

ENDORSED
FILED
ALAMEDA COUNTY

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ENDORSED
FILED
ALAMEDA COUNTY
CLERK OF THE SUPERIOR COURT
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JUL 14 2009

CLERK OF THE SUPERIOR COURT
By E. Opelski-Erickson, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
(Unlimited Jurisdiction)

AS YOU SOW,

Plaintiff,

v.

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

Defendants.

CASE NO.: RG09-431706

Assigned For All Purposes To The
Honorable Steven Brick

~~PROPOSED~~ ORDER
APPROVING SETTLEMENT AND
CONSENT JUDGMENT

Date: July 14, 2009

Time: 3:00p.m.

Dept: 17

Reservation No.: 949987

1 Plaintiff's motion for approval of settlement and entry of Consent Judgment was heard on
2 noticed motion on July 14, 2009. This Court finds that:

3 1. The warnings required by the Consent Judgment comply with the clear and reasonable
4 warning requirement of Proposition 65.;

5 2. The civil penalty and additional in lieu payments specified in the Consent Judgment are
6 reasonable based on the criteria in Cal Health & Safety Code section 25249.7(b)(2).

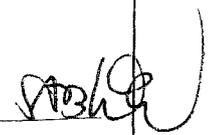
7 3. The attorneys fees awarded under the Consent Judgment are reasonable under California
8 law.

9 Based upon these findings, the settlement and Consent Judgment are approved.

10 IT IS SO ORDERED.

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13 Dated: JUL 14 2009

STEVEN A. BRICK
STEVEN A. BRICK
Judge of the Superior Court



San Francisco, California and incorporated under the laws of the State of California.

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1.2 XIM is a person in the course of doing business pursuant to Health and Safety Code § 25249.11(b), and has manufactured and distributed for sale in California the products XIM 900 Clear Coat, XIM 900 Clear Coat Aerosol, XIM 400, XIM GON and XIM Copper Doc ("Covered Products"). As You Sow alleges that the Covered Products contain ethylbenzene, a chemical regulated by the State of California as known to cause cancer pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65"), California Health and Safety Code §25249.5 et seq.; Title 22, California Code of Regulations, §12000 et seq.

1.3 On June 27, 2008 As You Sow sent a 60-day Notice of Violation to XIM and to public enforcers as required by Health & Safety Code Section 25249.7, alleging that XIM violated Proposition 65 by failing to provide clear and reasonable warning before exposing users to ethylbenzene in XIM 900 Clear Coat.

1.4 On January 21, 2009, As You Sow filed a Complaint against XIM and defendants Benjamin Moore & Company and Mark's Paint Mart (collective Defendants) in the Alameda Superior Court, No. RG09431706, alleging that Defendants violated Proposition 65 due to the alleged failure to provide clear and reasonable warning that users of XIM 900 Clear Coat were exposed to ethylbenzene.

1.5 On April 24, 2009, As You Sow sent a supplemental 60-day Notice of Violation to XIM and to public enforcers alleging that XIM violated Proposition 65 by failing to provide clear and reasonable warning before exposing users to ethylbenzene in XIM 900 Clear Coat, XIM 900 Clear Coat Aerosol, XIM 400, XIM GON and XIM Copper Doc. To the extent that the allegations in the April 24, 2009 60-Day Notice are not otherwise subsumed within the allegations of the June 27, 2008 60-Day Notice, and upon the expiration of sixty days after service if no public prosecutor has commenced and is diligently prosecuting the violations alleged in the April 24, 2009 60-Day Notice, the Complaint shall be deemed amended to include allegations that XIM violated Proposition 65 by exposing users of XIM 900 Clear Coat, XIM 900 Clear Coat Aerosol, XIM 400, XIM GON and XIM Copper Doc without providing clear and reasonable warning.

1 1.6 For purposes of this Consent Judgment only, the Parties stipulate that this Court
2 has jurisdiction over XIM as to the allegations contained in the Complaint, that venue is proper in
3 Alameda County, that this Court has jurisdiction to enter this Consent Judgment as a resolution of
4 all claims that were alleged in the Complaint, and that the Court shall retain jurisdiction to
5 implement and enforce the Consent Judgment.

6 1.7 The Parties enter into this agreement to settle certain disputed claims as alleged in
7 the complaint, and to avoid prolonged and costly litigation. By executing and complying with this
8 agreement, neither Party admits any facts or conclusions of law including, but not limited to, any
9 violations of Proposition 65, or any other statutory, common law or equitable claim or
10 requirement relating to or arising from the sale of Covered Products in California. Neither shall
11 this Consent Judgment be construed as an admission that any act provided for herein, or any
12 warnings regarding exposure to ethylbenzene from the Covered Products are required under
13 Proposition 65 or any other statute, regulation, or common law requirement. Nothing in this
14 Consent Judgment shall prejudice, waive, or impair any right, remedy, or defense that Plaintiff
15 and Defendants may have in any other or in future legal proceedings unrelated to these
16 proceedings. However, this paragraph shall not diminish or otherwise affect the obligation,
17 responsibilities, and duties of the Parties under this Consent Judgment.

18 1.8 The term "Effective Date" means the date of entry of this Consent Judgment.

19 **2. INJUNCTIVE RELIEF**

20 2.1 At all times after the Effective Date, XIM shall provide the following warning
21 statement for all Covered Products sold, distributed or manufactured for sale or use in the State of
22 California:

23 **"WARNING:** This product contains a chemical known to the State of California
to cause cancer."

24 2.2 At all times after the Effective Date, XIM shall provide the following warning
25 statement for all Covered Products that contain ethylbenzene and a chemical listed under
26 Proposition 65 as a reproductive toxin and that are sold, distributed or manufactured for sale or
27 use in the State of California:

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

3 2.3 **Conspicuousness.** The warning statements required in Section 2.1 or 2.2 shall be
4 prominently affixed to or printed on the Covered Products’ packaging and labeling by XIM and
5 shall be displayed with such conspicuousness, as compared with other words, statements, designs,
6 or devices on the Covered Product, or its packaging or labeling, as to render it likely to be read
7 and understood by an ordinary individual under customary conditions of purchase or use. For
8 purposes of this Section, a warning may be contained in the same section of the packaging and
9 labeling that contains other safety warnings, if any, concerning the use of the Covered Products.
10 The type size of the warning must comply with requirements of 16 C.F.R. § 1500.121.

11 2.3.1 Subject to Section 2.3.2, the entire warnings in Sections 2.1 and 2.2 above
12 shall be printed in bold text.

13 2.3.2 Section 2.3.1 shall not apply to warnings provided by XIM (i) on stickers
14 attached to Covered Products or (ii) on permanent labeling in effect as of the Effective Date,
15 provided that Section 2.3.1 shall apply to warnings provided by permanent labeling on all
16 subsequent revisions to permanent labeling for each Covered Product.

17 3. **SETTLEMENT PAYMENT**

18 3.1 The total settlement payment shall be \$80,000, which shall be paid pursuant to
19 Section 3.2, and distributed by As You Sow pursuant to Section 3.3.

20 3.2 XIM shall make an initial payment of \$25,000 to As You Sow within 15 days of
21 the Effective Date. The remaining \$55,000 shall be payable over 28 months, commencing 45
22 days after the Effective Date, and paid in 27 equal monthly installments of \$2,000, and a final
23 monthly installment of \$1,000. All payments shall be made payable to the As You Sow
24 Environmental Enforcement Fund, and delivered by overnight delivery to As You Sow, 311
25 California Street, Suite 510, San Francisco, CA 94104.

26 3.3 As You Sow shall allocate the payments made pursuant to Sections 3.1 and 3.2 as
27 follows:

28 3.3.1 \$23,680 as reimbursement for the investigation costs, testing costs.

1 plaintiff's attorneys fees, and other reasonable litigation costs and expenses.

2 3.3.2 \$7,500 as a civil penalty pursuant to Health and Safety Code Section
3 25249.7(b). As You Sow shall remit 75% of this amount to the State of California pursuant to
4 Health and Safety Code Section 25249.12(b).

5 3.3.3 \$48,820 in lieu of additional civil penalties. These funds shall be used by
6 As You Sow to reduce or remediate exposures to toxic chemicals and to increase consumer,
7 worker and community awareness of the health hazards posed by toxic chemicals in California via
8 its program work, but primarily through grants to other 501(c)(3) non-profit organizations
9 working in toxics reduction, remediation and/or environmental education. In deciding among the
10 grantee proposals, the As You Sow Board of Directors ("Board") takes into consideration a
11 number of important factors, including: (1) the nexus between the harm done in the underlying
12 case(s), and the grant program work; (2) the potential for toxics reduction, prevention,
13 remediation or education benefits to California citizens from the proposal; (3) the budget
14 requirements of the proposed grantee and the alternate funding sources available to it for its
15 project; and (4) the Board's assessment of the grantee's chances for success in its program work.
16 As You Sow shall ensure that all funds will be disbursed and used in accordance with As You
17 Sow's mission statement, articles of incorporation, and bylaws and applicable state and federal
18 laws and regulations. This payment shall not be construed as a credit against the personal claims
19 of absent third parties for restitution against Defendants.

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 in such a dispute shall be awarded its reasonable

attorney's fees and costs.

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2 **5. CLAIMS COVERED AND RELEASE**

3 5.1 As to the Covered Products, this Consent Judgment is a full, final, and binding
4 resolution between As You Sow and XIM and its parents, shareholders, divisions, subdivisions,
5 subsidiaries, partners, sister companies and their successors and assigns ("Defendant Releasees"),
6 and all entities to whom they distribute or sell Covered Products, including but not limited to
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 As You Sow for the alleged failure to provide clear, reasonable, and lawful
10 warnings of exposure to ethylbenzene used or contained in the Covered Products manufactured,
11 distributed, and/or sold by XIM.

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

17 5.3 Upon entry of the Consent Judgment, the Parties waive their respective rights to a
18 hearing or trial on the allegations of the complaint, and As You Sow shall dismiss the Complaint
19 with prejudice as to defendants Benjamin Moore & Company and Mark's Paint Mart.

20 5.4 This Consent Judgment is intended as a full settlement and compromise of all
21 claims arising out of or relating to Plaintiff's June 29, 2008 and April 24, 2009 Notices and/or the
22 Action regarding Covered Products. No claim is reserved as between the Parties hereto.

23 **6. GOVERNING LAW AND CONSTRUCTION**

24 6.1 This Consent Judgment shall be governed by, and construed in accordance with,
25 the laws of the State of California.

26 6.2 The Parties, including their counsel, have participated in the preparation of this
27 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This

1 Consent Judgment was subject to revision and modification by the Parties and has been accepted
2 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
3 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
4 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
5 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
6 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in
7 this regard, the Parties hereby waive California Civil Code section 1654.

8 6.3 XIM is not relieved of its obligations under Sections 2.1 through 3.3.3 inclusive of
9 this Consent Judgment by sale or assignment of the Covered Products.

10 7. MODIFICATION OF CONSENT JUDGMENT

11 7.1 This Consent Judgment may be modified only upon written agreement of the
12 Parties, with approval of the Court, or pursuant to court order issued upon noticed motion of a
13 Party for good cause shown, and upon entry of a modified Consent Judgment by this Court. Any
14 Party seeking to modify this Consent Judgment shall meet and confer with all affected Parties
15 prior to filing a motion to modify the Consent Judgment in a good faith to attempt to resolve any
16 differences.

17 8. COURT APPROVAL

18 8.1 The Court shall either approve or disapprove of this Consent Judgment in its
19 entirety, without alteration, deletion or amendment, unless otherwise so stipulated by the Parties
20 and their counsel. Defendants agree not to oppose this Consent Judgment.

21 8.2 In the event that the Court fails to approve and order entry of the Consent
22 Judgment without any change whatsoever (unless otherwise so stipulated by the Parties), this
23 Consent Judgment shall become null and void upon the election of either Party and upon written
24 notice to all of the Parties to the Action pursuant to the notice provisions herein, and shall not be
25 introduced into evidence or otherwise used in any proceeding for any purpose.

26 9. ENTIRE AGREEMENT

27 9.1 The Parties declare and represent that no promise, inducement or other agreement

1 has been made conferring any benefit upon any Party except those contained herein and that this
2 agreement contains the entire agreement pertaining to the subject matter hereof. This agreement
3 supersedes any prior or contemporaneous negotiations, representations, agreements and
4 understandings of the Parties with respect to such matters, whether written or oral. Parol evidence
5 shall be inadmissible to show agreement by, between, or among the Parties to any term or
6 condition contrary to or in addition to the terms and conditions contained in this Consent
7 Judgment. The Parties acknowledge that each has not relied on any promise, representation or
8 warranty, expressed or implied, not contained in this agreement.

9 **10. ATTORNEYS' FEES**

10 10.1 Except as specifically provided in this Consent Judgment, each Party shall bear its
11 own attorney's fees and costs incurred in connection with the 60-day Notices and Plaintiff's
12 Complaint.

13 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7.**

14 11.1 Plaintiff shall comply with the reporting requirements referred to in Health and
15 Safety Code section 25249.7(f) (and established in Title 11 of the California Code of Regulations
16 sections 3000-3008), and shall move for approval of this consent judgment pursuant to the terms
17 thereof.

18 **12. PROVISION OF NOTICE**

19 All correspondence and notices required by this Consent Judgment to the Parties shall be
20 sent.

21 To Plaintiff As You Sow

22 As You Sow Foundation
23 Attn: Kara Buchner / Larry Fahh
24 311 California Street, Suite 510
25 San Francisco, CA 94104

With a copy to:

26 Brian Gaffney
27 LIPPE GAFFNEY WAGNER LLP
28 329 Bryant Street, Suite 3D
San Francisco, CA 94107
Tel.: (415) 777-5600
Fax: (415) 777-9809
E-mail: bgaffney@lgwlawyers.com

26 To XIM

27 Richard Hardy
28 XIM Products, Inc.
1169 Bassett Road

With a copy to:

Jeffrey B. Margulies, Esq.
FULBRIGHT & JAWORSKI L.L.P.
555 S. Flower Street, 41st Floor

Westlake, OH 44145

Los Angeles, California 90071
Tel: (213) 892-8986
Fax: (213) 892-9494
E-mail: jmargulies@fulbright.com

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3 **13. EXECUTION AND COUNTERPARTS**

4 13.1 This Consent Judgment may be executed in counterparts and by means of facsimile
5 or portable document format (pdf), which taken together shall be deemed to constitute one
6 document.

7 **14. AUTHORIZATION**

8 14.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
9 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
10 execute the Consent Judgment on behalf of the Party represented and legally bind that Party. The
11 undersigned have read, understand, and agree to all of the terms and conditions of this Consent
12 Judgment.

13 IT IS SO STIPULATED:

14 DATED: _____

AS YOU SOW

15
16 BY: _____

17 ITS: _____

18
19 DATED: MAY 28, 2009

XIM PRODUCTS, INC.

20
21 BY: Richard Harder

22 ITS: PRESIDENT

Westlake, OH 44145

Los Angeles, California 90071

Tel: (213) 892-8986

Fax: (213) 892-9494

E-mail: jmargulies@fulbright.com

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14. AUTHORIZATION

14.1 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.

IT IS SO STIPULATED:

DATED: 5/27/09

AS YOU SOW

BY: *James E. Fel*

ITS: Executive Director

DATED: _____

XIM PRODUCTS, INC.

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: JUL 14 2009

STEVEN A. BRICK



STEVEN A. BRICK
JUDGE OF THE SUPERIOR COURT

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1 Brian Gaffney, Esq. (CBN 168778)
2 Celeste Langille, Esq. (CBN 185302)
3 LIPPE GAFFNEY WAGNER, LLP
4 329 Bryant Street, Suite 3D
5 San Francisco, CA 94107
6 Telephone: (415) 777-5600
7 Facsimile: (415) 777-9809

8 Attorney for Plaintiff
9 AS YOU SOW

ENDORSED
FILED
ALAMEDA COUNTY
JUL 20 2009
CLERK OF THE SUPERIOR COURT
By *[Signature]*

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.: RG09-431706

Assigned For All Purposes To The
Honorable Steven Brick

**PROOF OF SERVICE
OF REQUEST FOR DISMISSAL**

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Brian Gaffney, Esq. (SBN 168778) Celeste Langille, Esq. (SBN 185302) LIPPE GAFFNEY WAGNER, LLP 329 Bryant Street, Suite 3D San Francisco, CA 94107 TELEPHONE NO. (415) 777-5600 FAX NO. (Optional) (415) 777-9809 E-MAIL ADDRESS (Optional) bgaffney@lglawyers.com; clangille@lglawyers.com ATTORNEY FOR (Name) Plaintiff As You Sow	FOR COURT USE ONLY FILED JUL 14 2009 CLERK OF SUPERIOR COURT COUNTY OF ALAMEDA CASE NUMBER RG 09-431706
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Alameda STREET ADDRESS 1225 Fallon Street MAILING ADDRESS Same CITY AND ZIP CODE Oakland, CA 94612 BRANCH NAME	
PLAINTIFF/PETITIONER As You Sow	
DEFENDANT/RESPONDENT XIM Products, Inc., Benjamin Moore & Company, Mark's Paint Mart and Does 1 through 100	
REQUEST FOR DISMISSAL <input type="checkbox"/> Personal Injury, Property Damage, or Wrongful Death <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other <input type="checkbox"/> Family Law <input type="checkbox"/> Eminent Domain <input checked="" type="checkbox"/> Other (specify): Proposition 65	
- A conformed copy will not be returned by the clerk unless a method of return is provided with the document. -	

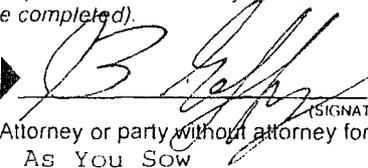
1. TO THE CLERK: Please dismiss this action as follows:
- a. (1) With prejudice (2) Without prejudice
 - b. (1) Complaint (2) Petition
 - (3) Cross-complaint filed by (name): _____ on (date): _____
 - (4) Cross-complaint filed by (name): _____ on (date): _____
 - (5) Entire action of all parties and all causes of action
 - (6) Other (specify):* As to Defendants Benjamin Moore & Company, Mark's Paint Mart and Does 1 through 100, Inclusive.
2. (Complete in all cases except family law cases.)
 Court fees and costs were waived for a party in this case. (This information may be obtained from the clerk. If this box is checked, the declaration on the back of this form must be completed).

Date: July 13, 2009

Brian Gaffney, Esq. (SBN 168778)

(TYPE OR PRINT NAME OF ATTORNEY PARTY WITHOUT ATTORNEY)

*If dismissal requested is of specified parties only of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.


 (SIGNATURE)
 Attorney or party without attorney for: Plaintiff
 As You Sow

Plaintiff/Petitioner Defendant/Respondent
 Cross-complainant

3. TO THE CLERK: Consent to the above dismissal is hereby given.**
 Date: _____

(TYPE OR PRINT NAME OF ATTORNEY PARTY WITHOUT ATTORNEY)


 (SIGNATURE)
 Attorney or party without attorney for:

** If a cross-complaint - or Response (Family Law) seeking affirmative relief - is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581 (i) or (j)

Plaintiff/Petitioner Defendant/Respondent
 Cross-Complainant

(To be completed by clerk)

- 4. Dismissal entered as requested on (date): JUL 14 2009
- 5. Dismissal entered on (date): _____ as to only (name): _____
- 6. Dismissal not entered as requested for the following reasons (specify): _____

- 7. a. Attorney or party without attorney notified on (date): _____
- b. Attorney or party without attorney not notified. Filing party failed to provide a copy to be conformed means to return conformed copy

Date: JUL 14 2009 Clerk, by _____ Deputy _____

PAT S. SWEETEN

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PROOF OF SERVICE

I am a citizen of the United States, employed in the County of San Francisco, State of California. My business address is 329 Bryant Street, Suite 3D, San Francisco, CA 94107. I am over the age of 18 years and not a party to the above entitled action.

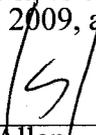
I served the following documents on the parties in this action, located on the attached service list, by service as designated below:

- **REQUEST FOR DISMISSAL**

MANNER OF SERVICE

- (A) **By First Class Mail:** In the ordinary course of business, I caused each such envelope to be placed in the custody of the United States Postal Service, with first-class postage thereon fully prepaid in a sealed envelope.
- (B) **By Personal Service:** I personally delivered each such envelope to the office of the address on the date last written below.
- (C) **By Overnight FedEx:** I caused such envelope to be placed in a box or other facility regularly maintained by the express service carrier or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for.
- (D) **By Facsimile:** I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action by transmitting a true copy to the following fax numbers listed under each addressee below.
- (E) **By Personal Delivery by Courier:** I caused each such envelope to be delivered to an authorized courier or driver, in an envelope or package addressed to the addressee below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 15, 2009, at San Francisco, California



 Ann Allen

SERVICE LIST

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TYPE OF SERVICE

ADDRESSEE

A

Jeffrey B. Margulies
Fulbright & Jaworski
555 South Flower Street
Forty-First Floor
Los Angeles, CA 90071
Attorneys for Defendants

XIM POS of ReqForDismissal.wpd