



CALIFORNIA DEPARTMENT OF  
FOOD & AGRICULTURE

A. G. Kawamura, Secretary

DMS Notice  
QC – 08 – 4

July 14, 2008

Discard: Retain

TO WEIGHTS AND MEASURES OFFICIALS

**SUBJECT: Kelly Moore Paint Company, Inc. Settlement**

Attached is a stipulated final judgment and permanent injunction involving recent litigation against Kelly Moore Paint Company, Inc. for overcharging in violation of Section 12024.2 of the California Business and Professions Code. We are again very pleased with the fine work done by this prosecution team and others representing the Department and county weights and measures programs.

The weights and measures lead prosecution counties should be sure to report these penalties in the County Monthly Report (CMR). According to the settlement Alameda, San Mateo, Santa Cruz, and Santa Clara Counties should determine who will report the overall settlement information. All participating counties should record their individual investigative cost reimbursements in the appropriate columns in the report. We are pleased with the level of involvement by jurisdictions throughout the state and thankful for the effective support and hard work from the District Attorneys.

Sincerely,

Ed Williams  
Director

Attachment

cc: QC Special Investigators  
Kevin Masuhara, Director, County Liaison Office  
Ron Flores, Program Supervisor



**ENDORSED FILED**  
**SAN MATEO COUNTY**  
JUL - 1 2008  
Clerk of the Superior Court  
By M. MARLOWE  
DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff,

v.

KELLY MOORE PAINT COMPANY, INC.,  
A California Corporation,

Defendant.

No. 474341

**FINAL JUDGMENT AND  
PERMANENT INJUNCTION  
PURSUANT TO STIPULATION**

Plaintiff, The People of the State of California, appearing through its attorneys, James P. Fox, District Attorney for the County of San Mateo, by John E. Wilson, Deputy District Attorney in Charge; Thomas J. Orloff, District Attorney for the County of Alameda, by Anthony Douglas, Deputy District Attorney; Dolores A. Carr, District Attorney for the County of Santa Clara, by Robin B. Wakshull, Deputy District Attorney, and Bob Lee, District Attorney for the County of Santa Cruz, by William Atkinson, Assistant District Attorney and Defendant, Kelly-Moore Paint Company, Inc., a California corporation (Kelly-Moore) appearing through its attorneys, McNamara, Dodge, Ney, Beatty, Slattery, Pfalzer, Borges & Brothers LLP, by Ann H. Larson, and

1 Plaintiff and Kelly-Moore having stipulated to the entry of this Final Judgment and Permanent  
2 Injunction Pursuant to Stipulation ("Final Judgment") without the taking of any proof and without  
3 this Final Judgment constituting evidence or an admission by Kelly-Moore regarding any issue of  
4 fact or law alleged in the complaint and without Kelly-Moore admitting any liability herein; and

5 The court having considered the pleadings;

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

7 **JURISDICTION**

8 1. This action is brought under California law, and this Court has jurisdiction of the subject  
9 matter and the parties.

10 **APPLICABILITY**

11 2. To the extent permitted by law, this Final Judgment is applicable to Kelly-Moore, its  
12 officers, directors, employees, agents, representatives, successors, assignees and all persons,  
13 partnerships, corporations, and other entities acting under, by, through, on behalf of, or in concert  
14 with Kelly-Moore with actual or constructive knowledge of this Judgment, and to the subsidiaries of  
15 Kelly-Moore, and their respective officers, directors, employees, agents, representatives, successors,  
16 assignees and all persons, partnerships, corporations, and other entities acting under, by, through, on  
17 behalf of, or in concert with any such subsidiary with actual or constructive knowledge of this Final  
18 Judgment (hereinafter collectively referred to as "Enjoined Persons").

19 **INJUNCTION**

20 3. Pursuant to Business and Professions Code sections 17203 and 17535, and subject to the  
21 provisions of Paragraph 11 below, Enjoined Persons, and each of them, are permanently enjoined and  
22 restrained from directly or indirectly engaging in any of the following acts or practices in Kelly-  
23 Moore's California stores (which, for purposes of this Final Judgment, includes Kelly-Moore stores  
24 opened after the entry of this Final Judgment):  
25



1 A. Making or causing to be made to the public any statement representing a price for  
2 an item offered for sale, including but not limited to statements made on a store shelf  
3 or sign relative to the item, and charging a greater price at the time the item is  
4 purchased, in violation of Business & Professions Code section 17500;

5 B. Charging at the time of sale of a commodity an amount greater than the lowest  
6 price that is advertised, posted, marked, displayed or quoted for that item, in violation  
7 of Business & Professions Code section 12024.2;

8 **COMPLIANCE PROGRAM**

9 4. Pursuant to Business and Professions Code sections 17203 and 17535, for a period of five  
10 (5) years, commencing on the date of entry of this final judgment, Kelly-Moore shall, to the extent it  
11 has not already done so, initiate and administer a program in every Kelly-Moore store in California  
12 (except as provided in Paragraph 4(G) to correct mislabeled shelf prices, incorrect in-store advertised  
13 prices, and inaccurate scanner prices. This program shall include, but need not be limited to, the  
14 following:

15 A. Designation of an employee for each store whose duties shall include those of  
16 price audit coordinator (hereinafter referred to as "PAC"). The PAC shall be  
17 responsible for maintaining in-store pricing accuracy, including, but not limited to,  
18 price scanner and merchandise shelving accuracy. The duties of the PAC shall  
19 include, but need not be limited to, conducting price accuracy audits, promptly  
20 correcting pricing errors and promptly communicating pricing errors to appropriate  
21 management personnel.

22 B. Designation of an employee whose duties include those of the corporate price audit  
23 coordinator (hereinafter referred to as "CPAC"). The CPAC shall be responsible for  
24 overseeing, with respect to all Kelly-Moore stores within California:

25 (1) The maintenance of pricing accuracy in the Price Scanning system;

1 (2) Price changes;

2 (3) Resolution of pricing discrepancies in the Kelly-Moore system or stores;

3 (4) Maintaining complete records of all price accuracy audits as required by  
4 paragraph 4.D.

5 C. The PAC shall conduct a price accuracy audit on a monthly basis, which shall  
6 include the review of not less than 50 items of merchandise by UPC offered for sale at  
7 that store. All pricing errors discovered during such audits shall be corrected in the  
8 store and those errors that appear likely to have occurred in other stores as well shall  
9 be promptly communicated to the CPAC, who shall take appropriate action statewide.

10 D. Upon the occurrence of any regular, sale or promotional price change covering one  
11 or more products in any Kelly-Moore store in California, the PAC or other qualified  
12 person at each store shall effectuate the price change(s) and as part of that process  
13 shall verify that all affected shelf prices and in-store signs are accurate. The PAC or  
14 other qualified person shall assure that any pricing inaccuracies are corrected  
15 promptly.

16 E. Kelly-Moore shall maintain at each store (or at corporate office) a record of price  
17 accuracy audits conducted pursuant to Paragraph 4(A), which record shall include: (1)  
18 the store number in which the review was conducted, (2) the date of the review, (3) the  
19 number of items reviewed, and (4) the name, employee number, or user identification  
20 of the person conducting the review. The record for each store shall be made available  
21 for inspection by any Weights and Measures official upon written request. (As used in  
22 this Judgment, the term "Weights and Measures official" shall mean any  
23 representative of the State of California Division of Measurement Standards,  
24 Department of Food and Agriculture, or any representative of a County Sealer or  
25



1 Director of a County Department of Agriculture, or any representative of the  
2 California Attorney General, or a district attorney.)

3 F. Kelly-Moore shall administer a "Scan-right" guarantee program as follows.

4 Whenever Kelly-Moore becomes aware at the time of sale that an item has scanned at  
5 a price higher than the lowest shelf or advertised price, Kelly-Moore shall provide one  
6 of the following remedies to the customer: (1) If the item's lowest advertised selling  
7 price is five dollars (\$5.00) or less, the item shall be given free to the customer; (2) If  
8 the item's lowest advertised selling price is greater than five dollars (\$5.00), the  
9 customer shall receive a five dollar (\$5.00) deduction from the lowest advertised  
10 selling price of the item. Where the transaction involves multiple same-item  
11 purchases, the customer shall receive the five-dollar reward on the first item only, and  
12 the lowest advertised, posted, marked or quoted price shall apply to the remainder of  
13 the items. Kelly-Moore shall inform customers of this program by posting signage  
14 which is clearly visible and legible to customers in the check stand area. The signs  
15 shall state in words or substance: "KELLY-MOORE SCAN-RIGHT GUARANTEE.  
16 AT KELLY-MOORE WE ARE COMMITTED TO ACCURATE PRICING! IF WE  
17 DO MAKE AN OVERCHARGE ERROR, WE WILL DO THE FOLLOWING\*:  
18 ITEMS UP TO \$5 WILL BE YOURS FREE. ITEMS OVER \$5 WILL BE \$5 OFF."

19 \*Includes first item on multiple same-item purchases.

20 G. Any records of Kelly-Moore's in-house procedures and audits required by or  
21 undertaken pursuant to this Final Judgment shall not be admissible in any subsequent  
22 proceeding against Enjoined Persons by the People of the State of California or others,  
23 except such records shall be admissible in subsequent proceedings by the People of the  
24 State of California for the sole purpose of establishing compliance or failure of  
25 compliance with the provision of this Paragraph 4.

1 **MONETARY RELIEF**

2 5. Kelly-Moore shall pay to Plaintiff as and for investigative costs the sum of THIRTY-FIVE  
3 THOUSAND THREE HUNDRED THIRTY-EIGHT DOLLARS AND TWENTY-FOUR CENTS  
4 (\$35,338.24) made payable to the investigating agencies in separate checks as follows:

5	California Department of Measurement Standards	\$ 5,027.70
6	Alameda County Department of Weights & Measures	\$ 2,348.50
7	Contra Costa County Department of Weights & Measures	\$ 560.00
8	Fresno County Department of Weights & Measures	\$ 109.00
9	Kern County Department of Weights & Measures	\$ 205.32
10	Marin County Department of Weights & Measures	\$ 985.15
11	Merced County Department of Weights & Measures	\$ 264.00
12	Monterey County Department of Weights & Measures	\$ 867.50
13	Napa County Department of Weights & Measures	\$ 528.00
14	Placer County Department of Weights & Measures	\$ 150.00
15	San Joaquin County Department of Weights & Measures	\$ 1,092.90
16	San Mateo County Department of Weights & Measures	\$ 1,400.30
17	Santa Clara County Department of Weights & Measures	\$19,074.59
18	Santa Cruz County Department of Weights & Measures	\$ 780.00
19	Sonoma County Department of Weights & Measures	\$ 745.86
20	Stanislaus County Department of Weights & Measures	\$ 757.03
21	Sutter County Department of Weights & Measures	\$ 350.39
22	Tulare County Department of Weights & Measures	\$ 92.00

23 6. Recognizing the infeasibility of identifying injured consumers who suffered actual loss, the  
24 impracticality of providing direct restitution to said consumers, and the disproportionate cost of  
25 making restitution to individual consumers, which would far exceed the benefit consumers would



1 gain, the parties agree that Kelly-Moore shall pay, pursuant to Business and Professions Code  
2 sections 17203 and 17535, *cy pres* restitution in the sum of THIRTY-TWO THOUSAND EIGHT  
3 HUNDRED DOLLARS (32,800.00). Said *cy pres* restitution shall be paid to the Consumer  
4 Protection Prosecution Trust Fund established in the case of *People v. ITT Consumer Financial*  
5 *Corporation* (Alameda Superior Court No. 656038-0). The payment required under this paragraph  
6 shall be made by one certified check payable to the "Consumer Protection Prosecution Trust Fund"  
7 and delivered to the San Mateo County District Attorney's Office.

8           7. Pursuant to Business and Professions Code sections 17206 and 17536, upon the filing of  
9 this Stipulated Final Judgment, Defendant Kelly-Moore shall pay to Plaintiff FIVE HUNDRED  
10 THOUSAND DOLLARS (\$500,000): \$400,000 shall be allocated to civil penalties and \$100,000  
11 shall be allocated to costs of prosecution. These amounts shall be distributed in equal portions by  
12 four separate checks made payable as follows:

13           District Attorney of San Mateo County	\$125,000
14           District Attorney of Alameda County	\$125,000
15           District Attorney of Santa Clara County	\$125,000
16           District Attorney of Santa Cruz County	\$125,000

17           8. Upon signing of the Stipulation for Entry of Stipulated Final Judgment, Defendant Kelly-  
18 Moore shall deliver to John E. Wilson, Deputy District Attorney in Charge, Office of the District  
19 Attorney of San Mateo County, 400 County Center, 3<sup>rd</sup> floor, Redwood City, California 94063, the  
20 separate checks enumerated in paragraphs 5 and 6 above, and a check in the amount of \$320.00  
21 payable to the Clerk of the Superior Court for filing fees. Defendant shall deliver to John E. Wilson  
22 the four checks enumerated in paragraph 7 above on July 14, 2008.

23           9. Except as otherwise expressly provided herein, each party shall bear its own attorney's  
24 fees and costs.



1 10. Plaintiff agrees not to seek any further relief relating to the matters alleged in the  
2 Complaint. The parties agree that the terms of this Final Judgment are intended to provide full  
3 statewide relief to the People of California and individuals who were overcharged at Kelly-Moore  
4 during the period from January 1, 2004 through the entry of this Final Judgment, and that the terms of  
5 this Final Judgment are full, fair and adequate in that regard.

6 **RETENTION OF JURISDICTION**

7 11. The parties waive the right to appeal this Judgment both as to form and content.

8 12. Jurisdiction is retained for purpose of enabling any party to this Judgment to apply to the  
9 court at any time for such further orders and directions as are necessary or appropriate for carrying  
10 out this Judgment, for the modification of any of the injunctive provisions herein, for the enforcement  
11 of compliance herewith and for punishment of violations hereof.

12 13. This Judgment shall take effect immediately upon entry hereof.

13 Dated:

**JUL -1 2008**

**BETH LABSON FREEMAN**

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16 JUDGE OF THE SUPERIOR COURT  
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