

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

**ADRIENNE ANDRY, on behalf of herself  
and all others similarly situated,**

**Plaintiff,**

**v.**

**BENJAMIN MOORE & CO. INC.,**

**Defendant.**

**CASE NO.: 1:18-cv-1923**

**CLASS ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL**

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Plaintiff Adrienne Andry (“Plaintiff”), by her attorneys, make the following allegations pursuant to the investigation of her counsel and based upon information and belief, except as to allegations specifically pertaining to herself and her counsel, which are based on personal knowledge.

**NATURE OF THE ACTION**

1. This is a class action on behalf of a Class of all New York consumers who purchased Defendant Benjamin Moore & Co. Inc.’s (“Benjamin Moore” or “Defendant”) “Natura” brand of interior paints, including, Benjamin Moore Natura Interior Paint - Flat, Benjamin Moore Natura Interior Paint - Eggshell, and Benjamin Moore Natura Interior Paint - Semi-Gloss (the “Natura Products”). Defendant labeled (and reinforced that labeling with an advertising and marketing campaign) the Natura Products as a safe alternative to conventional interior paints, producing “Zero emissions” upon and after application.

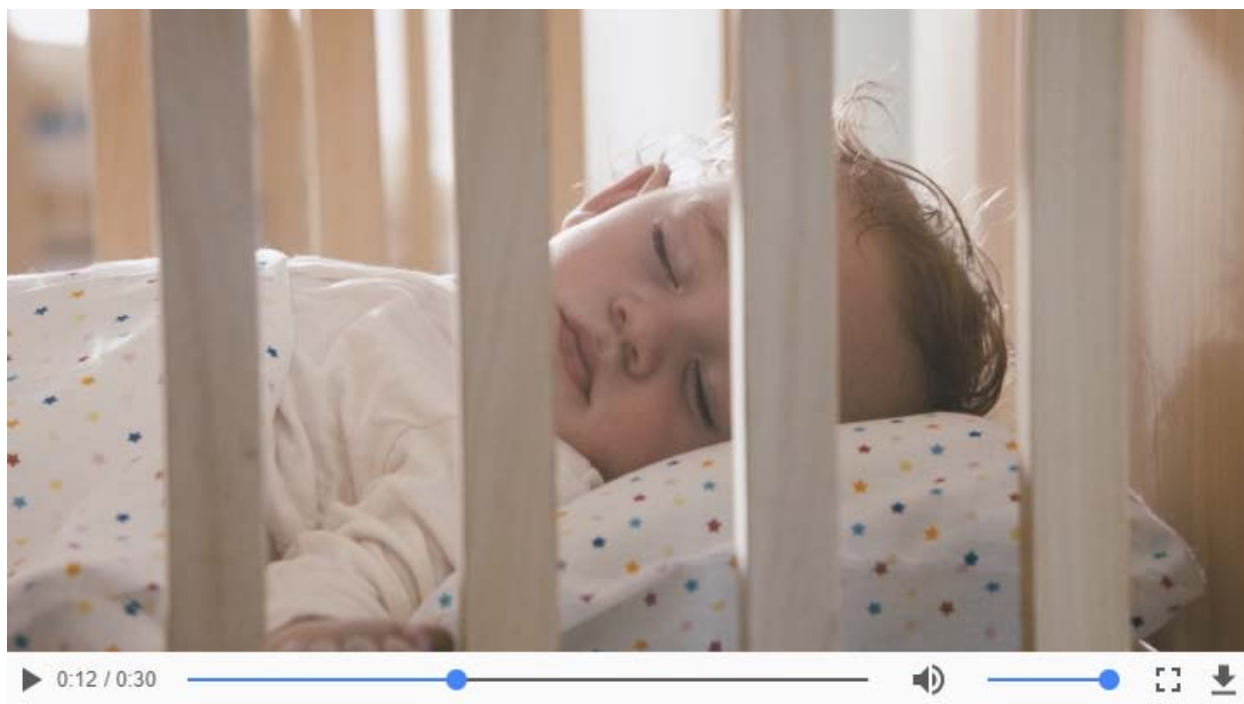
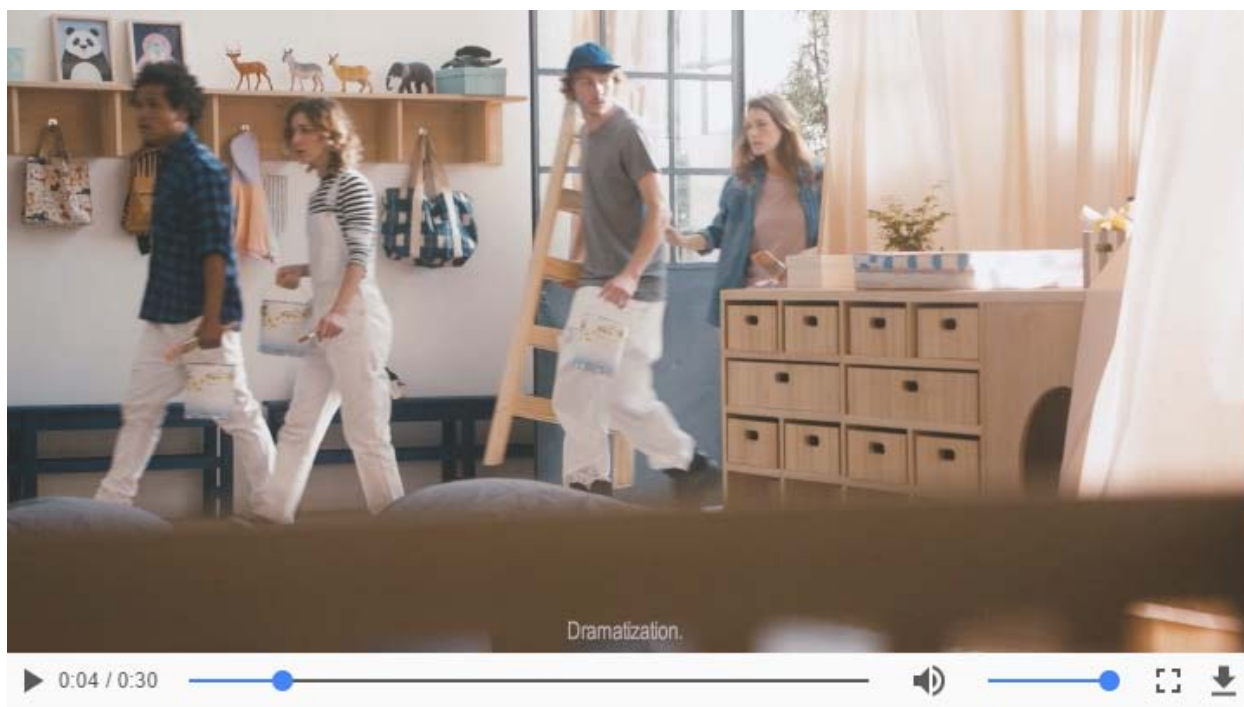
2. Specifically, through an extensive and comprehensive \$50 million labeling, advertising and marketing campaign<sup>1</sup> directed at consumers, Defendant claimed that its Natura Products: (1) were emission free; (2) were emission-free during or immediately after painting; (3) were free of harsh fumes; (4) were free of harmful chemicals; (5) would not emit any chemical or substance, including volatile organic compounds (“VOCs”), that caused material harm to consumers, including sensitive populations such as babies and allergy and asthma sufferers; (6) would not emit any chemical or substance, including VOCs, during or immediately after application, that caused material harm to consumers, including sensitive populations such as babies and allergy and asthma sufferers; and (7) otherwise had “Zero emissions” including “Zero VOCs.”

3. These “Zero emission” claims were prominently featured on the front panel of the Natura Products’ labels. Additionally, these claims were featured in various print, media and internet marketing and promotion materials. For example, Defendant produced a 30-second television and video promotion in which a group of painters quietly entering a room filled with baby cribs and a baby and commence painting. While a baby sleeps in a crib, a voiceover states: “If you want a paint with no harsh fumes; if you want a paint without harmful chemicals; if you want a paint that is safer for your family and the environment, only this can. Natura by Benjamin Moore.” Upon completion of the mural, the painters leave the room and the baby wakes up, smiling and standing in the crib. Screenshots of the commercial are reproduced below:<sup>2</sup>

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<sup>1</sup> See Exhibit A (AdAge article titled “Benjamin Moore Starts \$50 Million Ad Campaign, Its Biggest Yet”, published March 23, 2015).

<sup>2</sup> [https://www.ftc.gov/system/files/documents/cases/exhibit\\_a\\_video\\_bmftc000482.mp4](https://www.ftc.gov/system/files/documents/cases/exhibit_a_video_bmftc000482.mp4).





4. In light of the “Zero emissions” representations on Natura Products’ labels, reinforced by the marketing campaign and the “Zero VOCs” labeling and marketing claim, a reasonably prudent consumer would not expect the Natura Products to have any emissions, including harsh fumes and harmful chemicals, upon or after application. Indeed, as a result of

such false and misleading labeling (reinforced by its advertising and marketing and “Zero VOCs labeling and marketing claim), Benjamin Moore was able to sell these purportedly emission-free Products to thousands of unsuspecting consumers in New York while profiting handsomely from these transactions.

5. Defendant’s representations, however, are false and misleading. On July 11, 2017, Benjamin Moore settled charges with the United States Federal Trade Commission (“FTC”) that it deceptively promoted products as emission-free or containing zero volatile organic compounds, including during and immediately after application. That same day, the FTC published a Proposed Agreement Containing Consent Order, and Decision and Order in File No. 1623079. *See FTC, In the matter of Benjamin Moore & Co., Inc., Decision and Order 1623079* (Jul. 18, 2017), available at [https://www.ftc.gov/system/files/documents/cases/benjamin\\_moore\\_agreement\\_and\\_decision\\_and\\_order.pdf](https://www.ftc.gov/system/files/documents/cases/benjamin_moore_agreement_and_decision_and_order.pdf) (“Proposed Decision and Order”), attached hereto as Exhibit B. Even though the Proposed Decision and Order has not yet been finalized and requires more extensive labeling and marketing changes, Benjamin Moore materially changed the labeling of its Natura Products in or about September 2017 to remove the “Zero VOCs” claim and to state “Zero emissions after 4 hours,” effectively admitting that the Natura Products do in fact produce emissions, for a minimum of four hours after application. Moreover, the Safety Data Sheet for Natura Products specifically states that inhalation “May cause irritation of respiratory tract,” and recommends to “[a]void breathing vapors” and “[i]n case of insufficient ventilation, wear suitable respiratory equipment.”<sup>3</sup> This implies that in addition to its “Zero emissions” claims being false and misleading, the Natura Products’ emissions include VOCs rendering its “Zero VOCs” claim false and misleading as well. However, at a minimum, the Natura Products’ “Zero emissions” labeling claim is false and

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<sup>3</sup> See <https://www.benjaminmoore.com/en-us/interior-exterior-paints-stains/product-catalog/nwip/natura-paint>, and example at Exhibit C.

misleading as at least some emissions are being produced by Natura Products, whether VOCs or otherwise. Discovery will reveal the true nature of these emissions.

6. Plaintiff seeks relief individually, and as a class action, on behalf of a New York Class, as defined herein, for Defendant's violation of the New York General Business Law § 349 and New York General Business Law § 350 and gives rise to claims for Breach of Express Warranty under New York's Uniform Commercial Code, and for Unjust Enrichment under New York common law.

### **PARTIES**

7. Plaintiff Andry, a resident of Kings County, New York, purchased two one-gallon cans of Benjamin Moore Natura Interior Paint - Flat in April 2015 from a Benjamin Moore retailer near her home in Brooklyn, New York. Plaintiff Andry purchased the Natura Products based on the "Zero emissions" representation (reinforced by the Zero VOCs representation) on the products' labeling statements, which were viewed prior to the time of purchase and at the time of purchase. Based on these labeling statements, Plaintiff believed that the Natura Products she purchased produced no emissions upon application and relied on these representations and warranties in deciding to purchase the Natura Products, and these representations and warranties were part of the basis of the bargain. Plaintiff not only purchased these Benjamin Moore Products because the labels said they produced "Zero emissions," but she paid more money for these Natura Products than she would have had to pay for other products that purportedly did not produce "Zero emissions." Had Plaintiff known the truth that the Natura Products did not produce "Zero emissions," she would not have purchased these Natura Products, but would have purchased another brand of paint that truly did not produce emissions upon or after application or, if one was

not available, would have purchased other products that were less expensive than these Natura Products, such as other less expensive interior paints with “Zero VOCs.”

8. Defendant Benjamin Moore is a New Jersey corporation with its principal place of business at 101 Paragon Drive, Montvale, NJ 07645. Founded in 1883, Benjamin Moore bills itself as North America's favorite paint, color and coatings brand. Defendant manufactured, advertised, labeled, offered for sale, sold, and distributed paint products to consumers, including Natura Products, throughout New York using a network of more than 5,000 authorized retailers.

### **JURISDICTION AND VENUE**

9. Jurisdiction of this Court is proper under 28 U.S.C. § 1332(d)(2). Diversity jurisdiction exists as Plaintiff is a New York resident and Defendant Benjamin Moore is incorporated in New Jersey and maintains its principal place of business in Montvale, New Jersey. The Class Plaintiff seeks to certify includes citizens and residents of New York. The amount in controversy exceeds \$5,000,000 for Representative Plaintiff and members of the Class collectively, exclusive of interest and costs, by virtue of the combined purchase prices paid by Plaintiff and the Class, and the profits reaped by Defendant from its transactions with Plaintiff and the Class, as a direct and proximate result of the wrongful conduct alleged herein, and by virtue of the statutory penalties and injunctive and equitable relief sought.

10. Venue is proper within this judicial district pursuant to 28 U.S.C. § 1391 because a substantial portion of the underlying transactions and events complained of herein occurred and affected persons and entities are located in this judicial district, and Defendant received substantial compensation from such transactions and business activity in this judicial district, including as the result of purchases of the Natura Products from retail locations herein, and the interstate trade and commerce described herein is and has been carried out in part within this judicial district.

Moreover, Plaintiff is a resident of Kings County, Brooklyn, New York and her purchase of the Natura Products were from a Benjamin Moore retail location within this judicial district.

### **BACKGROUND**

11. Benjamin Moore was established in 1883 by Benjamin and Robert Moore. The company started with just one product, “Moore's® Prepared Calsom Finish,” which was sold exclusively through independent retailers. The Company expanded over time and now offers six different lines of interior paint alone, including the Natura Products. Moreover, Benjamin Moore proudly boasts of maintaining eight laboratories to keep the company at the forefront of product innovation with respect, *inter alia*, to the environmental safety of its Products.

12. Benjamin Moore was acquired by Berkshire Hathaway in 2000. On its website, Defendant boasts:

With our acquisition in 2000 by Berkshire Hathaway, Benjamin Moore joined a family of companies under the direction of Warren Buffett, which embodies success and is distinguished by sustainable brands that shine through the clutter of competition. We continue to be at the forefront of product innovation, with a commitment to research and development unrivaled in the architectural coatings industry. At Benjamin Moore laboratories and manufacturing facilities, our scientists and technicians work to exceed the already superior application, performance properties, ***and environmental safety of our products.***<sup>4</sup> (emphasis added)

13. Paint consists of several components, including a tint or pigment suspended in a base or emulsion, followed by the addition of a solvent. Pigments are finely ground, insoluble, dispersed particles that provide a coating formulation with color and opacity. They also can function as fillers, reinforcements and property modifiers. Pigments can be either natural or synthetic and inorganic or organic. Historically, the base consisted of linseed oil, or another drying

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<sup>4</sup> <https://www.benjaminmoore.com/en-us/then-now-always>.

oil, and other ingredients which were diluted with mineral spirits or other toxic substances. In the 1930's an acrylic base or emulsion was developed for paint which could be diluted with water.

14. Solvents are substances that are used for viscosity adjustments or to maintain paint in proper consistency. VOCs are often used as solvents or thinners.<sup>5</sup> VOCs are organic chemicals that have a high vapor pressure at ordinary room temperature. Their high vapor pressure results from a low boiling point, which causes large numbers of molecules to evaporate or sublime from the liquid or solid form of the compound and enter the surrounding air, a trait known as volatility.

15. VOCs are a class of substances that evaporate easily and react in the atmosphere with sunlight and heat, creating smog and otherwise unhealthy breathing environments. Moreover, VOCs can trigger asthmatic or allergic reactions (depending on the compound), and even contribute to the formation of smog. More importantly, concentrations of many VOCs are consistently higher indoors (up to ten times higher) than outdoors.

16. Today, interior latex house paints tend to be a combination of binder, in the case of Natura Products 100% acrylic, filler, pigment, and water. The transition from oil based emulsion to latex based emulsion transitioned interior paints from a predominantly organic to inorganic chemical composition. This transition was furthered by Benjamin Moore's introduction of waterborne tinting system to the marketplace in 2006 with its patented Gennex® Color Technology.

17. By the transition from organic oil based emulsions and ingredients to the inorganic water based ingredients, paint companies such as Benjamin Moore were able to reduce VOCs in the basic chemical composition of some interior paints.

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<sup>5</sup> The FTC has defined VOCs as "any compound of carbon that participates in atmospheric photochemical reactions" other than those listed at 40 C.F.R. § 51.100(s). *See* Proposed Decision and Order.

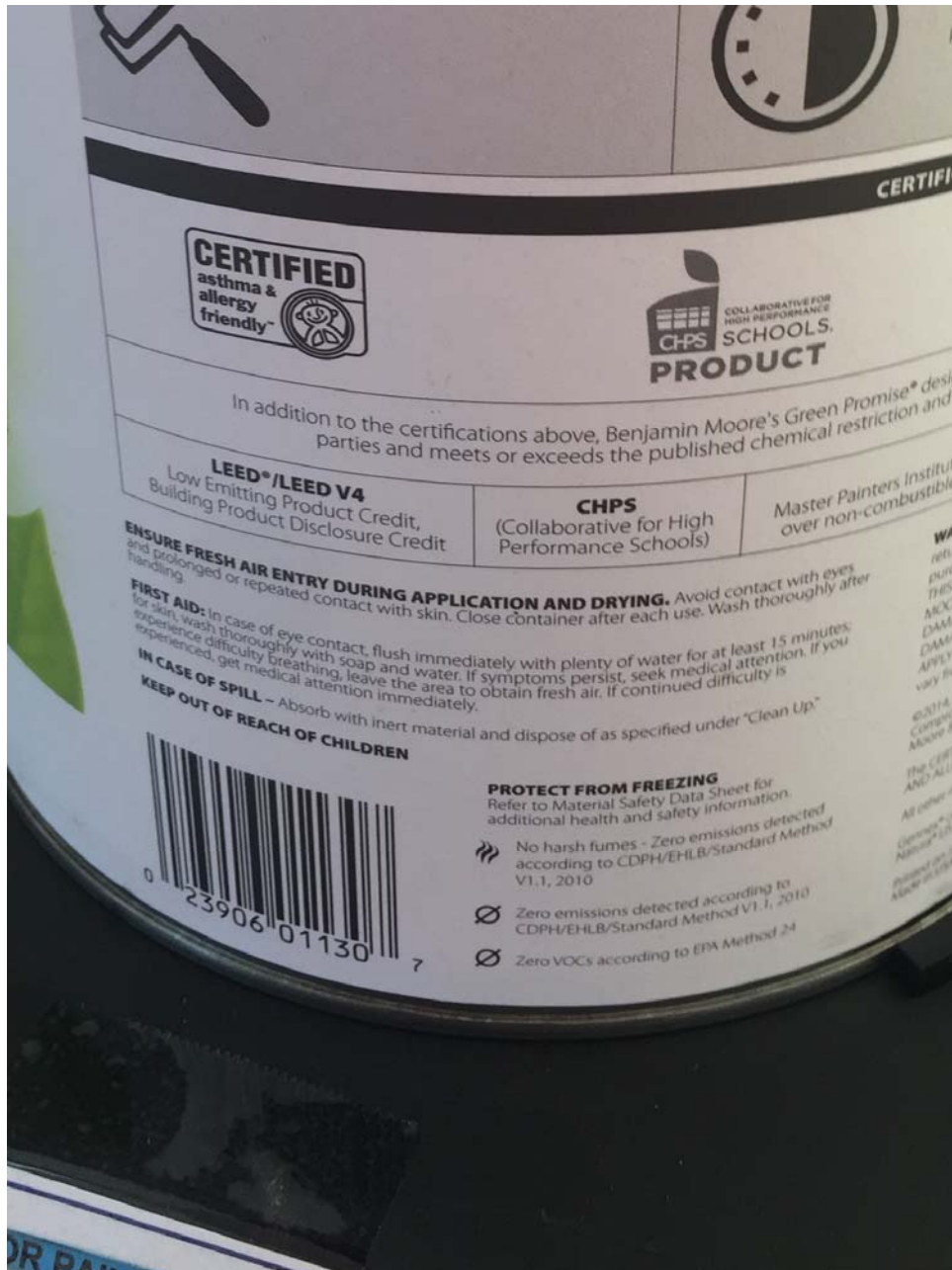
18. Over the last few years there has been a growing demand for safer interior paint products, those including low and/or zero emission and/or VOCs. Driving the market for these types of products is an increased consumer awareness of the negative impact of these components and the desire to buy more environmentally responsible products.

19. Further, most people spend the majority of their time indoors, commonly in the home. Young children, socially isolated seniors, caregivers, and individuals who work from home offices are among those who spend the vast majority of their time at home whereas school-age children and working adults typically spend 12-16 hours at home each day. Given how much time people spend at home, achieving and maintaining good indoor air quality in residences is a key priority.

20. In an effort to capitalize on this growing demand for safer products, Defendant marketed its Natura Products as not merely free of VOCs, but as producing “Zero emissions” altogether. For example, the front label of the Natura Product prominently features the “Zero emissions” misrepresentation juxtaposed next to the claim the product is “Safer for your family” and accompanied by its “Zero VOCs” claim. A screenshot of the label is reproduced below:



21. Similarly, the label on the back of the Natura Product can states both “Zero VOCs according to EPA Method 24” and “No Harsh Fumes – Zero emissions detected according to CDPH/EHLB/Standard Method V1.1, 2010,” as follows:



Both EPA Method 24 and CDPH/EHLB/Standard Method V1.1, however, only pertain to the measurement of VOCs, and establish no standard for, nor bear any relationship to, the measurement of non-VOC emissions from a 100% acrylic based latex interior paint tinted with a water based paint. Of course, Defendant's reference to these standards on the Natura Products' labels is unavailing for consumers either at the point of sale, or if they had time to review the

standards, as those standards involve dozens of pages of highly technical language beyond the knowledge and experience of the average reasonable consumer. Moreover, Defendant's recent label change removing the "Zero VOCs" claims and now stating "Zero emissions after 4 hours" implies that the Natura Products have emissions for at least 4 hours that include VOCs.

22. Benjamin Moore repeated these same "Zero emission" claims in its marketing, advertising and promotional materials. For example, the Company's print brochure for Natura Products stated: "Zero emissions with no harsh fumes" and "Zero VOCs"



#### THE BENJAMIN MOORE® ADVANTAGE:

- Over 5,000 independent retailers and 200+ field & architectural representatives ready to help you
- A full selection of premium products for every job
- An architectural support program to help you specify the right products for any job
- On-site specification and inspection help for complicated or difficult jobs
- Value-added business programs and services for professional contractors
- The colors designers prefer



Benjamin Moore® is a proud member of the U.S. Green Building Council, a nonprofit organization of building industry leaders working to make environmentally responsible, profitable, and healthy buildings.

Contact your Benjamin Moore representative to learn more about Waterborne Satin Impervo® and the Benjamin Moore advantage.

To find a representative in your area, visit [benjaminmoore.com](http://benjaminmoore.com) or call 1-866-708-9180.

## AVAILABLE FINISHES



#### FEATURES

- Zero VOCs\*
- Zero emissions with no harsh fumes\*\*
- Self-priming on most surfaces
- Dries fast for quicker return to service
- Excellent adhesion with a durable finish
- Available in over 3500 colors

#### TECHNICAL DATA

FINISH	CODE	VEHICLE TYPE	VOLUME SOLIDS %	COVERAGE Sq.Ft./Gallon	DRY TIME	VOC Grams/liter
Flat	0512	100% Acrylic Latex	45.5	375-425	Set to the touch 30 mins., To re-coat 1 to 2 hours	0
Eggshell	0513	100% Acrylic Latex	44.0	375-425	Set to the touch 30 mins., To re-coat 1 to 2 hours	0
Semi-Gloss	0514	100% Acrylic Latex	37.0	375-425	Set to the touch 30 mins., To re-coat 1 to 2 hours	0

*Natura® Zero VOC primer is available under our Fresh Start® line of primers. Safety Data Sheets and Technical Data Sheets are available at [benjaminmoore.com](http://benjaminmoore.com).*



The Green Promise® designation is Benjamin Moore's assurance that its environmentally friendly coatings meet and often exceed the strictest industry standards.

Natura US Patent No. 8,107,579 - Green® colors US Patent No. 7,403,627 & 7,702,014

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\*Zero VOC according to EPA Method 24

\*\*Zero emissions and/or no harsh fumes - No VOC emissions detected according to COPVHHS Standard Method V1.1, 2010

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# GOING BEYOND JUST GREEN



NATURA IS GREEN WITHOUT COMPROMISE®

With zero VOCs, zero emissions and no harsh fumes™, Natura can have a positive impact on air quality. This is a truly environmentally friendly paint without sacrifice to performance or color integrity.



23. Likewise, Benjamin Moore's website repeatedly claimed that the Natura Products were a "Zero Emissions Paint" and that "Natura goes beyond zero VOC to offer zero emissions, making it a safer paint for your family and the environment, all without compromise to performance or color selection." Screenshots of the website are reproduced below:



## Natura® Zero-VOC and Zero Emissions Paint

Natura Waterborne Interior Paint continues Benjamin Moore's commitment to providing the most environmentally friendly paint. Natura goes beyond zero VOC\* to offer zero emissions\*\*, making it a safer paint for your family and the environment, all without compromise to performance or color selection. Natura is truly "Green Without Compromise®."



SAVE



PRINT



SHARE



DOWNLOAD (PDF) :

SDS 512-1X (English)	SDS 512-1X (Español)
SDS 512-2X (English)	SDS 512-2X (Español)
SDS 512-3X (English)	SDS 512-3X (Español)
SDS 512-4X (English)	SDS 512-4X (Español)
SDS 512-01 (English)	SDS 512-01 (Español)

TDS 512 (English)

Flat

**FEATURES :**

- Virtually odorless
- Zero VOC\* and zero emissions\*\*
- Quick return to service
- Now Certified **asthma & allergy friendly™**
- 100% Acrylic
- Provides a durable, washable film
- Spatter-resistant
- Unlimited color selection
- One hour recoat for quick return to service
- Carries the **Green Promise** designation
- Self-priming on most surfaces.
- Voted 2015 Product of the Year

*Survey of 40,000 people by TNS*

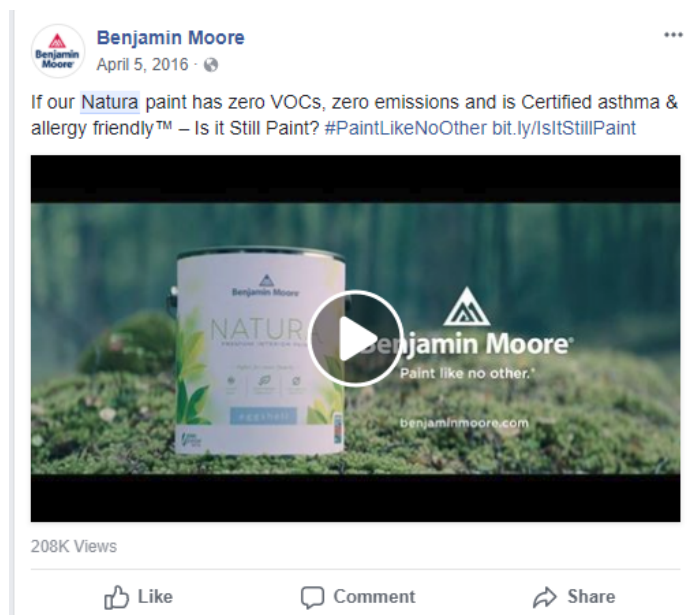
*Interior Paint Category: Natura*

\* Zero VOC according to EPA Method 24

\*\* No VOC emissions detected according to CDPH/EHLB/standard method v1.1. 2010

24. Additionally, Defendant's materially false and misleading marketing campaign includes representations made on its social media websites. For example, Defendant's Facebook site repeatedly states the Natura Products have "zero emissions":

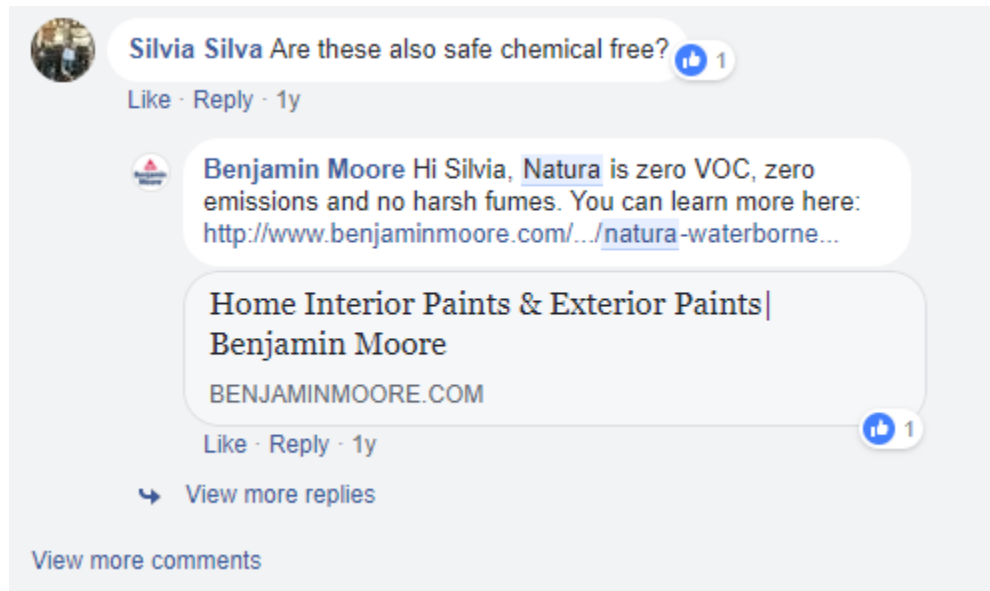




25. Moreover, Defendant reiterates that the Natura Products are so benign, they are “safer for a nursery”:



26. In fact, when queried by a consumer as to whether the Natura Products were “safe” and “chemical free,” a representative from Benjamin Moore reiterated that the products were “zero VOC, zero emissions and no harsh fumes.” A screenshot of the May 16, 2016 Facebook post is reproduced below:



27. Defendant’s zero emissions claims, however, are false and misleading. On July 11, 2017, Benjamin Moore settled charges with the FTC that it deceptively promoted products as emission-free or containing zero VOCs, including during and immediately after application. A Proposed Decision and Order is pending final approval after a public comment period. In the Proposed Decision and Order, the FTC defines the term “Emission” to mean “any compound that is emitted or produced during application, curing, or exposure of a covered product.” *See* Proposed Decision and Order, p. 3. To eliminate any confusion, in the FTC’s Analysis to Aid Public Comment published in the Federal Register on July 18, 2017, the FTC explained:

“Emission is any compound emitted from paint during application or thereafter and **includes volatile organic compounds (or VOCs)**

[...]

The orders define “emission” to include all emissions (*not just VOC’s that cause smog*).

(emphasis added).

FTC, Benjamin Moore & Co., Inc.; Analysis to Aid Public Comment, 82 FR 32818-01, \*32820, 2017 WL 3017861 (Jul. 18, 2017), *available at* [https://www.ftc.gov/system/files/documents/federal\\_register\\_notices/2017/07/benjamin\\_moore\\_7-18-17\\_0.pdf](https://www.ftc.gov/system/files/documents/federal_register_notices/2017/07/benjamin_moore_7-18-17_0.pdf) (Exhibit D); *see also* FTC, In the Matter of Benjamin Moore & Co., Inc., File No. 162-3079, Analysis of Proposed Consent Order to Aid Public Comment, 2017 WL 3049127 (Jul. 11, 2017), *available at* [https://www.ftc.gov/system/files/documents/cases/benjamin\\_moore\\_analysis.pdf](https://www.ftc.gov/system/files/documents/cases/benjamin_moore_analysis.pdf).

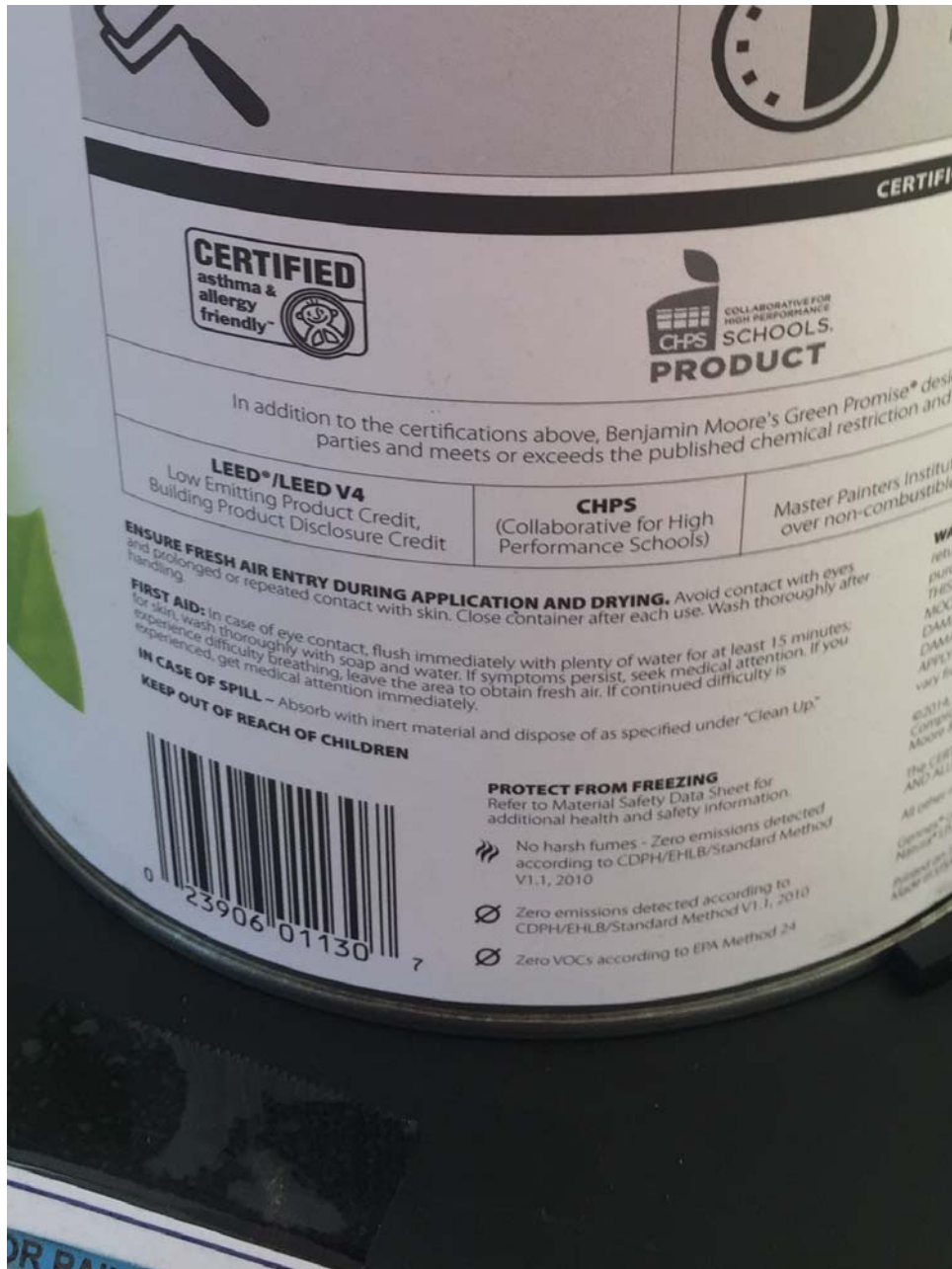
28. In its Proposed Decision and Order, the FTC prohibited Benjamin Moore from making unqualified “zero emissions” statements unless both content and emissions are actually zero, or emissions are at trace levels, beginning at application and thereafter, which “reflects [consumers’] concern about the potential health effects from exposure to chemical emissions found in indoor air, not just VOCs that affect outdoor air quality.” *See* Analysis to Aid Public Comment, 82 FR 32818-01, \*32820.

29. The Proposed Decision and Order’s definition of “trace level” generally tracks the “trace amount” test codified in the FTC’s “Green Guides,” and requires that emissions at trace levels do not (1) “cause material harm that consumers typically associate with emission, including harm to the environment and human health,” and (2) that emissions do “not result in more than harmless concentrations of any compound higher than would be found under normal conditions in the typical residential home without interior architectural coating.” *See* Analysis to Aid Public Comment, 82 FR at 32820; *see also* 16 C.F.R. § 260.1 et seq. As such, the FTC justifiably took action because Benjamin Moore’s “zero emissions” statements, without qualification (*e.g.*, zero emissions after X number of hours/days), are misleading as they falsely indicated to consumers

they will not be exposed to potentially harmful emissions at the time of application, which is precisely when individuals are at the highest risk of exposure.

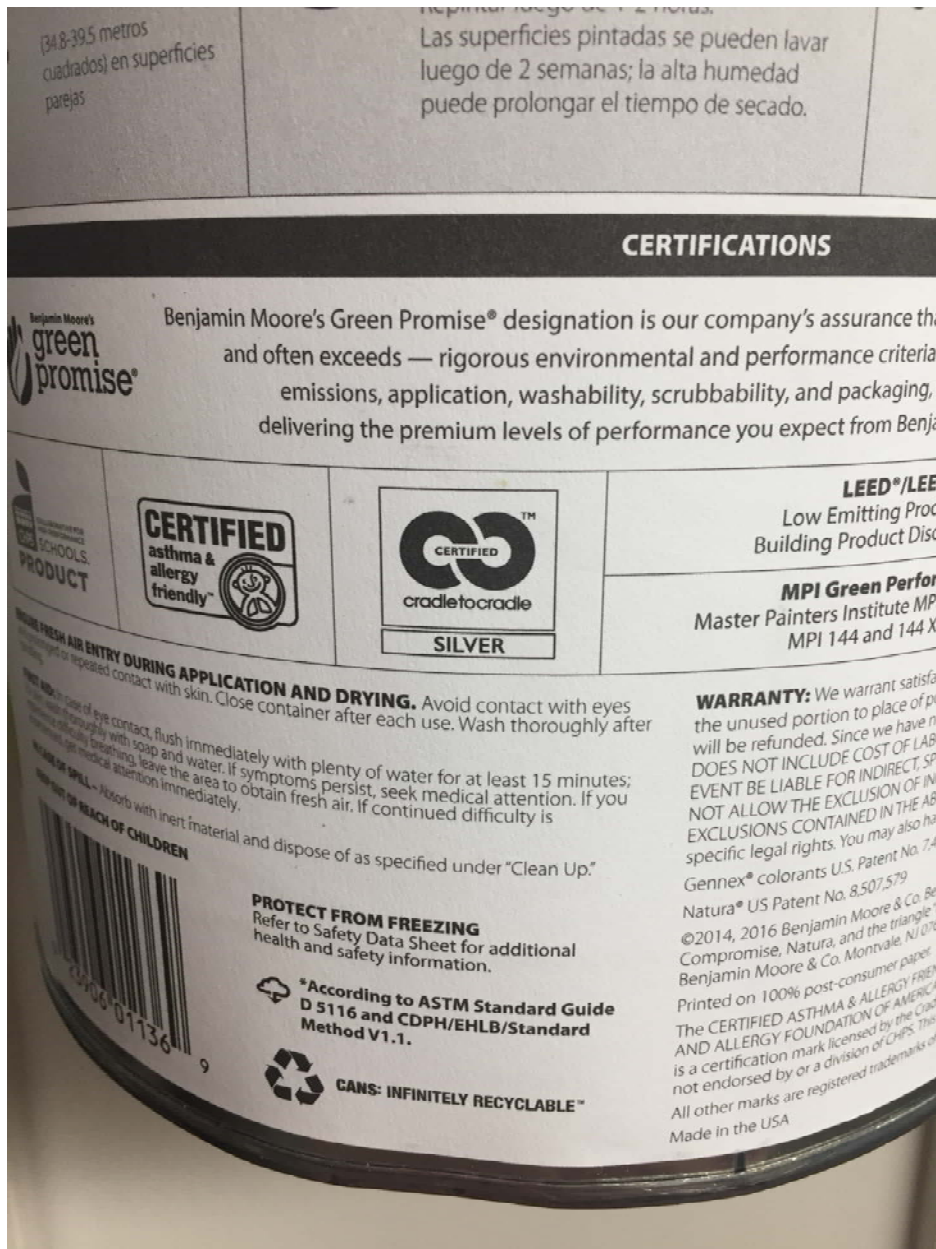
30. After the FTC issued its Proposed Decision and Order and Order in July 2017 and even though that Proposed Decision and Order is not yet final, Benjamin Moore in or about September 2017 modified its Natura Products' labels to remove the "Zero VOCs" claim and to state "Zero emissions after 4 hours". Additionally, Defendant removed the "*Safer For Your Family*" representation. Below is a screenshot of the modified Natura Products' labels that Defendant initially began using which a corrective stick-on label saying "Zero Emissions after 4 hours" affixed over the portion of the old label with the old "Zero emissions" and "*Safer For Your Family*" representations:





Subsequently, Defendant began using entirely new labels for the Natura Products now claiming “Zero emissions after 4 hours,” as shown below:





31. Accordingly, Benjamin Moore’s decision to update its “Zero emissions” statement to say “Zero emissions after 4 hours” constitutes an admission that its Natura Products give off emissions at greater than trace levels for up to four hours after application. This admission of fact will remain even if the FTC’s Proposed Decision and Order is modified pending the FTC's review of public comments. Thus, Benjamin Moore's “Zero emissions” statements, without the “after 4

hours” qualification, unlawfully, falsely and misleadingly conveyed to consumers that the Natura Products are emission free, both during and immediately after application.

32. Additionally, the Safety Data Sheet (“SDS”) for Natura Products contains an additional admission that inhalation, whether short or long term exposure to Natura Products “May cause irritation of respiratory tract.”<sup>6</sup> It is axiomatic that respiratory tract irritation would not occur unless there are some emissions from the Natura Products as Defendant now admits in its new labels. This, together with the recent label changes, implies that the Natura Products’ emissions include VOCs, which is consistent with the FTC’s findings in the Proposed Decision and Order. Below is a screenshot of the 2015 SDS for the Natura Products:

51100 - FRESH START NATURA ZERO VOC PRIMER  
WHITE

Revision Date: 28-Aug-2015

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Possibility Of Hazardous Reactions	None under normal conditions of use.
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Product Information

Information on likely routes of exposure

Principal Routes of Exposure	Eye contact, skin contact and inhalation.
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Acute Toxicity

Product Information	No information available
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Information on toxicological effects

Symptoms	No information available
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Delayed and immediate effects as well as chronic effects from short and long-term exposure

Eye contact	May cause slight irritation.
Skin contact	Substance may cause slight skin irritation.
Inhalation	May cause irritation of respiratory tract.
Ingestion	Ingestion may cause gastrointestinal irritation, nausea, vomiting and diarrhea.
Sensitization:	No information available
Neurological Effects	No information available.
Mutagenic Effects	No information available.
Reproductive Effects	No information available.
Developmental Effects	No information available.
Target Organ Effects	No information available.
STOT - single exposure	No information available
STOT - repeated exposure	No information available
Other adverse effects	No information available.
Aspiration Hazard	No information available

<sup>6</sup> See <https://www.benjaminmoore.com/en-us/interior-exterior-paints-stains/product-catalog/nwip/natura-paint>, and example at Exhibit C.

33. The SDS also and recommends to “[a]void breathing vapors.” and “[i]n case of insufficient ventilation, wear suitable respiratory equipment,” as follows:

## 7. HANDLING AND STORAGE

**Handling** Avoid contact with skin, eyes and clothing. Avoid breathing vapors, spray mists or sanding dust. In case of insufficient ventilation, wear suitable respiratory equipment.

## 8. EXPOSURE CONTROLS / PERSONAL PROTECTION

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### **Personal Protective Equipment**

**Eye/Face Protection** Safety glasses with side-shields.

**Skin Protection** Protective gloves and impervious clothing.

**Respiratory Protection** In case of insufficient ventilation wear suitable respiratory equipment.

34. A paint with zero emissions is material to consumers, including environmentalists, health-conscious people, and sensitive populations such as babies and allergy and asthma sufferers, who willing pay a premium for such products.

35. Benjamin Moore’s labeling and marketing claim that its zero emissions statements are based on the California Department of Health’s Standard Method for the Testing and Evaluation of Volatile Organic Chemical Emissions from Indoor Sources Using Environmental Chambers, V. 1.1, 2010 (“Standard Method”). The purpose of the Standard Method, however, is to determine VOC emissions, which are more narrowly defined and does not encompass all emissions. Similarly, the label as revised after the Proposed Consent and Order claims the representation of “Zero emissions after 4 hours” is based upon the Standard Method as well as ASTM Standard Guide D 5116 (“Standard Guide”). Like the Standard Method, the Standard Guide only pertains to VOCs and is only a guide “not a standard test method and must not be construed as such.” Thus, because the Standard Method and Standard Guide only measure VOCs,

the Natura Products may well have emissions beyond the 4 hours Defendant now admits to when all emissions (not just VOCs) are considered.

36. Benjamin Moore made a far broader and more encompassing representation by labeling its Natura Products as “Zero emissions” as opposed to simply saying the Natura Products contained and produced “Zero VOCs”. As set forth above, the Natura Products’ labels and marketing materials do not limit the representations to “Zero VOCs” but also claim “Zero emissions” – right next to each other. Moreover, the Natura Products marketing materials claim the Products produce no “harsh fumes,” despite the SDS for the Natura Products that concedes they “May cause irritation of respiratory tract.” Benjamin Moore’s decision to include representations that Natura Products produce “Zero VOCs,” “Zero Emissions” and no “Harsh Fumes” clearly implies and is intended to persuade consumers that “Zero emissions” is broader than just VOCs and encompasses all emissions, including harsh fumes. Moreover, the front of the Natura Products’ label made no reference to the basis for the “Zero emissions” statement, and it is only the back of the label that referenced the Standard Method.

37. Significantly, Benjamin Moore’s modified “Zero emissions” statement disclosing emissions up to 4 hours references on the back of the label the same Standard Method as its prior “Zero emissions” labeling statement that did not disclose emissions up to 4 hours, effectively admitting disclosure of emissions up to 4 hours is consistent with, if not required by, the Standard Method. Thus, juxtaposing the “Zero emissions” and “Zero VOCs” statements on the Products’ label (front and back alike) without disclosing the emissions up to 4 hours or the short and long term inhalation hazard was inherently false and misleading, when in actuality the Products have emissions, at a minimum, up to 4 hours as Benjamin Moore’s new labeling statements admit.

38. The materiality of labeling the Natura Products with the “Zero emissions” statement is obvious. The FTC has made similar misleading claims an enforcement priority, as evidenced by its previously approved final orders settling similar charges against Sherwin-Williams and PPG for making false and unsubstantiated claims that their products contained zero VOCs after tinting and by entering into proposed settlement agreements with three of Benjamin Moore’s competitors regarding similar misleading emissions statements.<sup>7</sup>

39. Furthermore, in its Analysis to Aid Public Comment, the FTC opined that consumers are concerned about all chemical emissions, not limited to VOCs. According to the FTC: “Consumers are likely concerned about the potential health effects from exposure to chemical emissions found in indoor air, not just VOCs that affect outdoor air quality.” *See* Analysis to Aid Public Comment. Thus, Defendant’s false and misleading “Zero emissions” claim on its Natura Products’ labeling and in its Natura Products’ marketing has a broad impact on consumers seeking a truly emissions free paint and who purchased Natura Products that unbeknownst to them have emissions, including emissions that “May cause irritation of respiratory tract.”

40. The materiality of the “Zero emission” representations is also demonstrated by the price premium Benjamin Moore was able to charge for its Natura Products. Benjamin Moore’s Natura Products cost between \$54.99 and \$69.99 per gallon, a substantial premium to comparable “Zero VOC” paints that do not also claim to have “Zero Emissions.” For example, Benjamin Moore charges less for its “Ben” interior paints, which are advertised as having zero VOCs, but do not claim to have zero emissions. Specifically, Benjamin Moore’s “Ben” interior paints cost

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<sup>7</sup> *See* FTC, Paint Companies Settle FTC Charges That They Misled Consumers; Claimed Products are Emission- and VOC-free and Safe for Babies and Other Sensitive Populations (Jul. 11, 2017); available at <https://www.ftc.gov/news-events/press-releases/2017/07/paint-companies-settle-ftc-charges-they-misled-consumers-claimed> (includes links to FTC Complaints against Benjamin Moore, ICP Construction, Inc., YOLO Colorhouse, LLC, and Imperial Paints, LLC).

retail for about \$40 per gallon depending on the finish and color. The same is true of Benjamin Moore's "Regal" paints advertised as "Zero VOCs" and retailing for about \$15 less than Natura Products. Likewise, competitors Glidden and Behr market Zero VOC paints which retail for \$21 and \$25 per gallon, respectively. These are but a few examples of many alternative Zero VOC paints that are significantly less expensive than the Natura Products.

41. Pursuant to Section 5 of the FTC Act, 15 U.S.C. § 45, which prohibits "unfair or deceptive acts or practices in or affecting commerce," the FTC has the authority to take action if a paint manufacturer makes a claim that its products contains "Zero emissions" when they give off emissions at greater than "trace levels." Any violation of the FTC Act is a violation of New York law and support a claim for violation of GBL §349. *See State by Lefkowitz v. Colorado State Christian Coll. of Church of Inner Power, Inc.*, 76 Misc. 2d 50, 54, 346 N.Y.S.2d 482, 487 (N.Y. Sup. Ct. 1973) ("the legislative purpose in enacting §349 of the [GBL] was to follow in the steps of the [FTC] with respect to the interpretation of deceptive acts and practices outlawed in Section 5 of the [FTC Act]").

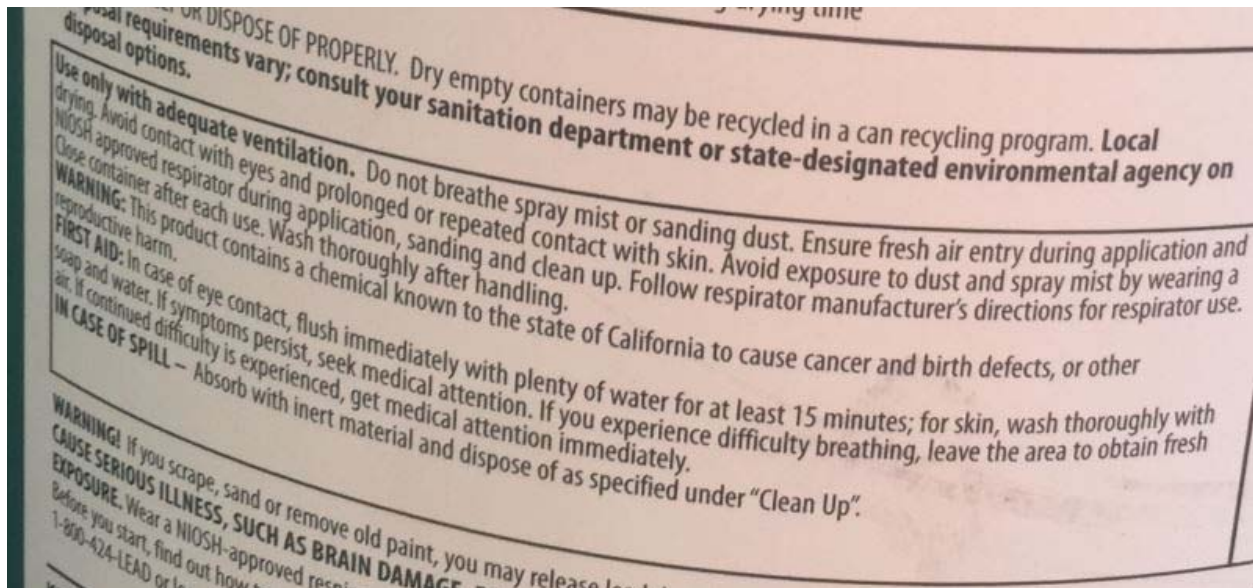
42. Thus, Benjamin Moore's conduct, including its false and misleading "Zero emissions" statements without qualification when its Natura Products give off more than trace amounts of emissions constituted violations of the FTC Act (as the FTC found here), which in turn are also violations of New York law. *See, e.g., State by Lefkowitz*, 346 N.Y.S.2d at 487. More specifically, Benjamin Moore's mislabeling, false and misleading advertisement and promotion of the Natura Products is a deceptive practice in violation of New York Gen. Bus. Law § 349, and false advertising in violation of New York Gen. Bus. Law § 350. It also gives rise to claims for breach of express warranty under N.Y. U.C.C. § 2-313, and under common law of New York for unjust enrichment.

43. In accord with N.Y. U.C.C. § 2-313 and New York's General Business Law, and any other laws requiring pre-suit demand and notice, Plaintiff gave written notice of the facts and claims asserted herein to Benjamin Moore on January 31, 2018, a copy of which is attached hereto as Exhibit E. Thirty days have lapsed since the date of this notice and Benjamin Moore has not responded to Plaintiff's notice, let alone taken any steps to address or redress Plaintiff's claims.

**DEFENDANT FRAUDULENTLY CONCEALED ITS WRONGS**

44. Benjamin Moore has now admitted, both through its relabeling and through the Products' Safety Data Sheet (SDS) that Natura Products labeled as producing "Zero emissions" did in fact produce more than trace amounts of emissions, including emissions harmful to consumers, at a minimum, for the first four hours after application. Defendant further concealed the existence of these emissions by citing to the Standard Method in both the labeling and marketing of Natura Products, which unbeknownst to consumer as discussed in paragraph 21 herein, applied only to VOCs and not to inorganic emissions unique to latex interior paints.

45. Moreover, like the Natura Products, Defendant's Ben and Regal paints are advertised as "Zero VOCs" and their SDS each say "May cause irritation of respiratory tract" and contain the same respiratory warning reflected in paragraph 33 herein. However, unlike the Natura Products, the Ben and Regal paint labels each contained the following respiratory risk warning:



The absence of this (or any) respiratory risk warning on the Natura Products' labels together with the "Zero emissions," "Zero VOCs" and "No harsh fumes" claims on those labels further concealed the existence of emissions in the Natura Products. This is especially true when a consumer in a Benjamin Moore authorized retailer where all these products are next to each other compares the "Zero emissions" Natura Products to the Ben and Regal "Zero VOCs" paints that retail for \$15 to \$30 less, respectively, than Natura Products.

46. A reasonably prudent consumer buying the Natura Products at a Benjamin Moore authorized retailer would have no reason to suspect the Natura Products labeled "Zero emissions" did produce more than trace amounts of emissions, at a minimum, for the first four hours after application.

### **CLASS ACTION ALLEGATIONS**

47. Plaintiff seeks certification of a class under Fed.R.Civ.P. 23 (b)(1), (b)(2), (b)(3) and/or (c)(4), as may deemed appropriate by the Court. Plaintiff Andry brings this action on behalf of herself and on behalf of all other persons who purchased from an authorized Benjamin Moore retailer in the State of New York Defendant Benjamin Moore's Natura Products at any time prior

to Defendant changing the Natura Products labels to say “Zero Emissions after 4 hours” (herein throughout, the “Class”). Excluded from the Class are: (i) Defendant Benjamin Moore and its employees, principals, affiliated entities, legal representatives, successors and assigns; and (ii) the judges to whom this action is assigned and any members of their immediate families.

48. Upon information and belief, there are thousands of members of the Class. Indeed, Defendant admitted in a recent court filing that “according to Benjamin Moore’s records, it has sold 990,528 gallons of Natura Paint Products in the United States between January 2014 and September 2017. Therefore, individual joinder of all members of the Class would be impracticable.

49. There is a well-defined community of interest in the questions of law and fact affecting the parties represented in this action.

50. Common questions of law or fact exist as to all members of the Class. These questions predominate over the questions affecting only individual Class members. These common legal or factual questions include:

- a. Whether Defendant labeled Natura Products as producing “Zero emissions;”
- b. Whether Defendant’s “Zero emission” labeling of the Natura Products was likely to deceive Class Members;
- c. Whether Defendant’s representations are unlawful; and
- d. The appropriate measure of damages and/or restitution.

51. The Class is ascertainable because its definition is objective and specific. Class Members may be identified through claim forms or receipts. Additionally, Class Members may be identified through records of authorized retailers selling Defendant’s Natura Products in New York. Certain authorized retailers maintain “reward” programs, pursuant to which consumers provide their name and personal information and are issued a “reward” card. These retailers

encourage consumers to display their “reward” card when making purchases by offering discounts and other incentives exclusively to consumers who show their “reward” card when making purchases. As a result, retailers who use “reward” card programs retain records sufficient to show which Class Members’ “reward” cards are associated with purchases of Defendant’s Natura Products. Moreover, because the false and misleading “Zero emissions” misrepresentations appear on the actual labels of the Natura Products, there is no concern that the Class includes individuals who were not exposed to the misrepresentation.

52. Plaintiff Andry’s claims are typical of the claims of the Class, in that she is a consumer who purchased Natura Products in New York that were labeled and marketed as producing “Zero emissions” and “Zero VOCs.” Plaintiff Andry, therefore, is no different in any relevant respect from any other Class member, and the relief sought is common to the Class.

53. Plaintiff Andry is an adequate representative of the Class because her interests do not conflict with the interests of the members of the Class she seeks to represent, and she has retained counsel competent and experienced in conducting complex class action litigation. Plaintiff and her counsel will adequately protect the interests of the Class.

54. A class action is superior to other available means for the fair and efficient adjudication of this dispute. The damages suffered by each individual member of the Class will likely be relatively small, especially given the cost of Natura Products at issue and the burden and expense of individual prosecution of the complex litigation necessitated by Defendant’s conduct. Thus, it would be virtually impossible for members of the Class to effectively redress the wrongs done to them through individual actions. Moreover, even if members of the Class could afford individual actions, it would still not be preferable to class-wide litigation. Individual actions also present the potential for inconsistent or contradictory judgments, which would be dispositive of at

least some of the issues and hence interests of the other members not party to the individual actions, would substantially impair or impede their ability to protect their interests, and would establish incompatible standards of conduct for the party opposing the class. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court.

55. Further, in the alternative, the action may be maintained as class actions with respect to particular issues, pursuant to Fed.R.Civ.P. 23(c)(4).

## **NEW YORK LAW COUNTS**

### **COUNT I**

#### **(Deceptive Acts or Practices, New York Gen. Bus. Law. § 349)**

56. Plaintiff repeats the allegations in the foregoing paragraphs as if fully set forth herein.

57. Plaintiff brings this Count I individually and on behalf of the members of the Class.

58. By the acts and conduct alleged herein, Defendant committed unfair or deceptive acts and practices by misrepresenting the Natura Products produced “Zero emissions” (reinforced by its “Zero VOCs” claim) when they in fact produced emissions, at a minimum, in the four hours after application.

59. The foregoing deceptive acts and practices were directed at consumers, and have had a broad impact on consumers in New York.

60. The foregoing deceptive acts and practices are misleading in a material way because they fundamentally misrepresent the characteristics and ingredients of the Natura Products to induce consumers to purchase the Natura Products.

61. Plaintiff and members of the Class were injured because they paid for the Natura Products labeled “Zero emissions” (reinforced by its “Zero VOCs” claim), which they would not have done had they known the truth that the Natura Products in fact produced emissions, at a minimum, in the four hours after application.

62. Plaintiff and members of the Class were injured because they paid a price premium for the Natura Products labeled “Zero emissions” (reinforced by its “Zero VOCs” claim), which they would not have done had they known the truth that in fact produced emissions, at a minimum, in the four hours after application.

63. Plaintiff, on behalf of herself, other members of the Class to recover actual damages or \$50.00, whichever is greater, three times actual damages, and reasonable attorneys’ fees and costs.

## **COUNT II**

### **(False Advertising, New York Gen. Bus. Law. § 350)**

64. Plaintiff repeats the allegations in the foregoing paragraphs as if fully set forth herein.

65. Plaintiff brings this Count II individually and on behalf of the members of the Class.

66. Based on the foregoing, Defendant has engaged in consumer-oriented conduct that is deceptive or misleading in a material way which constitutes false advertising in violation of Section 350 of the New York General Business Law.

67. Defendant’s Natura Products’ labels’ claims the Natura Products produced “Zero emissions” (reinforced by its “Zero VOCs” claim) were false, misleading and deceptive statements and representations of fact that were directed to consumers.

68. The Natura Products' labels' false, misleading and deceptive "Zero emissions" statements and representations of fact (reinforced by its "Zero VOCs" claim) have resulted in consumer injury and harm to the public interest.

69. As a result of the Natura Products' labels' false, misleading and deceptive "Zero emissions" statements and representations of fact (reinforced by its "Zero VOCs" claim), Plaintiff has suffered and continue to suffer economic injury.

70. Plaintiff and the Class suffered an ascertainable loss caused by Defendant's Natura Products' labels' "Zero emissions" misrepresentations (reinforced by its "Zero VOCs" claim) because they purchased and paid more for the Natura Products, which they would not have done had they known the truth about the product.

71. Plaintiff, on behalf of herself and other members of the Class, seeks to recover actual damages or \$500.00, whichever is greater, three times actual damages, and reasonable attorneys' fees and costs.

### **COUNT III**

#### **(Breach of Express Warranty, N.Y. U.C.C. § 2-313)**

72. Plaintiff repeats the allegations in the foregoing paragraphs as if fully set forth herein.

73. Plaintiff brings this Count III individually and on behalf of the members of the Class.

74. Benjamin Moore is and at all relevant times was a merchant under N.Y. U.C.C. § 2-313.

75. By labeling the Natura Products as producing "Zero emissions" (reinforced by its "Zero VOCs" claim), Benjamin Moore, as the designer, manufacturer, marketer, distributor, and/or

seller of the Natura Products expressly warranted that these Natura Products produced “Zero emissions.”

76. In fact, the supposedly “Zero emission” Natura Products produced emissions, at a minimum, in the four hours after application.

77. Plaintiff and members of the Class were injured as a direct and proximate result of Benjamin Moore’s breach of these warranties because they would not have purchased the Natura Products had they known the truth that these warranties were false.

#### **COUNT IV**

##### **(Unjust Enrichment)**

78. Plaintiff repeats the allegations in the foregoing paragraphs as if fully set forth herein.

79. Plaintiff brings this Count IV individually and on behalf of the members of the Class.

80. By selling the Natura Products falsely and misleadingly labeled “Zero emissions” (reinforced by its “Zero VOCs” claim) which in fact produced emissions, at a minimum, in the four hours after application, Benjamin Moore obtained money from Plaintiff and members of the Class.

81. By virtue of the unlawful conduct described herein, Benjamin Moore will be unjustly enriched if it is permitted to retain the money it obtained from Plaintiff and members of the Class for Natura Products falsely and misleadingly labeled “Zero emissions” (reinforced by its “Zero VOCs” claim).

82. In equity and good conscience, Benjamin Moore should be required to return to Plaintiff and the Class the amount they paid to purchase these Natura Products. Otherwise,

Benjamin Moore will be unjustly enriched and Plaintiff and members of the Class will be left without adequate remedy at law.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, on behalf of herself and on behalf of the members of the Class request an award, relief and entry of a judgment, as follows:

A. An order certifying that this action is properly brought and may be maintained as a class action; that Plaintiff Andry be appointed representative of the Class; and that Vozzolo LLC and Feinstein Doyle Payne & Kravec, LLC be appointed Co-Lead Counsel for the Class.

B. Restitution in such amount that Plaintiff and members of the Class paid to purchase Benjamin Moore the Natura Products or paid as a premium over non-zero emission or Zero VOC alternatives for Causes of Action for which it is available.

C. Compensatory damages for Causes of Action for which they are available.

D. Statutory damages allowable under New York Gen. Bus. Law §§ 349 and 350-e.

E. Punitive damages for Causes of Action for which they are available.

F. An Order awarding Plaintiff her costs of suit, including reasonable attorneys' fees and pre- and post-judgment interest.

G. An Order requiring an accounting for, and imposition of, a constructive trust upon all monies Benjamin Moore received as a result of the misleading, fraudulent and unlawful conduct alleged herein.

H. Such other and further relief as may be deemed necessary or appropriate.

**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a trial by jury on all causes of action and/or issues so triable.

DATED: March 29, 2018

**FEINSTEIN DOYLE PAYNE  
& KRAVEC, LLC**

By: /s/Joseph N. Kravec, Jr.  
Joseph N. Kravec, Jr. (No. JK-3696)

29 Broadway, 24<sup>th</sup> Floor  
New York, NY 10006-3205  
Telephone: (212) 952-0014  
Email: jkravec@fdpklaw.com

and

429 Fourth Avenue  
Law & Finance Building, Suite 1300  
Pittsburgh, PA 15219  
Telephone: (412) 281-8400  
Facsimile: (412) 281-1007

**VOZZOLO LLC**

By: /s/Antonio Vozzolo  
Antonio Vozzolo (No. AV-8773)

345 Route 17 South  
Upper Saddle River, New Jersey 07458  
Telephone: (201) 630-8820  
Facsimile: (201) 604-8400  
Email: avozzolo@vozzolo.com

***Counsel for Plaintiff and the Proposed Class***

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

ADRIENNE ANDRY

(b) County of Residence of First Listed Plaintiff Kings County  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Feinstein Doyle Payne & Kravec, LLC  
429 Fourth Avenue, Law & Finance Building, Suite 1300  
Pittsburgh, PA 15219 Telephone: (412) 281-8400

**DEFENDANTS**

BENJAMIN MOORE &amp; CO. INC.

County of Residence of First Listed Defendant \_\_\_\_\_  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF  
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question  
(U.S. Government Not a Party)
- ☒ 4 Diversity  
(Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |                                         | PTF                                   | DEF                        |                                                               | PTF                        | DEF                                   |
|-----------------------------------------|---------------------------------------|----------------------------|---------------------------------------------------------------|----------------------------|---------------------------------------|
| Citizen of This State                   | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4            |
| Citizen of Another State                | <input type="checkbox"/> 2            | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3 | Foreign Nation                                                | <input type="checkbox"/> 6 | <input type="checkbox"/> 6            |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice <b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input checked="" type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education <b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

**V. ORIGIN** (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding    ☐ 2 Removed from State Court    ☐ 3 Remanded from Appellate Court    ☐ 4 Reinstated or Reopened    ☐ 5 Transferred from Another District (specify)    ☐ 6 Multidistrict Litigation - Transfer    ☐ 8 Multidistrict Litigation - Direct File

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. Section 1332(d)(2)

Brief description of cause:

Consumer Product Mislabeling

**VII. REQUESTED IN COMPLAINT:**

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.    DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes    ☐ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

03/29/2018

SIGNATURE OF ATTORNEY OF RECORD

s/Joseph N. Kravec, Jr.

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

**CERTIFICATION OF ARBITRATION ELIGIBILITY**

Local Arbitration Rule 83.10 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

I, Joseph N. Kravec, Jr., counsel for Adrienne Andry, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

☒  
☐  
☐

monetary damages sought are in excess of \$150,000, exclusive of interest and costs,  
 the complaint seeks injunctive relief,  
 the matter is otherwise ineligible for the following reason

**DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1**

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks:

**RELATED CASE STATEMENT (Section VIII on the Front of this Form)**

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that "A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

**NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)**

- 1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County? ☐ Yes ☒ No
- 2.) If you answered "no" above:
- a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County? ☐ Yes ☒ No
- b) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District? ☒ Yes ☐ No
- c) If this is a Fair Debt Collection Practice Act case, specify the County in which the offending communication was received:

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County? ☐ Yes ☒ No

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

**BAR ADMISSION**

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

☒

Yes

☐

No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

☐

Yes

(If yes, please explain

☒

No

I certify the accuracy of all information provided above.

Signature: s/Joseph N. Kravec, Jr.



Civil Action No. 1:18-cv-1923

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_, who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify)*:

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

# EXHIBIT A

# AdAge

## Benjamin Moore Starts \$50 Million Ad Campaign, Its Biggest Yet

**Paint Producer Takes on Big-Box Stores Where Rivals Are Sold**

By Felicia Greiff

*Published:* March 23, 2015



0:00 / 0:30



Benjamin Moore is rolling out a spring campaign that will total about \$50 million in ad spending, according to the company, which called it the most robust and ambitious efforts in its 132-year history.

The new campaign, from The Martin Agency , will include TV, radio, print and digital components with a new tagline, "paint like no other."

The first phase includes three spots focusing on the brand's history of innovation, including its premium Regal Select paint and its Natura "Zero-VOC and Zero Emissions" paint. Themed "Feats of Can," CMO Ron Schuller said it will educate consumers on the different qualities of the paints and signal that the paint company can support upcoming spring projects.

"It's so unfortunate to see the impact the weather had on people's homes in the Atlantic Northeast," said Mr. Schuller, (during an interview ahead of the Northeast's spring snowstorm last Friday.) "The amount of snow we've had will certainly be harsh on exteriors as well as decks. I think spring can't get here soon enough for everyone."

In May, a new phase themed "Who Are You Talking To?" will make fun of the box chains where Benjamin Moore doesn't sell its products. In the ads, a customer seeks help at a "big box store," receiving unhelpful advice or non sequiturs in response.

Part of the goal is to break through monotonous messaging around straightforward products such as paint, according to Mr. Schuller, who joined the company in November.

The brand has been increasing spending since the economy began picking up again, and Mr. Schuller said North American and global sales are increasing for Benjamin Moore. The overall market for paint is better than a year ago as well, he added.

Previous efforts to separate Benjamin Moore from the pack include the Fenway Collection, a Red Sox-themed paint line that included a limited edition shade used to paint the stadium's scoreboard and left field wall.

# EXHIBIT B



Commission may either withdraw its acceptance of this Consent Agreement and so notify Proposed Respondent, in which event the Commission will take such action as it may consider appropriate, or issue and serve its Complaint (in such form as the circumstances may require) and decision in disposition of the proceeding, which may include an Order. *See* Section 2.34 of the Commission's Rules, 16 C.F.R. § 2.34.

5. If this agreement is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to Commission Rule 2.34, the Commission may, without further notice to Proposed Respondent: (1) issue its Complaint corresponding in form and substance with the attached draft Complaint and its Decision and Order; and (2) make information about them public. Proposed Respondent agrees that service of the Order may be effected by its publication on the Commission's website (ftc.gov), at which time the Order will become final. *See* Rule 2.32(d). Proposed Respondent waives any rights it may have to any other manner of service. *See* Rule 4.4.

6. When final, the Decision and Order will have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other Commission orders.

7. The Complaint may be used in construing the terms of the Decision and Order. No agreement, understanding, representation, or interpretation not contained in the Decision and Order or in this Consent Agreement may be used to vary or contradict the terms of the Decision and Order.

8. Proposed Respondent agrees to comply with the terms of the proposed Decision and Order from the date it signs this Consent Agreement. Proposed Respondent understands that it may be liable for civil penalties and other relief for each violation of the Decision and Order after it becomes final.

**Benjamin Moore & Co., Inc.**

**FEDERAL TRADE COMMISSION**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Katherine Johnson  
Attorney, Bureau of Consumer Protection  
Date: \_\_\_\_\_

COUNSEL TO PROPOSED RESPONDENT:

APPROVED:

By: \_\_\_\_\_  
Mark D. Godler  
Kaye Scholer LLP  
250 West 55th Street  
New York, New York 10019-9710

By: \_\_\_\_\_  
James A. Kohm  
Associate Director, Enforcement Division  
Date: \_\_\_\_\_

T: (212) 836-7087  
F: (212) 836-6487  
Mark.Godler@kayescholer.com  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Thomas B. Pahl, Acting Director  
Bureau of Consumer Protection  
Date: \_\_\_\_\_

1623079

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:** **Maureen K. Ohlhausen, Acting Chairman**  
**Terrell McSweeney**

**In the Matter of**

**BENJAMIN MOORE & CO., INC.,**  
a corporation.

## Decision and Order

Docket No. C-\_\_\_\_\_

## DECISION

The Federal Trade Commission (“Commission”) initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission’s Bureau of Consumer Protection (“BCP”) prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violations of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order (“Consent Agreement”). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, Respondent admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission’s Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

### **Findings**

1. The Respondent is Benjamin Moore & Co., Inc, a New Jersey corporation with its principal office or place of business at 101 Paragon Drive, Montvale, New Jersey 07645.
2. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondent, and the proceeding is in the public interest.

### **ORDER**

#### **Definitions**

For purposes of this Order, the following definitions apply:

- A. “Clearly and conspicuously” means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:
  1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made through only one means.
  2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.
  3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.
  4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.
  5. On a product label, the disclosure must be presented on the principal display panel.
  6. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.
  7. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

8. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.
  9. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, “ordinary consumers” includes reasonable members of that group.
- B. “Close proximity” means that the disclosure is very near the triggering representation. In an interactive electronic medium (such as a mobile app or other computer program), a visual disclosure that cannot be viewed at the same time and in the same viewable area as the triggering representation, on the technology used by ordinary consumers, is not in close proximity. A disclosure made through a hyperlink, pop-up, interstitial, or other similar technique is not in close proximity to the triggering representation. A disclosure made on a different printed page than the triggering representation is not in close proximity.
- C. “Covered product” means any architectural coating applied to stationary structures, portable structures, and their appurtenances.
- D. “Volatile Organic Compound” (“VOC”) means any compound of carbon that participates in atmospheric photochemical reactions, but excludes carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate, and specific compounds that the EPA has determined are of negligible photochemical reactivity, which are listed at 40 C.F.R. Section 51.100(s).
- E. “Emission” means any compound that is emitted or produced during application, curing, or exposure of a covered product.
- F. “Trace” level of emission means:
1. A VOC has not been intentionally added to the covered product;
  2. Emission of the covered product does not cause material harm that consumers typically associate with emission, including harm to the environment or human health; and
  3. Emission of the covered product does not result in more than harmless concentrations of any compound higher than would be found under normal conditions in the typical residential home without interior architectural coating.
- G. “Certification” means any seal, logo, emblem, shield, or other insignia that expresses or implies approval or endorsement of any product, package, service, practice, or program, or any attribute thereof.
- H. “Respondent” means Benjamin Moore & Co., Inc. and its successor and assigns.

**I. Prohibited Misleading and Unsubstantiated Representations  
Regarding Emission and VOC Level of Covered Product**

**IT IS ORDERED** that Respondent, and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, or sale of any covered product must not make any representation, expressly or by implication, that the emission level of a covered product is zero, or that the VOC level of a covered product is zero, unless the representation is non-misleading, including that, at the time such representation is made, Respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that:

- A. The covered product's emission is zero micrograms per meter cubed and the covered product's VOC content is zero grams per liter; or
- B. The covered product does not emit or produce more than a trace level of emission.

For purposes of this Provision, "competent and reliable scientific evidence" means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.

**II. Prohibited Misleading and Unsubstantiated Representations  
Regarding Environmental and Health Claims**

**IT IS FURTHER ORDERED** that Respondent, and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, or sale of any covered product must not make any representation, expressly or by implication, including through the use of a product name, regarding:

- A. The emission of the covered product;
- B. The VOC level of the covered product;
- C. The odor of the covered product;
- D. Any other health benefit or attribute of, or risk associated with exposure to, the covered product, including those related to VOC, emission, or chemical composition; or
- E. Any other environmental benefit or attribute of the covered product, including those related to VOC, emission, or chemical composition,

unless the representation is non-misleading, including that, at the time such representation is made, Respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of this Provision, “competent and reliable scientific evidence” means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.

### **III. Notice to Dealers and Distributors**

**IT IS FURTHER ORDERED** that Respondent deliver as soon as practicable, but in no event later than 60 days after the effective date of this Order, a notice in the form shown in Attachment A to all of Respondent’s dealers and distributors, and all other entities to which Respondent provided point-of-sale advertising, including product labels, for any covered product identified in Attachment A. The notice required by this paragraph must not include any document or other enclosures other than those referenced in Attachment A.

### **IV. Prohibited Misleading Certification Marks**

**IT IS FURTHER ORDERED** that Respondent and Respondent’s officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, or sale of any covered product must not make any misrepresentation, expressly or by implication, regarding certifications, including:

- A. The fact that, or degree to which, a third party has, evaluated a product, package, service, practice, or program based on its environmental benefits or attributes; or
- B. That a certification is endorsed by an independent person or organization.

### **V. Disclosure of Material Connection**

**IT IS FURTHER ORDERED** that Respondent and Respondent’s officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, or sale of any product, package, certification, service, practice, or program, must not make any representation, in any manner, expressly or by implication, about any user or endorser of such product, package, certification, service, practice, or program unless Respondent discloses, clearly and conspicuously, and in close proximity to the representation, any unexpected material connection, when one exists, between such user or endorser and (1) the Respondent or (2) any other individual or entity affiliated with the product or service. For purposes of this Provision, “unexpected material connection” means any relationship that might materially affect the weight

or credibility of the testimonial or endorsement and that would not reasonably be expected by consumers.

## **VI. Means and Instrumentalities**

**IT IS FURTHER ORDERED** that Respondent, and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, or sale of any covered product, must not provide to others the means and instrumentalities with which to make, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names, any false, unsubstantiated, or otherwise misleading representation of material fact, including but not limited to any representation prohibited by Provisions I, II, IV, or V, above. For purposes of this Provision, “means and instrumentalities” shall mean any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any covered product, in or affecting commerce.

## **VII. Acknowledgments of the Order**

**IT IS FURTHER ORDERED** that Respondent obtain acknowledgments of receipt of this Order:

- A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.
- B. Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.
- C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 30 days after delivery, a signed and dated acknowledgment of receipt of this Order.

## **VIII. Compliance Report and Notices**

**IT IS FURTHER ORDERED** that Respondent make timely submissions to the Commission:

- A. Sixty days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (1) identify the primary physical, postal, and email address and telephone number, as designated points

of contact, which representatives of the Commission may use to communicate with Respondent; (2) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (3) describe the activities of each business; (4) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with the Order and a copy of the notice sent to dealers and distributors; and (5) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

- B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in any designated point of contact or the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including the creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.
- C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.
- D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: \_\_\_\_" and supplying the date, signatory's full name, title (if applicable), and signature.
- E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re Benjamin Moore, Docket No. \_\_\_\_\_.

## **IX. Recordkeeping**

**IT IS FURTHER ORDERED** that Respondent must create certain records and retain each such record for 5 years. Specifically, Respondent must create and retain the following records:

- A. Accounting records showing the revenues from all goods or services sold;
- B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

- C. Records of all consumer complaints concerning the subject matter of the Order , including complaints involving representations covered by Parts I, II, IV, or V of the Order, whether received directly or indirectly, such as through a third party, and any response;
- D. A copy of each unique advertisement or other marketing material making a representation subject to this Order;
- E. For 5 years from the date of the last dissemination of any representation covered by this Order:
  - 1. All materials that were relied upon in making the representation; and
  - 2. All tests, analyses, research, studies, or other evidence in Respondent's possession, custody, or control that contradicts, qualifies, or otherwise calls into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and
- F. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

#### **X. Compliance Monitoring**

**IT IS FURTHER ORDERED** that, for the purpose of monitoring Respondent's compliance with this Order:

- A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.
- B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.
- C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

## **XI. Order Effective Dates**

**IT IS FURTHER ORDERED** that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate 20 years from the date of its issuance (which is stated at the end of this Order, next to the Commission's seal), or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any provision in this Order that terminates in less than 20 years;
- B. This Order's application to any Respondent that is not named as a defendant in such complaint; and
- C. This Order if such complaint is filed after the Order has terminated pursuant to this provision.

If such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Donald S. Clark  
Secretary

SEAL:  
ISSUED:

*Attachment A: Notice to Dealers and Distributors*

[on Respondent letterhead]

[insert date]

IMPORTANT NOTICE ABOUT \_\_\_\_\_  
ADVERTISING AND MARKETING MATERIALS

[insert addressee name]

[insert addressee address used in the ordinary course of business]

Dear Dealer or Distributor,

In response to a complaint from the Federal Trade Commission, Benjamin Moore & Co., Inc. has agreed not to make claims that its paints contain zero VOCs (volatile organic compounds) or other harmful emissions, unless we can substantiate that the level is actually zero or otherwise comply with the settlement terms. We request that you immediately stop using existing \_\_\_\_\_ advertising and marketing materials that represent the emission level of any paint is zero, or that the VOC level of any paint is zero.

In addition, our in-house Green Promise certification mark did not adequately identify it as a self-certification or the specific characteristics of the certification.

We have included placards that you must display clearly and prominently next to the paint containers and at each point of sale to eliminate any misrepresentation to consumers. Enclosed are illustrations of how to properly place the placards. The placards must be displayed until you have sold all paint containers bearing the problematic claims.

We will make revised marketing materials available to you shortly. Should you have any questions about compliance with this notice, please contact [insert contact person]. In addition, you can obtain further information about the settlement by visiting [www.ftc.gov](http://www.ftc.gov) and searching for “Benjamin Moore.”

Sincerely,  
[name]

**LABEL UPDATE:  
Benjamin Moore's "Zero Emission"  
and "Zero VOC" Paints**

All "Zero Emission" and "Zero VOC" (volatile organic compound) paints emit chemicals during the painting process and while drying. Some of these chemicals can be harmful to people, especially to sensitive groups such as babies and those suffering from asthma or allergies.

- Benjamin Moore Natura® Waterborne Interior "Zero Emission" paints may emit chemicals for the first 4 hours after latest application.
- Benjamin Moore "Zero VOC" interior paints may emit chemicals for the first 14 days after application.

**LABEL UPDATE:**  
**Benjamin Moore's "Green Promise" Certification**

Benjamin Moore's Green Promise® designation is the Company's assurance that this product meets—and often exceeds—rigorous environmental and performance criteria regarding VOCs, emissions, application, washability, scrubbability, and packaging, while also delivering the premium levels of performance you expect from Benjamin Moore.

# EXHIBIT C



## SAFETY DATA SHEET

Revision Date: 20-Jun-2015

Revision Number: 1

### 1. PRODUCT AND COMPANY IDENTIFICATION

<b>Product Name</b>	<b>NATURA WATERBORNE INTERIOR PAINT EGGSHELL FINISH WHITE</b>
<b>Product Code</b>	<b>51301</b>
<b>Product Class</b>	WATER THINNED PAINT
<b>Color</b>	White
<b>Recommended use</b>	Paint
<b>Restrictions on use</b>	No information available

**Manufacturer**  
Benjamin Moore & Co.  
101 Paragon Drive  
Montvale, NJ 07645  
Phone: 855-724-6802  
www.benjaminmoore.com

**Emergency Telephone Number(s)**  
CHEMTREC (US): 800-424-9300  
CHEMTREC (outside US): (703)-527-3887

### 2. HAZARDS IDENTIFICATION

#### **Classification**

This chemical is not considered hazardous by the 2012 OSHA Hazard Communication Standard (29 CFR 1910.1200)

#### **Label elements**

Not a dangerous substance or mixture according to the Globally Harmonized System (GHS)

**Appearance** liquid

**Odor** little or no odor

#### **Hazards not otherwise classified (HNOC)**

Not Applicable

#### **Other information**

No information available

51301 - NATURA WATERBORNE INTERIOR PAINT  
EGGSHELL FINISH WHITE

Revision Date: 20-Jun-2015

**3. COMPOSITION INFORMATION ON COMPONENTS**

Chemical Name	CAS-No	Weight % (max)
Titanium dioxide	13463-67-7	25
Nepheline syenite	37244-96-5	10
Kaolin, calcined	92704-41-1	5
Silica, amorphous	7631-86-9	5

**4. FIRST AID MEASURES**

<b>General Advice</b>	No hazards which require special first aid measures.
<b>Eye Contact</b>	Rinse thoroughly with plenty of water for at least 15 minutes and consult a physician.
<b>Skin Contact</b>	Wash off immediately with soap and plenty of water removing all contaminated clothes and shoes.
<b>Inhalation</b>	Move to fresh air. If symptoms persist, call a physician.
<b>Ingestion</b>	Clean mouth with water and afterwards drink plenty of water. Consult a physician if necessary.
<b>Most Important Symptoms/Effects</b>	None known.
<b>Notes To Physician</b>	Treat symptomatically.

**5. FIRE-FIGHTING MEASURES**

<b>Suitable Extinguishing Media</b>	Use extinguishing measures that are appropriate to local circumstances and the surrounding environment.
<b>Protective Equipment And Precautions For Firefighters</b>	As in any fire, wear self-contained breathing apparatus pressure-demand, MSHA/NIOSH (approved or equivalent) and full protective gear.
<b>Specific Hazards Arising From The Chemical</b>	Closed containers may rupture if exposed to fire or extreme heat.
<b>Sensitivity To Mechanical Impact</b>	No
<b>Sensitivity To Static Discharge</b>	No
<b>Flash Point Data</b>	
Flash Point (°F)	Not applicable
Flash Point (°C)	Not applicable
Flash Point Method	Not applicable

51301 - NATURA WATERBORNE INTERIOR PAINT  
EGGSHELL FINISH WHITE

Revision Date: 20-Jun-2015

**Flammability Limits In Air****Lower Explosion Limit**  
**Upper Explosion Limit**Not applicable  
Not applicable**NFPA**      **Health:** 1      **Flammability:** 0      **Instability:** 0      **Special:** Not Applicable**NFPA Legend**0 - Not Hazardous  
1 - Slightly  
2 - Moderate  
3 - High  
4 - Severe*The ratings assigned are only suggested ratings, the contractor/employer has ultimate responsibilities for NFPA ratings where this system is used.**Additional information regarding the NFPA rating system is available from the National Fire Protection Agency (NFPA) at [www.nfpa.org](http://www.nfpa.org).***6. ACCIDENTAL RELEASE MEASURES**

**Personal Precautions**      Avoid contact with skin, eyes and clothing. Ensure adequate ventilation.

**Other Information**      Prevent further leakage or spillage if safe to do so.

**Environmental Precautions**      See Section 12 for additional Ecological Information.

**Methods For Clean-Up**      Soak up with inert absorbent material. Sweep up and shovel into suitable containers for disposal.

**7. HANDLING AND STORAGE**

**Handling**      Avoid contact with skin, eyes and clothing. Avoid breathing vapors, spray mists or sanding dust. In case of insufficient ventilation, wear suitable respiratory equipment.

**Storage**      Keep container tightly closed. Keep out of the reach of children.

**Incompatible Materials**      No information available

**8. EXPOSURE CONTROLS / PERSONAL PROTECTION****Exposure Limits**

Chemical Name	ACGIH	OSHA
Titanium dioxide	10 mg/m <sup>3</sup> - TWA	15 mg/m <sup>3</sup> - TWA
Nepheline syenite	N/E	5 mg/m <sup>3</sup> - TWA (nuisance dust)
Silica, amorphous	N/E	- (80)/(% SiO <sub>2</sub> ) mg/m <sup>3</sup> TWA 20 mppcf - TWA

**Legend**ACGIH - American Conference of Governmental Industrial Hygienists Exposure Limits  
OSHA - Occupational Safety & Health Administration Exposure Limits  
N/E - Not Established

51301 - NATURA WATERBORNE INTERIOR PAINT  
EGGSHELL FINISH WHITE

Revision Date: 20-Jun-2015

<b>Engineering Measures</b>	Ensure adequate ventilation, especially in confined areas.
<b>Personal Protective Equipment</b>	
<b>Eye/Face Protection</b>	Safety glasses with side-shields.
<b>Skin Protection</b>	Protective gloves and impervious clothing.
<b>Respiratory Protection</b>	In case of insufficient ventilation wear suitable respiratory equipment.
<b>Hygiene Measures</b>	Avoid contact with skin, eyes and clothing. Remove and wash contaminated clothing before re-use. Wash thoroughly after handling.

## 9. PHYSICAL AND CHEMICAL PROPERTIES

<b>Appearance</b>	liquid
<b>Odor</b>	little or no odor
<b>Odor Threshold</b>	No information available
<b>Density (lbs/gal)</b>	11.4 - 11.7
<b>Specific Gravity</b>	1.36 - 1.41
<b>pH</b>	No information available
<b>Viscosity (cps)</b>	No information available
<b>Solubility</b>	No information available
<b>Water Solubility</b>	No information available
<b>Evaporation Rate</b>	No information available
<b>Vapor Pressure</b>	No information available
<b>Vapor Density</b>	No information available
<b>Wt. % Solids</b>	55 - 65
<b>Vol. % Solids</b>	35 - 45
<b>Wt. % Volatiles</b>	35 - 45
<b>Vol. % Volatiles</b>	55 - 65
<b>VOC Regulatory Limit (g/L)</b>	0
<b>Boiling Point (°F)</b>	212
<b>Boiling Point (°C)</b>	100
<b>Freezing Point (°F)</b>	32
<b>Freezing Point (°C)</b>	0
<b>Flash Point (°F)</b>	Not applicable
<b>Flash Point (°C)</b>	Not applicable
<b>Flash Point Method</b>	Not applicable
<b>Flammability (solid, gas)</b>	Not applicable
<b>Upper Explosion Limit</b>	Not applicable
<b>Lower Explosion Limit</b>	Not applicable
<b>Autoignition Temperature (°F)</b>	No information available
<b>Autoignition Temperature (°C)</b>	No information available
<b>Decomposition Temperature (°F)</b>	No information available
<b>Decomposition Temperature (°C)</b>	No information available
<b>Partition Coefficient (n-octanol/water)</b>	No information available

## 10. STABILITY AND REACTIVITY

<b>Reactivity</b>	Not Applicable
<b>Chemical Stability</b>	Stable under normal conditions.

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<b>Conditions To Avoid</b>	Prevent from freezing.
<b>Incompatible Materials</b>	No materials to be especially mentioned.
<b>Hazardous Decomposition Products</b>	None under normal use.
<b>Possibility Of Hazardous Reactions</b>	None under normal conditions of use.

### Product Information

#### Information on likely routes of exposure

**Principal Routes of Exposure** Eye contact, skin contact and inhalation.

#### Acute Toxicity

**Product Information** No information available

#### Information on toxicological effects

**Symptoms** No information available

#### Delayed and immediate effects as well as chronic effects from short and long-term exposure

<b>Eye contact</b>	May cause slight irritation.
<b>Skin contact</b>	Substance may cause slight skin irritation.
<b>Inhalation</b>	May cause irritation of respiratory tract.
<b>Ingestion</b>	Ingestion may cause gastrointestinal irritation, nausea, vomiting and diarrhea.
<b>Sensitization:</b>	No information available
<b>Neurological Effects</b>	No information available.
<b>Mutagenic Effects</b>	No information available.
<b>Reproductive Effects</b>	No information available.
<b>Developmental Effects</b>	No information available.
<b>Target Organ Effects</b>	No information available.
<b>STOT - single exposure</b>	No information available
<b>STOT - repeated exposure</b>	No information available
<b>Other adverse effects</b>	No information available.
<b>Aspiration Hazard</b>	No information available

#### Numerical measures of toxicity

The following values are calculated based on chapter 3.1 of the GHS document

<b>ATEmix (oral)</b>	20464 mg/kg
<b>ATEmix (dermal)</b>	85332 mg/kg

#### Component

#### Acute Toxicity

##### Titanium dioxide

LD50 Oral: > 10000 mg/kg (Rat)

LD50 Dermal: > 10000 mg/m<sup>3</sup> (Rabbit)

LC50 Inhalation (Dust): > 6.82 mg/L (Rat, 4 hr.)

##### Kaolin, calcined

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LD50 Oral: > 5000 mg/kg (Rat) vendor data

Silica, amorphous

LD50 Oral: > 5000 mg/kg (Rat)

LD50 Dermal: 2,000 mg/kg (Rabbit)

LC50 Inhalation (Dust): > 2 mg/L

### Carcinogenicity

The information below indicates whether each agency has listed any ingredient as a carcinogen:.

Chemical Name	IARC	NTP	OSHA Carcinogen
Titanium dioxide	2B - Possible Human Carcinogen		Listed

• Although IARC has classified titanium dioxide as possibly carcinogenic to humans (2B), their summary concludes: "No significant exposure to titanium dioxide is thought to occur during the use of products in which titanium dioxide is bound to other materials, such as paint."

### Legend

IARC - International Agency for Research on Cancer

NTP - National Toxicity Program

OSHA - Occupational Safety & Health Administration

## 12. ECOLOGICAL INFORMATION

### Ecotoxicity Effects

The environmental impact of this product has not been fully investigated.

### Product Information

#### Acute Toxicity to Fish

No information available

#### Acute Toxicity to Aquatic Invertebrates

No information available

#### Acute Toxicity to Aquatic Plants

No information available

#### Persistence / Degradability

No information available.

#### Bioaccumulation / Accumulation

No information available.

#### Mobility in Environmental Media

No information available.

#### Ozone

No information available

### Component

#### Acute Toxicity to Fish

Titanium dioxide

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LC50: > 1000 mg/L (Fathead Minnow - 96 hr.)

**Acute Toxicity to Aquatic Invertebrates**

No information available

**Acute Toxicity to Aquatic Plants**

No information available

### 13. DISPOSAL CONSIDERATIONS

**Waste Disposal Method**

Dispose of in accordance with federal, state, provincial, and local regulations. Local requirements may vary, consult your sanitation department or state-designated environmental protection agency for more disposal options.

### 14. TRANSPORT INFORMATION

**DOT**

Not regulated

**ICAO / IATA**

Not regulated

**IMDG / IMO**

Not regulated

**International Inventories**

**TSCA: United States**

Yes - All components are listed or exempt.

**DSL: Canada**

Yes - All components are listed or exempt.

**Federal Regulations**

**SARA 311/312 hazardous categorization**

Acute Health Hazard	No
Chronic Health Hazard	No
Fire Hazard	No
Sudden Release of Pressure Hazard	No
Reactive Hazard	No

**SARA 313**

Section 313 of Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA). This product contains a chemical or chemicals which are subject to the reporting requirements of the Act and Title 40 of the Code of Federal Regulations, Part 372:

*None*

**Clean Air Act, Section 112 Hazardous Air Pollutants (HAPs) (see 40 CFR 61)**

This product contains the following HAPs:

*None*

**State Regulations**

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Revision Date: 20-Jun-2015

**State Right-to-Know**

Chemical Name	Massachusetts	New Jersey	Pennsylvania
Titanium dioxide	X	X	X
Silica, amorphous	X	X	X

**Legend**

X - Listed

**16. OTHER INFORMATION****HMIS**      **Health:** 1      **Flammability:** 0      **Reactivity:** 0      **PPE:** -**HMIS Legend**

0 - Minimal Hazard

1 - Slight Hazard

2 - Moderate Hazard

3 - Serious Hazard

4 - Severe Hazard

\* - Chronic Hazard

X - Consult your supervisor or S.O.P. for "Special" handling instructions.

*Note: The PPE rating has intentionally been left blank. Choose appropriate PPE that will protect employees from the hazards the material will present under the actual normal conditions of use.*

*Caution: HMIS® ratings are based on a 0-4 rating scale, with 0 representing minimal hazards or risks, and 4 representing significant hazards or risks. Although HMIS® ratings are not required on MSDSs under 29 CFR 1910.1200, the preparer, has chosen to provide them. HMIS® ratings are to be used only in conjunction with a fully implemented HMIS® program by workers who have received appropriate HMIS® training. HMIS® is a registered trade and service mark of the NPCA. HMIS® materials may be purchased exclusively from J. J. Keller (800) 327-6868.*

**WARNING!** If you scrape, sand, or remove old paint, you may release lead dust. LEAD IS TOXIC. EXPOSURE TO LEAD DUST CAN CAUSE SERIOUS ILLNESS, SUCH AS BRAIN DAMAGE, ESPECIALLY IN CHILDREN. PREGNANT WOMEN SHOULD ALSO AVOID EXPOSURE. Wear a NIOSH approved respirator to control lead exposure. Clean up carefully with a HEPA vacuum and a wet mop. Before you start, find out how to protect yourself and your family by contacting the National Lead Information Hotline at 1-800-424-LEAD or log on to [www.epa.gov/lead](http://www.epa.gov/lead).

**Prepared By**

Product Stewardship Department  
Benjamin Moore & Co.  
101 Paragon Drive  
Montvale, NJ 07645  
855-724-6802

**Revision Date:**

20-Jun-2015

**Revision Summary**

Change to Format

51301 - NATURA WATERBORNE INTERIOR PAINT  
EGGSHELL FINISH WHITE

Revision Date: 20-Jun-2015

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Disclaimer

The information contained herein is presented in good faith and believed to be accurate as of the effective date shown above. This information is furnished without warranty of any kind. Employers should use this information only as a supplement to other information gathered by them and must make independent determination of suitability and completeness of information from all sources to assure proper use of these materials and the safety and health of employees. Any use of this data and information must be determined by the user to be in accordance with applicable federal, provincial, and local laws and regulations.

**END OF SAFETY DATA SHEET**

# EXHIBIT D

the Internet questionnaire. Staff will also pretest the questionnaire with approximately 100 respondents to ensure that all questions are easily understood. Allowing for an extra three minutes for questions unique to the pretest, staff estimates that the pretest will take approximately 23 minutes. Cumulatively, those completing the questionnaire will require approximately 2,667 hours (8,000 persons  $\times$  20 minutes each), and those completing the pretest will require approximately 38 hours (100 respondents  $\times$  23 minutes each).

Staff is revising its overall estimate of burden to include those responders who do not complete the questionnaire and pretest. Staff projects that those who will prematurely end the process will do so in less than one minute. The staff anticipates that 60 percent of those invited to participate in the study will complete the questionnaire. Accordingly, the contractor might contact as many as 13,333 people to achieve the study's goal of surveying 8,000 respondents, which would result in an additional 89 hours total. [(13,333 total contacts—8,000 people completing the questionnaire)  $\times$  1 minute each]. For the pretest, the staff estimates that an additional 67 people will prematurely end the process, which totals an additional 1 hour [(167 total contacts—100 persons completing the pretest)  $\times$  1 minute each]. Cumulatively, complete and partial surveying of 13,333 people will total about 2,756 hours and complete and partial pretesting will total 39 hours, for an overall total of 2,795 hours. The cost per respondent should be negligible. Participation will not require start-up, capital, or labor expenditures.

#### IV. Analysis of Comments Received

As noted above, the Commission received two comments regarding the proposed collections of information. *Class Action Trolls, Inc.* requested updates as information becomes available on issues related to this study. Information will be made public as appropriate on *FTC.gov* and through other means. The *Individual Commenter* expressed support for the FTC's work in this area.

#### V. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before August 17, 2017. Write "Class Action Notice Consumer Perception Study, Project No. P024210" on your comment. Your comment—including your name and your state—will be placed on the public record of this

proceeding, including, to the extent practicable, on the public Commission Web site, at <https://www.ftc.gov/policy/public-comments>.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at <https://ftcpublic.commentworks.com/ftc/classactionnoticepra2>, by following the instructions on the web-based form. If this Notice appears at <http://www.regulations.gov/#/home>, you also may file a comment through that Web site.

If you file your comment on paper, write "Class Action Notice Consumer Perception Study, Project No. P024210" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC-5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610, Washington, DC 20024. If possible, please submit your paper comment to the Commission by courier or overnight service.

Comments on any proposed information collection requirements subject to review under the PRA should additionally be submitted to OMB. If sent by U.S. mail, they should be addressed to Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission, New Executive Office Building, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503. Comments sent to OMB by U.S. postal mail, however, are subject to delays due to heightened security precautions. Thus, comments instead can also be sent via email to [wlberante@omb.eop.gov](mailto:wlberante@omb.eop.gov).

Because your comment will be placed on the publicly accessible FTC Web site at <https://www.ftc.gov/>, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your

comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential"—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC Web site—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC Web site, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Web site to read this Notice. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before August 17, 2017. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, *see* <https://www.ftc.gov/site-information/privacy-policy>.

By direction of the Commission.

**Donald S. Clark,**  
Secretary.

[FR Doc. 2017-14976 Filed 7-17-17; 8:45 am]

BILLING CODE 6750-01-P

#### FEDERAL TRADE COMMISSION

[File No. 162 3079]

**Benjamin Moore & Co., Inc.; Analysis To Aid Public Comment**

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before August 10, 2017.

**ADDRESSES:** Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write: “In the Matter of Benjamin Moore & Co., Inc., File No. 1623079” on your comment, and file your comment online at <https://ftcpublic.commentworks.com/ftc/benjaminmooreconsent> by following the instructions on the web-based form. If you prefer to file your comment on paper, write “In the Matter of Benjamin Moore & Co., Inc., File No. 1623079” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Katherine E. Johnson (202–326–2185), Bureau of Consumer Protection, 600 Pennsylvania Avenue NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for July 11, 2017), on the World Wide Web, at <https://www.ftc.gov/news-events/commission-actions>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before August 10, 2017. Write “In the Matter of Benjamin Moore & Co., Inc., File No. 1623079” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at <https://www.ftc.gov/policy/public-comments>.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at <https://ftcpublic.commentworks.com/ftc/benjaminmooreconsent> by following the instructions on the web-based form. If this Notice appears at <http://www.regulations.gov/#!/home>, you also may file a comment through that Web site.

If you prefer to file your comment on paper, write “In the Matter of Benjamin Moore & Co., Inc., File No. 1623079” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible FTC Web site at <https://www.ftc.gov>, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or

confidential”—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC Web site—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC Web site, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Web site at <http://www.ftc.gov> to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before August 10, 2017. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

#### **Analysis of Agreement Containing Consent Order To Aid Public Comment**

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Benjamin Moore & Co., Inc. (“respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter involves respondent's marketing, sale, and distribution of purportedly "emission-free" paints. Emission is any compound emitted from paint during application or thereafter and includes volatile organic compounds (or VOCs). According to the FTC complaint, respondent made unsubstantiated representations that Natura paints: (1) Are emission-free; (2) are emission-free during or immediately after painting; (3) will not emit any chemical or substance, including VOCs, that causes material harm to consumers, including sensitive populations such as babies and allergy and asthma sufferers; and (4) will not emit any chemical or substance, including VOCs, during or immediately after painting, that causes material harm to consumers, including sensitive populations such as babies and allergy and asthma sufferers. The FTC also alleges that respondent used its Green Promise seal without adequately disclosing that respondent awarded the seal to its own product. Consumers likely interpret such seals as a claim that an independent third party certified the product. The FTC further alleges that respondent provided independent retailers with promotional materials containing the same claims it made to consumers. Thus, the complaint alleges that respondent engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains five provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I prohibits emission-free and VOC-free claims unless both content and emission are actually zero or at trace levels. The orders define "emission" to include all emissions (not just VOCs that cause smog). This definition reflects the Commission's Enforcement Policy Statement and consumer expectations: Consumers are likely concerned about the potential health effects from exposure to chemical emissions found in indoor air, not just VOCs that affect outdoor air quality. The order defines "trace level of emission" to mean (1) no intentionally added VOC, (2) emission of the covered product does not cause material harm that consumers typically associate with emission, including harm to the environment or human health, and (3) emission of the covered product does not result in more than harmless concentrations of any compound higher than would be found under normal conditions in the typical residential home without interior architectural coating. Part II prohibits misleading representations regarding emission, VOC levels, odor, and any general

environmental and health benefit of paints. The order requires competent and reliable scientific evidence to substantiate these representations. Parts IV and V prohibit respondent from misrepresenting third-party certifications and failing to adequately disclose a material connection. Part VI prohibits respondent from providing third parties with the means and instrumentalities to make false, unsubstantiated, or otherwise misleading representations of material fact regarding paints, including any representation prohibited by Parts I, II, IV or V.

To correct allegedly existing unsubstantiated zero emission and VOC claims and deceptive certification claims, Part III requires the respondent to send letters to its dealers and distributors, instructing them to place placards next to paint cans and at point of sale.

Parts VII through XI are reporting and compliance provisions. Part VII mandates that respondent acknowledge receipt of the order, distribute the order to certain employees and agents, and secure acknowledgments from recipients of the order. Part VIII requires that respondent submit compliance reports to the FTC within sixty (60) days of the order's issuance and submit additional reports when certain events occur. Part IX requires that respondent must create and retain certain records for five (5) years. Part X provides for the FTC's continued compliance monitoring of respondent's activity during the order's effective dates. Part XI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

If the Commission finalizes the agreement's proposed order, it plans to propose harmonizing with this order the consent orders issued in the PPG Architectural Finishes, Inc. (Docket No. C-4385) and The Sherwin-Williams Company (Docket No. C-4386) matters. Specifically, the Commission plans to issue orders to show cause why those matters should not be modified pursuant to Section 3.72(b) of the Commission Rules of Practice, 16 CFR 3.72(b).

The purpose of the analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

By direction of the Commission.

**Donald S. Clark,**  
Secretary.

[FR Doc. 2017-14972 Filed 7-17-17; 8:45 am]

**BILLING CODE 6750-01-P**

## FEDERAL TRADE COMMISSION

[File No. 162 3081]

### ICP Construction Inc.; Analysis To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before August 10, 2017.

**ADDRESSES:** Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write: "In the Matter of ICP Construction Inc., File No. 162-3081" on your comment, and file your comment online at <https://ftcpublic.commentworks.com/ftc/icpconstructionconsent> by following the instructions on the web-based form. If you prefer to file your comment on paper, write "In the Matter of ICP Construction Inc., File No. 162-3081" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Megan Gray (202-326-3408), Bureau of Consumer Protection, 600 Pennsylvania Avenue NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement

# EXHIBIT E



429 Fourth Avenue  
Law & Finance Building, Suite 1300  
Pittsburgh, PA 15219  
T: 412.281.8400  
F: 412.281.1007

29 Broadway, 24<sup>th</sup> Floor  
New York, NY 10006-3205  
T: 212.952.0014  
www.fdpklaw.com

*Writers' Emails:*  
[jkravec@fdpklaw.com](mailto:jkravec@fdpklaw.com)  
[wlison@fdpklaw.com](mailto:wlison@fdpklaw.com)

January 31, 2018

*via Certified Mail/Return Receipt Requested*

Michael M. Shearles  
Chief Executive Officer  
Benjamin Moore & Co.  
101 Paragon Drive  
Montvale, NJ 07645

Benjamin Moore & Co.  
c/o Corporation Service Company d/b/a CSC  
– Lawyers Incorporating Service  
2710 Gateway Oaks Drive, Ste. 150N  
Sacramento, CA 95833

**Re: Unlawful, False, and Misleading Labeling and Marketing of Benjamin Moore & Co.'s Natura Waterborne Interior Paints in Violation of California and New York Law**

Dear Mr. Shearles:

We, along with Anthony Vozzolo of Vozzolo, LLC, represent Howard Clark, Adrienne Andry (our "Clients"), as well as potential classes of California and New York consumers, who purchased Benjamin Moore & Co.'s ("Benjamin Moore") "Natura" brand interior paints (the "Products") that are unlawfully, falsely and misleadingly labeled, advertised, and promoted in violation of California and New York laws, and the U.S. Federal Trade Commission Act ("FTC Act"). As explained more fully herein, Benjamin Moore labels its Products with an unsubstantiated and unqualified "Zero Emissions" statement.<sup>1</sup> This letter serves as notice and pre-suit demand for all states that require pre-suit notice prior to filing an action, for remedial action related to the marketing and sale of the Products.

This letter shall serve as our Clients' pre-litigation notice and demand in accordance with the requirements of California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750–85, and N.Y. U.C.C. § 2-313. Accordingly, this letter is to demand that, in California and New York, Benjamin Moore immediately cease the false and misleading labeling, advertising, and promotion described herein; refrain from using labels, advertisements, and marketing materials that do not comply with California and New York law; and pay damages to consumers who purchased the Products. If you do not do so within thirty (30) days of receipt of this letter, one or more of our Clients may bring claims for deceptive practices under the CLRA, for false and

---

<sup>1</sup>At least the following Benjamin Moore Products are mislabeled as described in this letter: Benjamin Moore Natura Interior Paint – Flat, Benjamin Moore Natura Interior Paint – Eggshell, and Benjamin Moore Natura Interior Paint – Semi-Gloss. See Exhibit 1, which includes examples of labels, promotional materials, and screenshots from Benjamin Moore's website.

Michael M. Shearles, CEO  
 Benjamin Moore & Co.  
 January 31, 2018  
 Page 2

misleading advertising under California's Unfair Competition Law ("UCL"), Cal Bus. & Prof. Code §§ 17200-17209 and California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500-17509, for breach of express warranty under N.Y. U.C.C. § 2-313, and/or for deceptive business practices and false advertising under New York's General Business Law ("GBL") §§ 349 and 350, among other claims. All further communications intended for our Clients must be directed through this office.

Mr. Clark purchased two 1-gallon cans of Benjamin Moore Natura Interior Paint – Semi-Gloss in July 2015 from a Benjamin Moore retailer near his home in San Francisco, California, and Ms. Andry purchased two 1-gallon cans of Benjamin Moore Natura Interior Paint – Flat in April 2015 from a Benjamin Moore retailer near her home in Brooklyn, New York. Our Clients each relied on the Benjamin Moore Products' "Zero Emissions" labeling and marketing statements, and were induced by those statements to pay a premium for the Benjamin Moore Products over alternative paints having some emissions. Had the Products been labeled in compliance with applicable California and New York law, our Clients would not have been led to believe by virtue of the unlawful, false, and misleading "Zero Emissions" statements that the Products gave off no emissions at any time, including at the time of and up to 4 hours after application, and this would have affected their purchasing decisions.

Benjamin Moore's "Zero Emissions" statement is prominently displayed on the Products' labels. *See* Exhibit 1. As you are well aware, the Federal Trade Commission ("FTC") proposed to define the term "Emission" to mean any compound that is emitted or produced during application, curing, or exposure of interior paint products, and includes Volatile Organic Compounds ("VOCs"), which are separately defined as "any compound of carbon that participates in atmospheric photochemical reactions" other than those listed at 40 C.F.R. § 51.100(s). *See* FTC, *In the matter of Benjamin Moore & Co., Inc.*, Decision and Order 1623079 (Jul. 18, 2017), available at <https://www.ftc.gov/enforcement/cases-proceedings/162-3079/benjamin-moore-co-inc-matter> ("Proposed Decision and Order"), attached hereto as Exhibit 2; *see also* FTC, *In the Matter of Benjamin Moore & Co., Inc.: Analysis of Proposed Consent Order to Aid Public Comment*, File No. 162-3079, 2017 WL 3049127 (Jul. 17, 2017), [https://www.ftc.gov/system/files/documents/cases/benjamin\\_moore\\_analysis.pdf](https://www.ftc.gov/system/files/documents/cases/benjamin_moore_analysis.pdf) ("Emission is any compound emitted from paint during application or thereafter and includes volatile organic compounds (or VOCs) [...] 'emission' includes all emissions (not just VOCs that cause smog)" ("Analysis to Aid Public Comment"), attached hereto as Exhibit 3.

In its Proposed Decision and Order, the FTC prohibited Benjamin Moore from making unqualified "Zero Emissions" statements unless both content and emissions are actually zero, or emissions are at trace levels, beginning at application and thereafter, which "reflects [consumers'] concern about the potential health effects from exposure to chemical emissions found in indoor air, not just VOCs that affect outdoor air quality." *See* Analysis to Aid Public Comment. Therefore, Benjamin Moore could only make unqualified "Zero Emissions" statements based on competent and reliable scientific evidence that emission levels are actually zero or at trace levels. *See* Proposed Decision and Order. The Proposed Decision and Order's definition of "trace level" generally tracks the "trace amount" test codified in the FTC's "Green Guides," and requires that

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 Benjamin Moore & Co.  
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emissions at trace levels do not (1) “cause material harm that consumers typically associate with emission, including harm to the environment and human health,” and (2) that emissions do “not result in more than harmless concentrations of any compound higher than would be found under normal conditions in the typical residential home without interior architectural coating.” *See* Analysis to Aid Public Comment; *see also* 16 C.F.R. § 260.1 *et seq.* As such, the FTC justifiably took action because Benjamin Moore’s “Zero Emissions” statements, without qualification (e.g. zero emissions after X number of hours/days), are misleading as they falsely indicate to consumers they will not be exposed to potentially harmful emissions at the time of application, which is precisely when individuals are at the highest risk of exposure.

After the FTC issued its Proposed Decision and Order in July 2017, Benjamin Moore modified its Products’ labels to state “Zero emissions after 4 hours.” *See* Exhibit 4. If the Products’ emissions were truly zero or at permissible trace levels, Benjamin Moore presumably would not have modified its Emissions Statements to say the emissions are zero after 4 hours. Therefore, Benjamin Moore’s decision to update its “Zero Emissions” statement to say “Zero Emissions after 4 hours” constitutes an admission that its Products give off emissions at greater than trace levels for up to four hours after application. This admission of fact will remain even if the FTC’s Proposed Decision and Order is modified pending the FTC’s review of public comments. Thus, Benjamin Moore’s “Zero Emissions” statements, without the “after 4 hours” qualification, unlawfully, falsely and misleadingly conveyed to consumers that the Products are emission free, both during and immediately after application. A paint with zero emissions is material to consumers, including environmentalists, health-conscious people, and sensitive populations such as babies and allergy and asthma sufferers, who willing pay a premium for such products.

Benjamin Moore may argue that the Products give off zero emissions based on the California Department of Health’s Standard Method for the Testing and Evaluation of Volatile Organic Chemical Emissions from Indoor Sources Using Environmental Chambers, V. 1.1, 2010 (“Standard Method”). However, the purpose of the Standard Method is to determine *VOC emissions*, which are more narrowly defined. Given the Products’ labels said “Zero Emissions” and “Zero VOCs” right next to each other, it clearly implies that “Zero Emissions” is broader than just VOCs and encompasses all emissions. Moreover, while the front of Products’ label made no reference to the basis for the “Zero Emissions” statement, the back of the label referenced the Standard Method. Significantly, Benjamin Moore’s modified “Zero Emissions” statement disclosing emissions up to 4 hours references the same Standard Method as its prior back of label “Zero Emissions” statement that did not disclose emissions up to 4 hours, effectively admitting disclosure of emissions up to 4 hours is consistent with, if not required by, the Standard Method. *See* Exhibit 4. Thus, juxtaposing the “Zero Emissions” and “Zero VOCs” statements on the Products’ label (front and back alike) without disclosing the emissions up to 4 hours is inherently false and misleading, when in actuality the Products have emissions up to 4 hours as Benjamin Moore’s new labeling statements admit.

The materiality of labeling the Products with the “Zero Emissions” statement is obvious. The FTC has made similar misleading claims an enforcement priority, as evidenced by its previously approved final orders settling charges against Sherwin-Williams and PPG for making

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false and unsubstantiated claims that their products contained zero VOCs after tinting<sup>2</sup> and by entering into proposed settlement agreements with three of Benjamin Moore's competitors regarding their similar emissions statements.<sup>3</sup>

Furthermore, in its Analysis to Aid Public Comment the FTC opined that consumers are concerned about all chemical emissions, not limited to VOCs. According to the FTC:

Consumers are likely concerned about the potential health effects from exposure to chemical emissions found in indoor air, not just VOCs that affect outdoor air quality.

See Analysis to Aid Public Comment.

Pursuant to Section 5 of the FTC Act, 15 U.S.C. § 45, which prohibits "unfair or deceptive acts or practices in or affecting commerce," the FTC has the authority to take action if a paint manufacturer makes a claim that its products contains "Zero Emissions" when they give off emissions at greater than "trace levels."<sup>4</sup> Any violation of the FTC Act is a violation of California and New York law and, therefore, our Clients may justifiably bring actions against Benjamin Moore for its unlawful, false, and misleading "Zero Emissions" statements. See, e.g., *Rubenstein v. Neiman Marcus Group, LLC*, 687 Fed.Appx. 564, 2017 WL 1381147 (9<sup>th</sup> Cir. April 18, 2017) (alleged violation of FTC Guides is sufficient to state a claim under the UCL); *F.T.C. v. Lights of Am., Inc.*, 760 F. Supp. 2d 848, 854 (C.D. Cal. 2010) ("violation of the FTC Act are analogous to, if not entirely congruent with, claims for violation of California's CLRA and UCL..."); *Davis v. Ford Motor Credit Co.*, 179 Cal. App. 4th 581, 595, 101 Cal. Rptr. 3d 697, 708 (2009) (claims for unfair competition under the UCLs is analogous to the standard under the FTC Act); *State by Lefkowitz v. Colorado State Christian Coll. of Church of Inner Power, Inc.*, 76 Misc. 2d 50, 54, 346 N.Y.S.2d 482, 487 (N.Y. Sup. Ct. 1973) ("the legislative purpose in enacting §349 of the [GBL] was to follow in the steps of the [FTC] with respect to the interpretation of deceptive acts and practices outlawed in Section 5 of the [FTC Act]").

Thus, Benjamin Moore's conduct, including its false and misleading "Zero Emissions" statements without qualification when its Products give off more than trace amounts of emissions

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<sup>2</sup> <https://www.ftc.gov/news-events/press-releases/2013/03/ftc-approves-final-orders-settling-charges-against-sherwin>

<sup>3</sup> See FTC, Paint Companies Settle FTC Charges That They Misled Consumers; Claimed Products are Emission- and VOC-free and Safe for Babies and Other Sensitive Populations (Jul. 11, 2017); available at <https://www.ftc.gov/news-events/press-releases/2017/07/paint-companies-settle-ftc-charges-they-misled-consumers-claimed> (includes links to FTC Complaints against Benjamin Moore, ICP Construction, Inc., YOLO Colorhouse, LLC, and Imperial Paints, LLC).

<sup>4</sup> See, e.g., <https://www.ftc.gov/news-events/press-releases/2017/07/paint-companies-settle-ftc-charges-they-misled-consumers-claimed> ("The proposed orders' definition of "trace level of emissions," which generally tracks the Green Guides,' "trace amount" test, requires, in part, that emission at that level does not cause material harm that consumers typically associate with emission from the covered product, including harm to the environment or human health.")

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and emit chemicals after application for up to 4 hours as it now admits, is a violation of the FTC Act and amounts to a violation of California consumer protection statutes and New York's General Business Law §§ 349 and 350 for deceptive business practices and false advertising, respectively. With regard to Ms. Andry, in particular, because Ms. Andry will be able to show some price premium attributable to the Products' mislabeling, ***Benjamin Moore would be exposed to \$550 dollars in statutory damages under New York's GBL §§ 349 and 350 for each mislabeled or falsely advertised Product sold to consumers in New York.*** See *In re Scotts EZ Seed Litigation*, 2017 WL 3396433, \*\*5-6 (S.D. N.Y., August 8, 2017) (denying summary judgement for defendant and sustaining for a class-wide trial the class claims for \$550 per unit sold under New York GBL §§ 349 and 350). Specifically, some of Benjamin Moore's price premium is attributable to its unlawful, false, and misleading "Zero Emissions" statements and is susceptible of measurement across an entire class of New York consumers as required for class certification.

The Products clearly command a higher price than comparable "Zero VOC" paints that do not also claim to have "Zero Emissions." For example, Benjamin Moore charges less for its "Ben" paints, which are advertised as having zero VOCs, but do not claim to have zero emissions. Specifically, Benjamin Moore's "Ben" paints cost between \$30 and \$40 per gallon depending on the finish and color. Additionally, competitors Glidden and Behr market Zero VOC paints which retail for \$21 and \$25 per gallon, respectively. These are but a few examples of many alternative Zero VOC paints that are less expensive than the Products. In contract (during the past 4 years), Benjamin Moore's Natura Products have sold at a premium and cost between \$57 and \$69 per gallon.

We do not think it will be difficult to attribute on a class-wide basis at least some of that price premium to the "Zero Emissions" statements on Benjamin Moore's Products and its failure to inform consumers, including our Clients, that the Products produce emissions for up to four hours after application. See, e.g., *In re Scotts EZ Seed Litigation*, 304 F.R.D. 397, 413-414 (S.D.N.Y. 2015) (Damages expert provided enough evidence on plaintiffs' motion for class certification to satisfy the Court that a price premium existed related to defendants' "50% thicker" claim on their Scotts Turf Builder EZ Seed product, based on plaintiffs' testimony that they would not have purchased the product in absence of the claim, the predominance of the claim, and internal documents suggesting the existence of a premium based on the claim).

Because our Clients will be able to show some price premium attributable to the Products' mislabeling, Benjamin Moore would be exposed to \$550 dollars in statutory damages under New York's GBL §§ 349 and 350 for each mislabeled Product sold to consumers in New York. Moreover, the argument that a \$550 award for each Product is excessive for the Class since the Products cost much less has been rejected in *Scotts EZ Seed* on summary judgement and the case ordered to proceed to trial on class basis. *In re Scotts EZ Seed Litigation*, 2017 WL 3396433, \*\*5-6.

As discussed above, violations of the FTC Act, in turn, are also violations of California law and New York law. See, e.g., *Rubenstein*, 687 Fed.Appx. 564, 2017 WL 1381147 (9<sup>th</sup> Cir. April 18, 2017); *Lights of Am., Inc.*, 760 F. Supp. 2d at 854; *Davis*, 179 Cal. App. 4th at 595; *State by Lefkowitz*, 346 N.Y.S.2d at 487. Benjamin Moore's conduct violates California's CLRA in at

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least two ways. First, Cal. Civ. Code § 1770(a)(5) applies to misrepresentations regarding the characteristics and benefits of goods sold, *i.e.*, that they have “Zero Emissions” when they do not. Second, § 1770(a)(9) applies to goods advertised with the intent not to provide what is advertised, which also is described herein.

Additionally, Benjamin Moore’s mislabeling, false and misleading advertisement and promotion of the Products is a deceptive practice in violation of New York Gen. Bus. Law § 349, and false advertising in violation of New York Gen. Bus. Law § 350. It also gives rise to claims for breach of express warranty under N.Y. U.C.C. § 2-313 and Cal. Com. Code § 2313, and under common law of New York and California for unjust enrichment, fraudulent concealment and nondisclosure, and other statutory and common-law claims. For all of these claims as shown above, we will be able to show ascertainable class-wide damages by way of a price premium attributable to the “Zero Emissions” claim.

In accord with Cal. Civ. Code § 1782, N.Y. U.C.C. § 2-313 and New York’s General Business Law, and any other laws requiring pre-suit demand and notice,<sup>5</sup> our Clients demand that within thirty (30) days of receipt of this letter, Benjamin Moore take the following steps to cure the issues complained of herein:

1. Provide our Clients with an accounting of its sales and profits (both gross and net profits) for all of the Products sold within the past four (4) years in California and New York that were labeled in violation of applicable laws and regulations in the way described above;
2. Refrain from selling in California and New York Products mislabeled in any of the ways described above;
3. Pay damages to our Clients and to all other putative class members in California and New York, including restitutionary disgorgement of profits earned over the past four (4) years as a result of sales in California New York, as well as attorneys’ fees and expenses.

If we do not receive a response from you within thirty (30) days of receipt of this letter, we will assume that Benjamin Moore has no interest in curing the matters complained of herein, and one or more of our Clients may file a class action complaint seeking damages and/or injunctive<sup>6</sup> or equitable relief for these, and potentially other, violations of federal and state law.

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<sup>5</sup> This notice and demand complies with all states’ laws requiring a pre-suit demand on behalf of our Clients, any additional plaintiff(s) and/or class members in the event that this matter proceeds to nationwide class action litigation.

<sup>6</sup> Actions for injunctive relief by our Clients can be brought individually under California and New York law, respectively, without the need to certify a class. *McGill v. Citibank, N.A.*, 393 P.3d 85,

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Benjamin Moore & Co.  
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Thank you for your attention to this matter. If you wish to discuss this matter, please contact Joe Kravec at 412-281-8400.



Wyatt A. Lison  
Admitted in CA and PA

Sincerely,



Joseph N. Kravec, Jr.  
Admitted in PA and NY

Enclosures

cc: Mr. Howard Clark (via Electronic Mail w/o enc.)  
Ms. Adrienne Andry (via Electronic Mail w/o enc.)  
Anthony Vozzolo, Esquire (Admitted in NY and NJ) (via Electronic Mail)

# EXHIBIT 1



LEED V4  
Product Credit,  
Product Disclosure Credit

CHPS  
(Collaborative for High  
Performance Schools)

Master Painters Institute MF  
over non-combustible sur

**NO AIR ENTRY DURING APPLICATION AND DRYING.** Avoid contact with eyes  
or repeated contact with skin. Close container after each use. Wash thoroughly after

In case of eye contact, flush immediately with plenty of water for at least 15 minutes;  
thoroughly with soap and water. If symptoms persist, seek medical attention. If you  
difficulty breathing, leave the area to obtain fresh air. If continued difficulty is  
get medical attention immediately.

**IF SPILL -** Absorb with inert material and dispose of as specified under "Clean Up."

KEEP OUT OF REACH OF CHILDREN

**PROTECT FROM FREEZING**

Refer to Material Safety Data Sheet for  
additional health and safety information.



No harsh fumes - Zero emissions detected  
according to CDPH/EHLB/Standard Method  
V1.1, 2010



Zero emissions detected according to  
CDPH/EHLB/Standard Method V1.1, 2010



Zero VOCs according to EPA Method 24



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Gennex®  
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**BASE 1 513 1X**  
126 FLUID OUNCES 3.726 LITERS



## Benjamin Moore® Natura® Interior Waterborne Paint, Eggshell (513)

### USE

- Eggshell finish for walls and ceilings.
- Tint bases only with Benjamin Moore® Genex® Waterborne colorant.
- New or previously painted wallboard, plaster, masonry or wallpapered surfaces.
- Primed or previously painted wood or metal, new or coated acoustic ceilings.

### SURFACE PREPARATION

- Surfaces must be clean, dry, and free of wax, grease, scaling paint and mildew.
- Dull glossy areas.
- Remove wall covering if there is evidence of bleeding colors.



### PRIMING

- Self-priming for most surfaces. Consult your retailer if surface is water stained, smoke damaged, grease stained or very slick for special purpose primers.
- Certain deep custom colors may require a Deep Base Primer tinted to a special prescription formula to achieve the desired color.

### APPLICATION

- Paint when surface temperature is above 50° F (10° C).
- Stir thoroughly before use; apply one or two coats with brush, roller or spray.
- For best results, use a Benjamin Moore® premium applicator for latex paints.

### COVERAGE

(per gallon)

**375-425 sq. ft.**

(34.9-39.5 sq. meters) on smooth surfaces



### DRY TIME



### 30 minutes to the touch

Recoat after 1-2 hours.  
Painted surfaces can be washed after 2 weeks; high humidity may prolong drying time.

### CLEAN UP



### Use soap and water

**USE COMPLETELY OR DISPOSE OF PROPERLY.**  
Dry empty containers may be recycled in a can recycling program. Local disposal requirements vary; consult your sanitation department or state-designated environmental agency on disposal options.

### CERTIFICATIONS



In addition to the certifications above, Benjamin Moore's Green Promise® designation means that this product has been tested by independent third parties and meets or exceeds the published chemical restriction and performance criteria included in the standards shown below.

LEED®/LEED V4 Low Emitting Product Credit, Building Product Disclosure Credit	CHPS (Collaborative for High Performance Schools)	MPI Green Performance™ Master Painters Institute MPI # 144, 144 X-Green	Green Seal™ GS-11 2010
-------------------------------------------------------------------------------------	---------------------------------------------------------	----------------------------------------------------------------------------	---------------------------

**ENSURE FRESH AIR ENTRY DURING APPLICATION AND DRYING.** Avoid contact with eyes and prolonged or repeated contact with skin. Close container after each use. Wash thoroughly after handling.

**FIRST AID:** In case of eye contact, flush immediately with plenty of water for at least 15 minutes; for skin, wash thoroughly with soap and water. If symptoms persist, seek medical attention. If you experience difficulty breathing, leave the area to obtain fresh air. If continued difficulty is experienced, get medical attention immediately.

**IN CASE OF SPILL:** Absorb with inert material and dispose of as specified under "Clean Up."

**KEEP OUT OF REACH OF CHILDREN**

### PROTECT FROM FREEZING

Refer to Material Safety Data Sheet for additional health and safety information.

No harsh fumes - Zero emissions detected according to CDPH/EHLB/Standard Method VI.1, 2010

Zero emissions detected according to CDPH/EHLB/Standard Method VI.1, 2010

Zero VOCs according to EPA Method 24

**WARRANTY:** We warrant satisfactory results if used according to label directions. If not satisfied, return the unused portion to place of purchase with sales receipt. Material will be replaced or purchase price will be refunded. Since we have no control over surface preparation or application, THIS WARRANTY DOES NOT INCLUDE COST OF LABOR FOR APPLICATION OF PAINT. BENJAMIN MOORE SHALL IN NO EVENT BE LIABLE FOR INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES. SOME STATES DO NOT ALLOW THE EXCLUSION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE LIMITATIONS OR EXCLUSIONS CONTAINED IN THE ABOVE WARRANTY MAY NOT APPLY TO YOU. This warranty gives you specific legal rights. You may also have other rights which vary from state to state.

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All other marks are registered trademarks of their respective owners.

Genex® colorants U.S. Patent Nos. 7,402,627 & 7,750,074

Natura® U.S. Patent No. 8,507,579

Printed on 100% post-consumer paper

Made in USA





## GIRL'S BEDROOM

Natura comes in any color — so you can select a green option for your family that offers zero emissions and virtually no odor without having to compromise on color, or anything else.

## Natura® Zero VOC and Zero Emissions\* Paint



### Beautiful Color. Lasting Durability. None of the other stuff.

Creating a greener and safer life for you and your family should be simple. It should be easy to find environmentally sustainable products that offer exactly what you want - and nothing you don't.

At Benjamin Moore, we're committed to providing environmentally-friendly products that both protect and beautify your home. Natura paint goes beyond zero VOC to offer zero emissions and virtually no odor, so there is nothing standing between you and gorgeous rooms your whole family can enjoy. Its patented manufacturing process was also designed to ensure that there is no compromise on style or results. With Natura, what's good for your walls is even better for your family - and the planet.

[LEARN MORE »](#)

[FIND A STORE »](#)

## "Green Without Compromise®" - what Natura offers

- **Patented manufacturing process** - Natura is produced on a dedicated manufacturing line to ensure virtually no odor and low emissions.
- **Zero VOCs, zero emissions & virtually odorless** - allows you to return to using your space quickly.
- **Unlimited color selection** - going green doesn't mean giving up your options - you can get any Benjamin Moore color in Natura paint.
- **Paint and primer together** - for fast, easy application that requires less product overall.
- **Provides a durable, washable film** - so you can wash and scrub it as needed, and your walls will still look beautiful for years to come.



The Green Good Housekeeping Seal helps consumers choose products that demonstrate environmental responsibility on a wide range of criteria.

In order for a product to earn the Green GH Seal, the product must first earn the primary Good Housekeeping Seal, which signifies that the product has been reviewed by the experts at the Good Housekeeping Institute. It is then evaluated on a wide range of environmental criteria, including reduction of energy and water use in manufacturing, ingredient and product safety, packaging, distribution and the brand's corporate social responsibility. Natura was the first and is currently the only paint to earn the Green Good Housekeeping Seal in the Paints and Coatings category.

Among the features of Natura that stood out in the evaluation process were the absence of VOCs in Natura's base paint and tint colors and its patented manufacturing process - requiring less energy usage and producing less waste.



Products carrying the Green Promise designation indicate the Benjamin Moore assurance that this product is environmentally-friendly and meets - and even exceeds - the strictest industry standards and regulations, while maintaining the premium level of performance you expect from Benjamin Moore.



## AVAILABLE FINISHES



**THE BENJAMIN MOORE® ADVANTAGE:**

- Over 5,000 independent retailers and 200+ field & architectural representatives ready to help you
- A full selection of premium products for every job
- An architectural support program to help you specify the right products for any job
- On-site specification and inspection help for complicated or difficult jobs
- Value-added business programs and services for professional contractors
- The colors designers prefer

 Benjamin Moore® is a proud member of the U.S. Green Building Council, a nonprofit organization of building industry leaders working to make environmentally responsible, profitable, and healthy buildings.

Contact your Benjamin Moore representative to learn more about Waterborne Satin Impervo® and the Benjamin Moore advantage.

To find a representative in your area, visit [benjaminmoore.com](http://benjaminmoore.com) or call 1-866-708-9180.

**FEATURES**

- Zero VOCs\*
- Zero emissions with no harsh fumes\*\*
- Self-priming on most surfaces
- Dries fast for quicker return to service
- Excellent adhesion with a durable finish
- Available in over 3500 colors

TECHNICAL DATA						
FINISH	CODE	VEHICLE TYPE	VOLUME SOLIDS %	COVERAGE Sq.Ft./Gallon	DRY TIME	VOC Grams/liter
Flat	0512	100% Acrylic Latex	45.5	375-425	Set to the touch 30 mins., To re-coat 1 to 2 hours	0
Eggshell	0513	100% Acrylic Latex	44.0	375-425	Set to the touch 30 mins., To re-coat 1 to 2 hours	0
Semi-Gloss	0514	100% Acrylic Latex	37.0	375-425	Set to the touch 30 mins., To re-coat 1 to 2 hours	0

*Natura® Zero VOC primer is available under our Fresh Start® line of primers. Safety Data Sheets and Technical Data Sheets are available at [benjaminmoore.com](http://benjaminmoore.com).*

 **green promise**  
ZERO VOC

The Green Promise® designation is Benjamin Moore's assurance that its environmentally friendly coatings meet and often exceed the strictest industry standards.

Natura US Patent No. 8,507,579 • Gemini® colors US Patent No. 7,402,627 & 7,730,074

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\*Zero VOC according to EPA Method 24  
\*\*Zero emissions and/or no harsh fumes - No VOC emissions detected according to CDPH 014.8/Standard Method V1.1, 2010

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MD440523 8/2015

# NATURA®

PREMIUM INTERIOR PAINT



## SAFER FOR HOMES, BUILDINGS AND THE ENVIRONMENT.

  
**Benjamin Moore®**  
Paint like no other.™

# NATURA®

PREMIUM INTERIOR PAINT

## GREEN WITHOUT COMPROMISE™

Natura® continues Benjamin Moore's commitment to innovation by providing our most decorated and environmentally friendly paint. Natura® is safer for your family and the environment while still providing a durable, beautiful finish.

- Zero VOCs\* and zero emissions\*\* with no harsh fumes\*\*\*
- Self-priming on most surfaces
- Dries fast for quicker return to service
- Excellent adhesion with a durable finish

### Customer Profile:

- Consumers who seek an environmentally-friendly paint, and are unwilling to compromise on performance or color integrity
- Consumers looking for a paint that is more suitable for people with allergies
- Residential contractors needing a high performing green, zero VOC\* paint to meet their clients' needs
- Architects, designers, and specifiers seeking a premium quality product which meets LEED®, MPI and CHPS standards

**Available Sheens:** Flat, Eggshell and Semi-Gloss

**Available Colors:** Available in four bases. Can be tinted in thousands of colors.

**Cleanup:** Soap and water

**Recommended Use:** Natura® is ideal for residential or commercial applications where a zero-VOC\* paint with low emissions is desired. It's perfect for residential homes, hospitals, healthcare facilities, LEED® certified facilities and green buildings.

**Competitive Advantage:** "Certified asthma & allergy friendly™" now joins Natura's® other recognitions and accolades; Natura® is truly Green Without Compromise®.

### Awards and Certifications:





\*Zero VOC according to EPA Method 24

\*\*Zero emissions detected according to CDPH/EHLB/Standard Method V1.1, 2010

\*\*\*No harsh fumes - Zero emissions detected according to CDPH/EHLB/Standard Method V1.1, 2010

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customer service: 855-724-6802 Login  ENGLISH 

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For **Architects & Designers** For **Contractors**

**FOR Your Home:** Painting Ideas Explore Color Find Products Learn How Exterior Stains Shop Now Store Locator **Register Now**



## Natura® Zero-VOC and Zero Emissions\* Paint

Natura Waterborne Interior Paint continues Benjamin Moore's commitment to providing the most environmentally friendly paint. Natura goes beyond zero VOC to offer zero emissions, making it a safer paint for your family and the environment, all without compromise to performance or color selection. Natura is truly "Green Without Compromise®."



SAVE



PRINT



SHARE

## AVAILABLE IN



### Natura Waterborne Interior Paint - Flat Finish

Flat(512)

DOWNLOAD (PDF) :  
MSDS 512 (English) | MSDS 512 (Español)  
TDS 512 (English)

### FEATURES :

- Virtually odorless
- Zero VOC and zero emissions\*
- Quick return to service
- Now Certified **asthma & allergy friendly™**
- 100% Acrylic
- Provides a durable, washable film
- Spatter-resistant
- Unlimited color selection
- One hour recoat for quick return to service
- Carries the **Green Promise** designation
- Self-priming on most surfaces.
- **Voted 2015 Product of the Year**

*Survey of 40,000 people by TNS*  
*Interior Paint Category: Natura*

\* Zero VOC according to EPA Method 24. No VOC emissions detected according to CDPH/EHLB/standard method v1.1. 2010

### ADDITIONAL INFO :

**Available Colors :** All Colors, Ready Mix White

**Sheen (or Gloss) :** Flat

**Cleanup :** Soap and Water

**Resin Type :** Acrylic Latex

**Recommended Use :** Interior



### Natura Waterborne Interior Paint - Eggshell Finish

Eggshell(513)

DOWNLOAD (PDF) :

SDS 513-1X (English)	SDS 513-1X (Español)
SDS 513-2X (English)	SDS 513-2X (Español)
SDS 513-3X (English)	SDS 513-3X (Español)
SDS 513-4X (English)	SDS 513-4X (Español)
SDS 513-01 (English)	SDS 513-01 (Español)

TDS 513 (English)

## Eggshell

### FEATURES :

- Virtually odorless
- Zero VOC and zero emissions\*
- Quick return to service
- Now Certified **asthma & allergy friendly™**
- 100% Acrylic
- Provides a durable, washable film
- Spatter-resistant
- Unlimited color selection
- One hour recoat for quick return to service
- Carries the **Green Promise** designation.
- Self-priming on most surfaces.
- **Voted 2015 Product of the Year**

**Survey of 40,000 people by TNS**

**Interior Paint Category: Natura**

\* Zero VOC according to EPA Method 24. No VOC emissions detected according to CDPH/EHLB/standard method v1.1. 2010

### ADDITIONAL INFO :

**Available Colors :** All Colors, Ready Mix White

**Sheen (or Gloss) :** Eggshell

**Cleanup :** Soap and Water

**Resin Type :** Acrylic Latex

**Recommended Use :** Interior



**Natura Waterborne Interior  
Paint - Semi-Gloss Finish**

Semi-Gloss(514)

DOWNLOAD (PDF) :

[MSDS 514 \(English\)](#) | [MSDS 514 \(Español\)](#)

[TDS 514 \(English\)](#)

**Semi-Gloss**

**FEATURES :**

- Virtually odorless
- Zero VOC and zero emissions\*
- Quick return to service
- Now Certified **asthma & allergy friendly™**
- 100% Acrylic
- Provides a durable, washable film
- Spatter-resistant
- Unlimited color selection
- One hour recoat for quick return to service
- Carries the [Green Promise](#) designation.
- Self-priming on most surfaces.
- [Voted 2015 Product of the Year](#)

*Survey of 40,000 people by TNS*

*Interior Paint Category: Natura*

\* Zero VOC according to EPA Method 24. No VOC emissions detected according to CDPH/EHLB/standard method v1.1. 2010

**ADDITIONAL INFO :**

**Available Colors :** All Colors, Ready Mix White

**Sheen (or Gloss) :** Semi-Gloss

**Cleanup :** Soap and Water

**Resin Type :** Acrylic Latex

**Recommended Use :** Interior

# EXHIBIT 2

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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**In the Matter of**

**BENJAMIN MOORE & CO., INC.,**  
a corporation.

---

)  
) **Agreement Containing Consent Order**  
)

) File No. 1623079  
)  
)  
)

The Federal Trade Commission (“Commission”) has conducted an investigation of certain acts and practices of Benjamin Moore & Co., Inc. (“Proposed Respondent”). The Commission’s Bureau of Consumer Protection (“BCP”) has prepared a draft of an administrative Complaint (“draft Complaint”). BCP and Proposed Respondent, through their duly authorized officers, enter into this Agreement Containing Consent Order (“Consent Agreement”) to resolve the allegations in the attached draft Complaint through a proposed Decision and Order to present to the Commission, which is also attached and made a part of this Consent Agreement.

**IT IS HEREBY AGREED** by and between Proposed Respondent and BCP, that:

1. The Proposed Respondent is Benjamin Moore & Co., Inc., a New Jersey corporation with its principal office or place of business at 101 Paragon Drive, Montvale, New Jersey 07645.
2. Proposed Respondent neither admits nor denies any of the allegations in the Complaint, except as specifically stated in the Decision and Order. Only for purposes of this action, Proposed Respondent admits the facts necessary to establish jurisdiction.
3. Proposed Respondent waives:
  - a. Any further procedural steps;
  - b. The requirement that the Commission’s Decision contain a statement of findings of fact and conclusions of law; and
  - c. All rights to seek judicial review or otherwise to challenge or contest the validity of the Decision and Order issued pursuant to this Consent Agreement.
4. This Consent Agreement will not become part of the public record of the proceeding unless and until it is accepted by the Commission. If the Commission accepts this Consent Agreement, it, together with the draft Complaint, will be placed on the public record for 30 days and information about it publicly released. Acceptance does not constitute final approval, but it serves as the basis for further actions leading to final disposition of the matter. Thereafter, the

Commission may either withdraw its acceptance of this Consent Agreement and so notify Proposed Respondent, in which event the Commission will take such action as it may consider appropriate, or issue and serve its Complaint (in such form as the circumstances may require) and decision in disposition of the proceeding, which may include an Order. *See* Section 2.34 of the Commission's Rules, 16 C.F.R. § 2.34.

5. If this agreement is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to Commission Rule 2.34, the Commission may, without further notice to Proposed Respondent: (1) issue its Complaint corresponding in form and substance with the attached draft Complaint and its Decision and Order; and (2) make information about them public. Proposed Respondent agrees that service of the Order may be effected by its publication on the Commission's website (ftc.gov), at which time the Order will become final. *See* Rule 2.32(d). Proposed Respondent waives any rights it may have to any other manner of service. *See* Rule 4.4.

6. When final, the Decision and Order will have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other Commission orders.

7. The Complaint may be used in construing the terms of the Decision and Order. No agreement, understanding, representation, or interpretation not contained in the Decision and Order or in this Consent Agreement may be used to vary or contradict the terms of the Decision and Order.

8. Proposed Respondent agrees to comply with the terms of the proposed Decision and Order from the date it signs this Consent Agreement. Proposed Respondent understands that it may be liable for civil penalties and other relief for each violation of the Decision and Order after it becomes final.

**Benjamin Moore & Co., Inc.**

**FEDERAL TRADE COMMISSION**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Katherine Johnson  
Attorney, Bureau of Consumer Protection  
Date: \_\_\_\_\_

COUNSEL TO PROPOSED RESPONDENT:

APPROVED:

By: \_\_\_\_\_  
Mark D. Godler  
Kaye Scholer LLP  
250 West 55th Street  
New York, New York 10019-9710

By: \_\_\_\_\_  
James A. Kohm  
Associate Director, Enforcement Division  
Date: \_\_\_\_\_

T: (212) 836-7087  
F: (212) 836-6487  
Mark.Godler@kayescholer.com  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Thomas B. Pahl, Acting Director  
Bureau of Consumer Protection  
Date: \_\_\_\_\_

1623079

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:** **Maureen K. Ohlhausen, Acting Chairman**  
**Terrell McSweeney**

**In the Matter of**

**BENJAMIN MOORE & CO., INC.,**  
a corporation.

## Decision and Order

Docket No. C-

## DECISION

The Federal Trade Commission (“Commission”) initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission’s Bureau of Consumer Protection (“BCP”) prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violations of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order (“Consent Agreement”). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, Respondent admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission’s Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

### **Findings**

1. The Respondent is Benjamin Moore & Co., Inc, a New Jersey corporation with its principal office or place of business at 101 Paragon Drive, Montvale, New Jersey 07645.
2. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondent, and the proceeding is in the public interest.

### **ORDER**

#### **Definitions**

For purposes of this Order, the following definitions apply:

- A. “Clearly and conspicuously” means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:
  1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made through only one means.
  2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.
  3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.
  4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.
  5. On a product label, the disclosure must be presented on the principal display panel.
  6. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.
  7. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

8. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.
  9. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, “ordinary consumers” includes reasonable members of that group.
- B. “Close proximity” means that the disclosure is very near the triggering representation. In an interactive electronic medium (such as a mobile app or other computer program), a visual disclosure that cannot be viewed at the same time and in the same viewable area as the triggering representation, on the technology used by ordinary consumers, is not in close proximity. A disclosure made through a hyperlink, pop-up, interstitial, or other similar technique is not in close proximity to the triggering representation. A disclosure made on a different printed page than the triggering representation is not in close proximity.
- C. “Covered product” means any architectural coating applied to stationary structures, portable structures, and their appurtenances.
- D. “Volatile Organic Compound” (“VOC”) means any compound of carbon that participates in atmospheric photochemical reactions, but excludes carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate, and specific compounds that the EPA has determined are of negligible photochemical reactivity, which are listed at 40 C.F.R. Section 51.100(s).
- E. “Emission” means any compound that is emitted or produced during application, curing, or exposure of a covered product.
- F. “Trace” level of emission means:
1. A VOC has not been intentionally added to the covered product;
  2. Emission of the covered product does not cause material harm that consumers typically associate with emission, including harm to the environment or human health; and
  3. Emission of the covered product does not result in more than harmless concentrations of any compound higher than would be found under normal conditions in the typical residential home without interior architectural coating.
- G. “Certification” means any seal, logo, emblem, shield, or other insignia that expresses or implies approval or endorsement of any product, package, service, practice, or program, or any attribute thereof.
- H. “Respondent” means Benjamin Moore & Co., Inc. and its successor and assigns.

**I. Prohibited Misleading and Unsubstantiated Representations  
Regarding Emission and VOC Level of Covered Product**

**IT IS ORDERED** that Respondent, and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, or sale of any covered product must not make any representation, expressly or by implication, that the emission level of a covered product is zero, or that the VOC level of a covered product is zero, unless the representation is non-misleading, including that, at the time such representation is made, Respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that:

- A. The covered product's emission is zero micrograms per meter cubed and the covered product's VOC content is zero grams per liter; or
- B. The covered product does not emit or produce more than a trace level of emission.

For purposes of this Provision, "competent and reliable scientific evidence" means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.

**II. Prohibited Misleading and Unsubstantiated Representations  
Regarding Environmental and Health Claims**

**IT IS FURTHER ORDERED** that Respondent, and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, or sale of any covered product must not make any representation, expressly or by implication, including through the use of a product name, regarding:

- A. The emission of the covered product;
- B. The VOC level of the covered product;
- C. The odor of the covered product;
- D. Any other health benefit or attribute of, or risk associated with exposure to, the covered product, including those related to VOC, emission, or chemical composition; or
- E. Any other environmental benefit or attribute of the covered product, including those related to VOC, emission, or chemical composition,

unless the representation is non-misleading, including that, at the time such representation is made, Respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of this Provision, “competent and reliable scientific evidence” means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.

### **III. Notice to Dealers and Distributors**

**IT IS FURTHER ORDERED** that Respondent deliver as soon as practicable, but in no event later than 60 days after the effective date of this Order, a notice in the form shown in Attachment A to all of Respondent’s dealers and distributors, and all other entities to which Respondent provided point-of-sale advertising, including product labels, for any covered product identified in Attachment A. The notice required by this paragraph must not include any document or other enclosures other than those referenced in Attachment A.

### **IV. Prohibited Misleading Certification Marks**

**IT IS FURTHER ORDERED** that Respondent and Respondent’s officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, or sale of any covered product must not make any misrepresentation, expressly or by implication, regarding certifications, including:

- A. The fact that, or degree to which, a third party has, evaluated a product, package, service, practice, or program based on its environmental benefits or attributes; or
- B. That a certification is endorsed by an independent person or organization.

### **V. Disclosure of Material Connection**

**IT IS FURTHER ORDERED** that Respondent and Respondent’s officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, or sale of any product, package, certification, service, practice, or program, must not make any representation, in any manner, expressly or by implication, about any user or endorser of such product, package, certification, service, practice, or program unless Respondent discloses, clearly and conspicuously, and in close proximity to the representation, any unexpected material connection, when one exists, between such user or endorser and (1) the Respondent or (2) any other individual or entity affiliated with the product or service. For purposes of this Provision, “unexpected material connection” means any relationship that might materially affect the weight

or credibility of the testimonial or endorsement and that would not reasonably be expected by consumers.

#### **VI. Means and Instrumentalities**

**IT IS FURTHER ORDERED** that Respondent, and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, or sale of any covered product, must not provide to others the means and instrumentalities with which to make, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names, any false, unsubstantiated, or otherwise misleading representation of material fact, including but not limited to any representation prohibited by Provisions I, II, IV, or V, above. For purposes of this Provision, “means and instrumentalities” shall mean any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any covered product, in or affecting commerce.

#### **VII. Acknowledgments of the Order**

**IT IS FURTHER ORDERED** that Respondent obtain acknowledgments of receipt of this Order:

- A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.
- B. Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.
- C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 30 days after delivery, a signed and dated acknowledgment of receipt of this Order.

#### **VIII. Compliance Report and Notices**

**IT IS FURTHER ORDERED** that Respondent make timely submissions to the Commission:

- A. Sixty days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (1) identify the primary physical, postal, and email address and telephone number, as designated points

of contact, which representatives of the Commission may use to communicate with Respondent; (2) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (3) describe the activities of each business; (4) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with the Order and a copy of the notice sent to dealers and distributors; and (5) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

- B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in any designated point of contact or the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including the creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.
- C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.
- D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: \_\_\_\_\_" and supplying the date, signatory's full name, title (if applicable), and signature.
- E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re Benjamin Moore, Docket No. \_\_\_\_\_.

## **IX. Recordkeeping**

**IT IS FURTHER ORDERED** that Respondent must create certain records and retain each such record for 5 years. Specifically, Respondent must create and retain the following records:

- A. Accounting records showing the revenues from all goods or services sold;
- B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

- C. Records of all consumer complaints concerning the subject matter of the Order , including complaints involving representations covered by Parts I, II, IV, or V of the Order, whether received directly or indirectly, such as through a third party, and any response;
- D. A copy of each unique advertisement or other marketing material making a representation subject to this Order;
- E. For 5 years from the date of the last dissemination of any representation covered by this Order:
  - 1. All materials that were relied upon in making the representation; and
  - 2. All tests, analyses, research, studies, or other evidence in Respondent's possession, custody, or control that contradicts, qualifies, or otherwise calls into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and
- F. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

#### **X. Compliance Monitoring**

**IT IS FURTHER ORDERED** that, for the purpose of monitoring Respondent's compliance with this Order:

- A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.
- B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.
- C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

## **XI. Order Effective Dates**

**IT IS FURTHER ORDERED** that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate 20 years from the date of its issuance (which is stated at the end of this Order, next to the Commission's seal), or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any provision in this Order that terminates in less than 20 years;
- B. This Order's application to any Respondent that is not named as a defendant in such complaint; and
- C. This Order if such complaint is filed after the Order has terminated pursuant to this provision.

If such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Donald S. Clark  
Secretary

SEAL:  
ISSUED:

*Attachment A: Notice to Dealers and Distributors*

[on Respondent letterhead]

[insert date]

IMPORTANT NOTICE ABOUT \_\_\_\_\_  
ADVERTISING AND MARKETING MATERIALS

[insert addressee name]

[insert addressee address used in the ordinary course of business]

Dear Dealer or Distributor,

In response to a complaint from the Federal Trade Commission, Benjamin Moore & Co., Inc. has agreed not to make claims that its paints contain zero VOCs (volatile organic compounds) or other harmful emissions, unless we can substantiate that the level is actually zero or otherwise comply with the settlement terms. We request that you immediately stop using existing \_\_\_\_\_ advertising and marketing materials that represent the emission level of any paint is zero, or that the VOC level of any paint is zero.

In addition, our in-house Green Promise certification mark did not adequately identify it as a self-certification or the specific characteristics of the certification.

We have included placards that you must display clearly and prominently next to the paint containers and at each point of sale to eliminate any misrepresentation to consumers. Enclosed are illustrations of how to properly place the placards. The placards must be displayed until you have sold all paint containers bearing the problematic claims.

We will make revised marketing materials available to you shortly. Should you have any questions about compliance with this notice, please contact [insert contact person]. In addition, you can obtain further information about the settlement by visiting [www.ftc.gov](http://www.ftc.gov) and searching for “Benjamin Moore.”

Sincerely,  
[name]

**LABEL UPDATE:  
Benjamin Moore's "Zero Emission"  
and "Zero VOC" Paints**

All "Zero Emission" and "Zero VOC" (volatile organic compound) paints emit chemicals during the painting process and while drying. Some of these chemicals can be harmful to people, especially to sensitive groups such as babies and those suffering from asthma or allergies.

- Benjamin Moore Natura® Waterborne Interior "Zero Emission" paints may emit chemicals for the first 4 hours after latest application.
- Benjamin Moore "Zero VOC" interior paints may emit chemicals for the first 14 days after application.

**LABEL UPDATE:**  
**Benjamin Moore's "Green Promise" Certification**

Benjamin Moore's Green Promise® designation is the Company's assurance that this product meets—and often exceeds—rigorous environmental and performance criteria regarding VOCs, emissions, application, washability, scrubbability, and packaging, while also delivering the premium levels of performance you expect from Benjamin Moore.

# EXHIBIT 3

the Internet questionnaire. Staff will also pretest the questionnaire with approximately 100 respondents to ensure that all questions are easily understood. Allowing for an extra three minutes for questions unique to the pretest, staff estimates that the pretest will take approximately 23 minutes. Cumulatively, those completing the questionnaire will require approximately 2,667 hours (8,000 persons  $\times$  20 minutes each), and those completing the pretest will require approximately 38 hours (100 respondents  $\times$  23 minutes each).

Staff is revising its overall estimate of burden to include those responders who do not complete the questionnaire and pretest. Staff projects that those who will prematurely end the process will do so in less than one minute. The staff anticipates that 60 percent of those invited to participate in the study will complete the questionnaire. Accordingly, the contractor might contact as many as 13,333 people to achieve the study's goal of surveying 8,000 respondents, which would result in an additional 89 hours total. [(13,333 total contacts—8,000 people completing the questionnaire)  $\times$  1 minute each]. For the pretest, the staff estimates that an additional 67 people will prematurely end the process, which totals an additional 1 hour [(167 total contacts—100 persons completing the pretest)  $\times$  1 minute each]. Cumulatively, complete and partial surveying of 13,333 people will total about 2,756 hours and complete and partial pretesting will total 39 hours, for an overall total of 2,795 hours. The cost per respondent should be negligible. Participation will not require start-up, capital, or labor expenditures.

#### IV. Analysis of Comments Received

As noted above, the Commission received two comments regarding the proposed collections of information. *Class Action Trolls, Inc.* requested updates as information becomes available on issues related to this study. Information will be made public as appropriate on *FTC.gov* and through other means. The *Individual Commenter* expressed support for the FTC's work in this area.

#### V. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before August 17, 2017. Write "Class Action Notice Consumer Perception Study, Project No. P024210" on your comment. Your comment—including your name and your state—will be placed on the public record of this

proceeding, including, to the extent practicable, on the public Commission Web site, at <https://www.ftc.gov/policy/public-comments>.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at <https://ftcpublish.commentworks.com/ftc/classactionnoticepra2>, by following the instructions on the web-based form. If this Notice appears at <http://www.regulations.gov/#/home>, you also may file a comment through that Web site.

If you file your comment on paper, write "Class Action Notice Consumer Perception Study, Project No. P024210" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC-5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610, Washington, DC 20024. If possible, please submit your paper comment to the Commission by courier or overnight service.

Comments on any proposed information collection requirements subject to review under the PRA should additionally be submitted to OMB. If sent by U.S. mail, they should be addressed to Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission, New Executive Office Building, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503. Comments sent to OMB by U.S. postal mail, however, are subject to delays due to heightened security precautions. Thus, comments instead can also be sent via email to [wlberante@omb.eop.gov](mailto:wlberante@omb.eop.gov).

Because your comment will be placed on the publicly accessible FTC Web site at <https://www.ftc.gov/>, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your

comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential"—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC Web site—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC Web site, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Web site to read this Notice. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before August 17, 2017. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, *see* <https://www.ftc.gov/site-information/privacy-policy>.

By direction of the Commission.

**Donald S. Clark,**  
Secretary.

[FR Doc. 2017-14976 Filed 7-17-17; 8:45 am]

BILLING CODE 6750-01-P

#### FEDERAL TRADE COMMISSION

[File No. 162 3079]

**Benjamin Moore & Co., Inc.; Analysis To Aid Public Comment**

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before August 10, 2017.

**ADDRESSES:** Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the

**SUPPLEMENTARY INFORMATION** section below. Write: “In the Matter of Benjamin Moore & Co., Inc., File No. 1623079” on your comment, and file your comment online at <https://ftcpublic.commentworks.com/ftc/benjaminmooreconsent> by following the instructions on the web-based form. If you prefer to file your comment on paper, write “In the Matter of Benjamin Moore & Co., Inc., File No. 1623079” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Katherine E. Johnson (202–326–2185), Bureau of Consumer Protection, 600 Pennsylvania Avenue NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for July 11, 2017), on the World Wide Web, at <https://www.ftc.gov/news-events/commission-actions>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before August 10, 2017. Write “In the Matter of Benjamin Moore & Co., Inc., File No. 1623079” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at <https://www.ftc.gov/policy/public-comments>.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at <https://ftcpublic.commentworks.com/ftc/benjaminmooreconsent> by following the instructions on the web-based form. If this Notice appears at <http://www.regulations.gov/#!/home>, you also may file a comment through that Web site.

If you prefer to file your comment on paper, write “In the Matter of Benjamin Moore & Co., Inc., File No. 1623079” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible FTC Web site at <https://www.ftc.gov>, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or

confidential”—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC Web site—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC Web site, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Web site at <http://www.ftc.gov> to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before August 10, 2017. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

#### **Analysis of Agreement Containing Consent Order To Aid Public Comment**

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Benjamin Moore & Co., Inc. (“respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter involves respondent's marketing, sale, and distribution of purportedly "emission-free" paints. Emission is any compound emitted from paint during application or thereafter and includes volatile organic compounds (or VOCs). According to the FTC complaint, respondent made unsubstantiated representations that Natura paints: (1) Are emission-free; (2) are emission-free during or immediately after painting; (3) will not emit any chemical or substance, including VOCs, that causes material harm to consumers, including sensitive populations such as babies and allergy and asthma sufferers; and (4) will not emit any chemical or substance, including VOCs, during or immediately after painting, that causes material harm to consumers, including sensitive populations such as babies and allergy and asthma sufferers. The FTC also alleges that respondent used its Green Promise seal without adequately disclosing that respondent awarded the seal to its own product. Consumers likely interpret such seals as a claim that an independent third party certified the product. The FTC further alleges that respondent provided independent retailers with promotional materials containing the same claims it made to consumers. Thus, the complaint alleges that respondent engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains five provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I prohibits emission-free and VOC-free claims unless both content and emission are actually zero or at trace levels. The orders define "emission" to include all emissions (not just VOCs that cause smog). This definition reflects the Commission's Enforcement Policy Statement and consumer expectations: Consumers are likely concerned about the potential health effects from exposure to chemical emissions found in indoor air, not just VOCs that affect outdoor air quality. The order defines "trace level of emission" to mean (1) no intentionally added VOC, (2) emission of the covered product does not cause material harm that consumers typically associate with emission, including harm to the environment or human health, and (3) emission of the covered product does not result in more than harmless concentrations of any compound higher than would be found under normal conditions in the typical residential home without interior architectural coating. Part II prohibits misleading representations regarding emission, VOC levels, odor, and any general

environmental and health benefit of paints. The order requires competent and reliable scientific evidence to substantiate these representations. Parts IV and V prohibit respondent from misrepresenting third-party certifications and failing to adequately disclose a material connection. Part VI prohibits respondent from providing third parties with the means and instrumentalities to make false, unsubstantiated, or otherwise misleading representations of material fact regarding paints, including any representation prohibited by Parts I, II, IV or V.

To correct allegedly existing unsubstantiated zero emission and VOC claims and deceptive certification claims, Part III requires the respondent to send letters to its dealers and distributors, instructing them to place placards next to paint cans and at point of sale.

Parts VII through XI are reporting and compliance provisions. Part VII mandates that respondent acknowledge receipt of the order, distribute the order to certain employees and agents, and secure acknowledgments from recipients of the order. Part VIII requires that respondent submit compliance reports to the FTC within sixty (60) days of the order's issuance and submit additional reports when certain events occur. Part IX requires that respondent must create and retain certain records for five (5) years. Part X provides for the FTC's continued compliance monitoring of respondent's activity during the order's effective dates. Part XI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

If the Commission finalizes the agreement's proposed order, it plans to propose harmonizing with this order the consent orders issued in the PPG Architectural Finishes, Inc. (Docket No. C-4385) and The Sherwin-Williams Company (Docket No. C-4386) matters. Specifically, the Commission plans to issue orders to show cause why those matters should not be modified pursuant to Section 3.72(b) of the Commission Rules of Practice, 16 CFR 3.72(b).

The purpose of the analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

By direction of the Commission.

**Donald S. Clark,**  
Secretary.

[FR Doc. 2017-14972 Filed 7-17-17; 8:45 am]

**BILLING CODE 6750-01-P**

## FEDERAL TRADE COMMISSION

[File No. 162 3081]

### ICP Construction Inc.; Analysis To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before August 10, 2017.

**ADDRESSES:** Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write: "In the Matter of ICP Construction Inc., File No. 162-3081" on your comment, and file your comment online at <https://ftcpublic.commentworks.com/ftc/icpconstructionconsent> by following the instructions on the web-based form. If you prefer to file your comment on paper, write "In the Matter of ICP Construction Inc., File No. 162-3081" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Megan Gray (202-326-3408), Bureau of Consumer Protection, 600 Pennsylvania Avenue NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement

# EXHIBIT 4



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<p>1. Article Addressed to:</p> <p>Michael M. Shearles            Chief Executive Officer            Benjamin Moore &amp; Co.            101 Paragon Drive            Montvale, NJ 07645</p>		<p>B. Received by (Printed Name)  <i>Elliott Knott</i></p>	<p>C. Date of Delivery</p>
<p>2. Article Number (Transfer from service label)</p> <p>7015 3430 0000 8532 8463</p>		<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes            If YES, enter delivery address below: <input type="checkbox"/> No</p>	
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<p>1. Article Addressed to:</p> <p>Benjamin Moore &amp; Co.            c/o Corporation Service Company d/b/a CSC            – Lawyers Incorporating Service            2710 Gateway Oaks Drive, Ste. 150N            Sacramento, CA 95833</p>		<p>B. Received by (Printed Name)  <i>Catherine Webb</i></p>	<p>C. Date of Delivery</p>
<p>2. Article Number (Transfer from service label)</p> <p>7015 3430 0000 8532 8470</p>		<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes            If YES, enter delivery address below: <input type="checkbox"/> No</p>	
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