with its instructions.

23 27. Plaintiff's allegations regarding 35 Year Caulk concern a "[c]onsumer products
24 exposure," which "is an exposure that results from a person's acquisition, purchase,
25 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
26 exposure that results from receiving a consumer service." *Cal. Code Regs. 27 §*
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1 25602(b). 35 Year Caulk is a consumer product, and exposures to BBP took place as a
2 result of such consumption and foreseeable use as is described herein.

3 28. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
4 Proposition 65 as to 35 Year Caulk have been ongoing and continuous to the date of the
5 signing of this complaint, so that a separate and distinct violation of Proposition 65
6 occurred each and every time a consumer was exposed to BBP by using 35 Year Caulk as
7 mentioned herein.

8 29. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
9 mentioned herein is ever continuing.

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11 **SATISFACTION OF PRIOR NOTICE**

12 30. On or about July 3, 2008, Plaintiff gave notice of alleged violations of Health and Safety
13 Code section 25249.6 subject to a private action to Benjamin Moore & Co., identified in
14 the notice as "Benjamin Moore & Co.," and to the California Attorney General, County
15 District Attorneys, and City Attorneys for each city containing a population of at least
16 750,000 people in whose jurisdictions the violations allegedly occurred, concerning
17 consumer products (i) Benjamin Moore® Moorlastic® Painters Caulk commercial
18 formula 15 year durability and/or (ii) Benjamin Moore® Moorlastic® Silconized Caulk
19 versatile use 35 year durability.

20 31. Before sending the notice of alleged violations, Plaintiff investigated the consumer
21 product involved, the likelihood that such products would cause users to suffer exposures
22 to BBP, and the corporate structure of each of the Defendants.

23 32. Plaintiff's notice of alleged violation included a certificate of merit executed by the
24 attorney for the noticing party, Plaintiff. The certificate of merit stated that the attorney
25 for Plaintiff who executed the certificate had consulted with at least one person with
26 relevant and appropriate expertise who had reviewed data regarding the alleged
27 exposures to BBP, the subject Proposition 65-listed chemical of this action. Based on
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1 that information, the attorney for Plaintiff who executed the certificate believed there was
2 a reasonable and meritorious case for this private action. The attorney for Plaintiff
3 attached to the certificate of merit served on the Attorney General information sufficient
4 to establish the basis of the certificate of merit.

5 33. Plaintiff is commencing this action more than sixty (60) days from the date that Plaintiff
6 gave notice of the alleged violations to Benjamin Moore & Co. and to the public
7 prosecutors referenced in Paragraph 30.

8 34. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
9 any applicable district attorney or city attorney has commenced and is diligently
10 prosecuting an action against the Defendants.

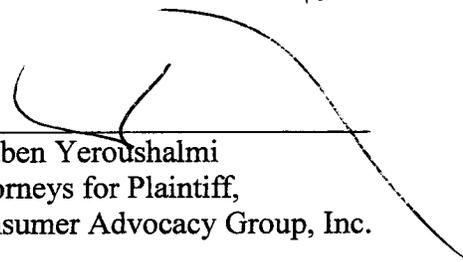
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12 **PRAYER FOR RELIEF**

13 Plaintiff demands against each of the Defendants as follows:

- 14 1. A permanent injunction mandating Proposition 65-compliant warnings;
15 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
16 3. Costs of suit;
17 4. Reasonable attorney fees and costs; and
18 5. Any further relief that the court may deem just and equitable.

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20 Dated: August 7, 2009

YEROUSHALMI & ASSOCIATES

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23 BY: 
24 Reuben Yeroushalmi
25 Attorneys for Plaintiff,
26 Consumer Advocacy Group, Inc.