

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

AS YOU SOW,)	Case No. RG09431706
)	
Plaintiff,)	Assigned For All Purposes To The
)	Honorable Steven Brick
v.)	
)	CONSENT JUDGMENT
XIM PRODUCTS, INCORPORATED,)	
BENJAMIN MOORE & COMPANY, MARK'S)	
PAINT MART and DOES 1 through 100)	
INCLUSIVE,)	
)	
Defendants.)	

This Consent Judgment is entered into by and between Plaintiff AS YOU SOW and Defendant XIM PRODUCTS, INC. (“XIM”) to resolve all claims raised in the plaintiff’s complaint filed in the above-captioned action. This Consent Judgment shall be effective upon entry. As You Sow and XIM (collectively “the Parties”) agree to the terms and conditions set forth below.

1. INTRODUCTION

1.1 As You Sow 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 rights, environmental education, and corporate accountability. As

You Sow is based in San Francisco, California and incorporated under the laws of the State of California.

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.

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

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

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

2. INJUNCTIVE RELIEF

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

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

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

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

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

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

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

3. SETTLEMENT PAYMENT

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

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

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

3.3.1 \$23,680 as reimbursement for the investigation costs, testing costs, plaintiff's attorneys fees, and other reasonable litigation costs and expenses.

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

3.3.3 \$48,820 in lieu of additional civil penalties. These funds shall be used by As You Sow to reduce or remediate exposures to toxic chemicals and to increase consumer, worker and community awareness of the health hazards posed by toxic chemicals in California via its program work, but primarily through grants to other 501(c)(3) non-profit organizations working in toxics reduction, remediation and/or environmental education. In deciding among the grantee proposals, the As You Sow Board of Directors ("Board") takes into consideration a number of important factors, including: (1) the nexus between the harm done in the underlying case(s), and the grant program work; (2) the potential for toxics reduction, prevention, remediation or education benefits to California citizens from the proposal; (3) the budget requirements of the proposed grantee and the alternate funding sources available to it for its project; and (4) the Board's assessment of the grantee's chances for success in its program work. As You Sow shall ensure that all funds will be disbursed and used in accordance with As You

Sow's mission statement, articles of incorporation, and bylaws and applicable state and federal laws and regulations. This payment shall not be construed as a credit against the personal claims of absent third parties for restitution against Defendants.

4. ENFORCEMENT OF CONSENT JUDGMENT

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

5. CLAIMS COVERED AND RELEASE

5.1 As to the Covered Products, this Consent Judgment is a full, final, and binding resolution between As You Sow and XIM and its parents, shareholders, divisions, subdivisions, subsidiaries, partners, sister companies and their successors and assigns ("Defendant Releasees"), and all entities to whom they distribute or sell Covered Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees ("Downstream Defendant Releasees"), of any actual and potential claims that were or could have been brought by As You Sow for the alleged failure to provide clear, reasonable, and lawful warnings of exposure to ethylbenzene used or contained in the Covered Products manufactured, distributed, and/or sold by XIM.

5.2 As to the Covered Products, compliance with the terms of this Consent Judgment by XIM resolves any issue from the date of entry of this Consent Judgment into the future concerning compliance by XIM, Defendant Releasees and Downstream

Defendant Releasees with regard to Proposition 65 as to the presence of, or exposure to, ethylbenzene in the Covered Products manufactured, distributed or sold by XIM.

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

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

6. GOVERNING LAW AND CONSTRUCTION

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

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

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

7. MODIFICATION OF CONSENT JUDGMENT

7.1 This Consent Judgment may be modified only upon written agreement of

the Parties, with approval of the Court, or pursuant to court order issued upon noticed motion of a Party for good cause shown, and upon entry of a modified Consent Judgment by this Court. Any Party seeking to modify this Consent Judgment shall meet and confer with all affected Parties prior to filing a motion to modify the Consent Judgment in a good faith to attempt to resolve any differences.

8. COURT APPROVAL

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

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

9. ENTIRE AGREEMENT

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

10. ATTORNEYS' FEES

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

11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7.

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

12. PROVISION OF NOTICE

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

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

To XIM

Richard Hardy
XIM Products, Inc.
1169 Bassett Road
Westlake, OH 44145

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

13. EXECUTION AND COUNTERPARTS

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

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: _____

AS YOU SOW

By: _____

Its: _____

DATED: May 26, 2009

XIM PRODUCTS, INC.

By: Richard Hardy

Its: PRESIDENT

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

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: 5/21/09

AS YOU SOW

BY: *Darry Fahn*
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: _____

JUDGE OF THE SUPERIOR COURT