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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

WHITNEY POOLE, individually and on behalf of  
all others similarly situated,

Plaintiff,

v.

BENJAMIN MOORE & CO., INC., a New Jersey  
corporation,

Defendant.

NO.  
DEFENDANT'S NOTICE OF REMOVAL

- TO: THE CLERK OF THE UNITED STATES DISTRICT COURT IN AND FOR  
THE WESTERN DISTRICT OF WASHINGTON
- AND TO: Whitney Poole, Plaintiff
- AND TO: Gordon Tilden Thomas & Cordell LLP, attorneys for Plaintiffs
- AND TO: Kozonis Law, Ltd., attorneys for Plaintiffs
- AND TO: Waskowski Johnson Yohalem LLP, attorneys for Plaintiffs

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1332, 1367, 1441, 1446, and  
1453, Defendant Benjamin Moore & Co., Inc. ("Benjamin Moore") removes to this Court the  
lawsuit captioned *Whitney Poole, individually and on behalf of all others similarly situated v.*

1 *Benjamin Moore & Co., Inc., a New Jersey corporation*, Cause No. 18-2-00231-18 (Wash.  
2 Super. Ct., Kitsap Cnty.) (the “State Court Action”). In support of this Notice of Removal,  
3 Benjamin Moore states:

4 I. PROCEDURAL BACKGROUND

5 1. **State Court Action:** Benjamin Moore is named as the sole defendant in the  
6 State Court Action, which is a civil action filed in the Superior Court of Washington, in and for  
7 Kitsap County.

8 2. **Commencement of State Court Action:** The State Court Action was  
9 commenced when Plaintiff Whitney Poole filed a Summons and Complaint with the Clerk of  
10 the Superior Court of Washington, in and for Kitsap County, on or about January 25, 2018.  
11 Service of the Summons and Complaint was effected on Benjamin Moore via service on its  
12 registered agent, CT Corporation, on or about February 2, 2018. This Notice of Removal is  
13 timely pursuant to 28 U.S.C. § 1446(b), in that it is being filed within 30 days of receipt of  
14 service of the Summons and Complaint by Benjamin Moore. Benjamin Moore has not filed  
15 pleadings in this case in the State Court Action.

16 3. **Record in State Court:** The following pleadings filed in the State Court Action  
17 encompass all of the pleadings received or filed by Benjamin Moore in this action up to the  
18 present time:

19 Summons

20 Amended Summons

21 Class Action Complaint (the “Complaint”)

22 Case Information Cover Sheet

23 Demand for Jury 12 Person (the “Jury Demand”)

1 Pursuant to 28 U.S.C. § 1446(a) and LCR 101(b), a copy of the Complaint is attached  
2 as Exhibit A, a copy of the Jury Demand is attached as Exhibit B, and copies of the balance  
3 of the above-listed submissions are attached as Exhibit C. Pursuant to LCR 101(c), the  
4 undersigned verifies that Exhibits A through C comprise true and complete copies of all the  
5 records and proceedings in the state court proceeding.

6  
7 4. **Applicable Statutes:** This is a civil action over which this Court has original  
8 jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1367, and the action is properly removable  
9 to this Court pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332, 1441,  
10 1446, and 1453 (“CAFA”). The Superior Court of Washington, in and for Kitsap County, is  
11 located within this judicial district. 28 U.S.C. § 128(b). This Notice is therefore properly filed  
12 in this Court pursuant to 28 U.S.C. § 1441(a).

13 5. **Nature and Description of Case:**

14 a. Plaintiff alleges that Benjamin Moore made certain  
15 misrepresentations in the marketing, labeling and sale of Natura Paint products concerning  
16 the absence from the products of certain toxic emissions and volatile organic compounds  
17 (the “alleged Green Promise”), and the certification of the products by certain third parties.  
18 Complaint ¶¶ 1-9, 31-46, 50-54.

19  
20 b. On behalf of Plaintiff and a putative class of all individuals and entities  
21 within the United States who purchased Benjamin Moore Natura Paint products “from the  
22 beginning of any applicable limitations period through the date of class certification,” *id.* ¶  
23 82(a), the Complaint purports to state claims for breach of express warranties and violation  
24 of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.* (the “MMA”). Complaint ¶¶  
25 111-40.  
26

1 c. On behalf of Plaintiff and a putative class of all individuals and entities  
2 in the states of California, Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri,  
3 New Hampshire, New Jersey, New York, Rhode Island, Washington, and Wisconsin who  
4 purchased Benjamin Moore Natura Paint products “from the beginning of any applicable  
5 limitations period through the date of class certification,” *id.* ¶ 82(b), the Complaint purports  
6 to state claims for violation of the Washington Consumer Protection Act, 19 RCW §  
7 19.86.010 *et seq.* (the “WCPA”), and of certain consumer-oriented statutes of the other  
8 above states. Complaint ¶¶ 141-62.  
9

10 d. In the alternative, the Complaint seeks certification of a subclass of  
11 Washington residents who purchased Benjamin Moore Natura Paint products “from the  
12 beginning of any applicable limitations period through the date of class certification,” *id.* ¶  
13 82(c), asserting the breach of express warranty, MMA and WCPA claims.  
14

15 e. The Complaint also appears to assert an individual claim on behalf of  
16 Plaintiff only for unjust enrichment. *Id.* ¶¶ 163-67.

17 f. With respect to the above claims, the Complaint seeks, *inter alia*,  
18 actual, statutory, consequential, exemplary, and punitive damages, attorneys’ fees and  
19 costs, restitution, and certain other relief. *Id.* at p. 28 (paragraphs B through J of Request  
20 for Relief).

21 g. Benjamin Moore disputes the Complaint’s factual and class-related  
22 allegations and legal conclusions, and denies that Plaintiff or the putative classes have been  
23 harmed in any way.  
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II. DIVERSITY JURISDICTION

1  
2 6. Diversity of Citizenship is Basis for Federal Court Jurisdiction: CAFA grants  
3 district courts original jurisdiction over putative class actions in which the amount in  
4 controversy exceeds \$5 million and any member of the putative class of Plaintiffs is a citizen  
5 of a State different from that of Defendant. As set forth below, this action satisfies each of  
6 the requirements of 28 U.S.C. § 1332(d)(2) for original jurisdiction under CAFA.

7  
8 a. Covered Class Action. Without conceding that there is any merit to the  
9 Complaint's allegations or claims, this action meets the CAFA definition of a class action,  
10 which is "any civil action filed under [R]ule 23 of the Federal Rules of Civil Procedure or  
11 similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or  
12 more representative persons as a class action." 28 U.S.C. §§ 1332(d)(1)(B), 1453(a). *See*  
13 Complaint ¶¶ 81-110.

14 b. Class Action Consisting of More than 100 Members. As set forth  
15 above, the Complaint's claim for breach of express warranties is asserted on behalf of every  
16 United States purchaser of Benjamin Moore Natura Paint products within the applicable  
17 statute of limitations, which is four years from the tender of delivery of the goods at issue.  
18 RCW § 62A.2-725(1), (2). Plaintiffs allege that the members of this putative class "number  
19 in at least the thousands, and could number in the tens of thousands or hundreds of  
20 thousands." Complaint ¶ 87. Moreover, according to Benjamin Moore's records, it had sold  
21 990,528 gallons of Natura Paint products in the United States between January 2014 and  
22 September 2017. Accordingly, the aggregate number of class members is greater than 100  
23 persons for purposes of 28 U.S.C. § 1332(d)(5)(B).  
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1 c. Diversity. The required diversity of citizenship under CAFA is satisfied  
2 whenever “any member of a class of Plaintiffs is a citizen of a State different from any  
3 Defendant.” 28 U.S.C. § 1332(d)(2)(A). Plaintiff alleges that she is a Washington citizen.  
4 Complaint ¶ 15. Benjamin Moore is a New Jersey corporation with its principal place of  
5 business in New Jersey. *Id.* ¶¶ 17-18.

6 d. Amount in Controversy. Under CAFA, the claims of the individual class  
7 members are aggregated to determine if the amount in controversy exceeds the required  
8 “sum or value of \$5,000,000, exclusive of interest and costs.” 28 U.S.C. §§ 1332(d)(2),  
9 (d)(6). Without conceding any merit to the Complaint’s allegations or claims, the amount in  
10 controversy here satisfies this jurisdictional threshold.

11 i. Plaintiff seeks, among other relief, restitution for the purchase  
12 price of all Natura Paint products sold by Benjamin Moore during the applicable periods of  
13 limitation, which Plaintiff alleges to be approximately \$57 per gallon. Complaint ¶ 48; *Id.* at  
14 p. 28 (paragraph G of Request for Relief). Multiplying this figure by the 990,528 gallons of  
15 Natura Pain products sold over the past four years, as set forth in subparagraph 6(b) above,  
16 yields an amount in controversy in excess of \$56 million.

17 ii. Plaintiff also alleges that she and the members of the putative  
18 classes have suffered actual damages consisting of the difference between the retail price  
19 of Natura Paint products containing the alleged Green Promise and the retail price of  
20 “similar paint” products sold without the alleged Green Promise. *Id.* ¶¶ 47-49. Benjamin  
21 Moore markets other paint products that do not include the alleged Green Promise for retail  
22 prices of between \$30 and \$40 per gallon. Multiplying the above \$17 to \$27 price  
23 differential by the 990,528 gallons of Natura Pain products sold over the past four years, as  
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1 set forth in subparagraph 6(b) above, yields an amount in controversy in excess of between  
2 \$16 and \$26 million.

3           iii       Plaintiff additionally seeks, on behalf of the putative classes,  
4 declaratory relief “prohibiting the false and deceptive advertising or marketing of Natura  
5 Paint as described above.” *Id.* at p. 29 (paragraph I of Request for Relief). Although  
6 Benjamin Moore denies that this remedy is appropriate, the value of the declaratory relief –  
7 the cost of a corrective advertising campaign for Natura Paint products – should also be  
8 factored into the amount in controversy. *See Hunt v. Washington State Apple Advert.*  
9 *Comm’n*, 432 U.S. 333, 347 (1977) (“In an action seeking declaratory or injunctive relief, it  
10 is well established that the amount in controversy is measured by the value of the object of  
11 the litigation.”).

12  
13           iv.       Plaintiff and the putative classes also seek to recover attorneys’  
14 fees, presumably pursuant to the MMA and WCPA claims. Complaint at p. 29 (paragraph F  
15 of Request for Relief). The likely amount of such fees also should be counted in determining  
16 the amount in controversy. *See Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 980 (9th Cir.  
17 2005).

18  
19           v.       For purposes of removal “the question is not what damages  
20 the Plaintiff will recover, but what amount is ‘in controversy’ between the parties.” *Brill v.*  
21 *Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (“That the Plaintiff may  
22 fail in its proof, and the judgment be less than the threshold (indeed, a good chance that the  
23 Plaintiff will fail and the judgment will be zero) does not prevent removal.”). While Benjamin  
24 Moore disputes that it is liable to Plaintiff or the putative classes, or that Plaintiff or the  
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1 putative classes suffered any injury whatsoever, for purposes of satisfying the jurisdictional  
2 prerequisites of CAFA, the matter in controversy exceeds \$5 million.

3  
4 **III. NOTICE TO STATE COURT AND RESERVATION OF RIGHTS**

5 7. **Concurrent Notice to State Court:** Benjamin Moore is concurrently filing a  
6 copy of this Notice of Removal with the Clerk of the Superior Court of Washington in and for  
7 Kitsap County, Cause No. 18-2-00231-18, pursuant to 28 U.S.C. § 1446(d).

8 8. **Reservation of Rights and Defenses:** Benjamin Moore reserves all defenses,  
9 and further reserves the right to amend or supplement this Notice as necessary.  
10

11 **IV. INTRADISTRICT ASSIGNMENT**

12 9. Pursuant to LCR 3(e), removal of the State Court Action to the Tacoma  
13 Division of this Court is appropriate because the original state court venue of the State Court  
14 Action lies in Kitsap County. Assignment to the Tacoma Division is also appropriate  
15 pursuant to LCR 3(e) because Plaintiff maintains her residence in Kitsap County, Complaint  
16 ¶ 15, and because she purchased the Natura Paint products at issue in Kitsap County. *Id.* ¶  
17 63.  
18

19 DATED this 5<sup>th</sup> day of March, 2018.

20 GORDON THOMAS HONEYWELL LLP

21 By /s/ Diane J. Kero

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Attorneys for Defendant Benjamin Moore &  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 5, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following

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