

**ELECTRONICALLY
FILED**
*Superior Court of California,
County of San Francisco*
FEB 10 2015
Clerk of the Court
BY: ROMY RISK
Deputy Clerk

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO**

YSIDRO LIMON, SR.,)	Case No. CGC-15-276378
)	
Plaintiff,)	
)	DEFENDANT KELLY-MOORE PAINT
vs.)	COMPANY, INC.'S ANSWER TO
)	PLAINTIFF'S COMPLAINT FOR PERSONAL
AMCORD, INC., et al)	INJURY - ASBESTOS
)	
Defendants.)	Complaint Filed: January 2, 2015
)	Trial Date: Not Set
)	

The Kelly-Moore Paint Company, Inc., answering solely on its own behalf and for no other party or entity, files this general denial under *Code of Civil Procedure* sections 431.30(d) and denies each and every, all and singular of the viable allegations in Plaintiff's Complaint, and further specifically denies it is responsible in any way for Plaintiff's claimed injuries. Kelly-Moore also specifically denies any liability or fault whatsoever with respect to the matters complained of in Plaintiff's Complaint, as it has been improperly sued in this action.

Kelly-Moore reserves the right to a trial by jury.

Kelly-Moore alleges the following affirmative defenses:

1 **FAILURE TO STATE A CAUSE OF ACTION**

2 1. Plaintiff's Complaint fails to state a cause of action upon which relief may be granted.

3 **STATUTE OF LIMITATIONS**

4 2. Kelly-Moore alleges on information and belief that:

5 A. Plaintiff's Complaint is barred by the applicable statute of limitations under
6 *Code of Civil Procedure* sections 355.1, 339, 340.2, 343, 353.1, or 474 and California Commercial
7 Code section 2725; or

8 B. The causes of action in Plaintiff's Complaint arose outside the State of
9 California while Plaintiff was a non-resident, under the applicable statutes of limitation or statutes of
10 repose where Plaintiff was then residing or working, and Plaintiff's Complaint is barred by the
11 provisions of those statutes and by section 361 of the California *Code of Civil Procedure*.

12 **ASSUMPTION OF RISK**

13 3. Kelly-Moore alleges on information and belief that Plaintiff voluntarily and
14 knowingly assumed the alleged risks and hazards incident to the alleged operations, acts, and
15 conduct at the times and places alleged in Plaintiff's Complaint, and Plaintiff's acts proximately
16 caused and contributed to Plaintiff's alleged injuries and damages, if any.

17 **FAILURE TO FOLLOW WARNINGS**

18 4. Kelly-Moore alleges that Plaintiff was advised, informed, and warned of any potential
19 hazards or damages associated with the normal or foreseeable use, handling, and storage of the
20 products, substances, and equipment described in Plaintiff's Complaint, and Plaintiff failed to follow
21 the warnings.

22 **COMPARATIVE NEGLIGENCE**

23 5. Kelly-Moore alleges upon information and belief that:

24 A. At the time and places mentioned in Plaintiff's Complaint, Plaintiff was
25 careless and negligent, and this carelessness and negligence caused and contributed to any injuries
26 and damages allegedly sustained by Plaintiff.

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1 B. In the event of any judgment or verdict in favor of Plaintiff, the judgment or
2 verdict must be reduced in direct proportion to the Plaintiff's carelessness and negligence, if any.

3 **CONDUCT OF OTHERS**

4 6. Kelly-Moore alleges that any loss, injury, or damage to Plaintiff was proximately
5 caused or contributed to by the negligent or other tortious acts, omissions, or fault of third parties
6 that Kelly-Moore neither controlled nor had the right to control, and that no particular damages of
7 Plaintiff were caused by Kelly-Moore's acts or omissions.

8 **NOT A SUCCESSOR-IN-INTEREST**

9 7. Kelly-Moore alleges that it has no liability for the acts, omissions or otherwise of any
10 other defendant or any other entity because Kelly-Moore did not become legally responsible for the
11 acts of any such defendant or entity given the facts and circumstances of the pertinent transactions
12 and never was, nor is, a successor-in-interest, a successor-in-liability or an alternate entity for any
13 other user, manufacturer, supplier, seller, distributor or premises holder relating to asbestos or
14 asbestos-containing products.

15 **PROPOSITION 51**

16 8. Kelly-Moore alleges that there are other persons, parties or defendants who are at
17 fault and whose conduct proximately caused Plaintiff's injuries, if any. If Kelly-Moore is found
18 responsible to Plaintiff, which Kelly-Moore expressly denies, Kelly-Moore is only liable for its
19 proportionate share of non-economic damages as set forth in *Civil Code* section 1431.2.

20 **MODIFICATION OR ALTERATION OF PRODUCT**

21 9. Kelly-Moore alleges the products that allegedly injured Plaintiff were altered,
22 changed, or otherwise modified by parties, individuals, or entities other than Kelly-Moore, and these
23 modifications, changes or alterations were a proximate cause of any damages alleged by Plaintiff.

24 **MISUSE AND ABUSE**

25 10. Before and at the time of the alleged injuries, on information and belief, Kelly-Moore
26 alleges that the products which allegedly injured Plaintiff were misused and abused and were not
27 being used in their intended manner. This misuse and abuse caused and contributed to the Plaintiff's
28 injuries and damages, if any.

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NOT A SUBSTANTIAL FACTOR

11. Kelly-Moore denies that any product for which Kelly-Moore is responsible was a substantial factor in causing Plaintiff's damages.

NO EXPOSURE

12. Kelly-Moore denies Plaintiff was exposed to any product manufactured or sold by Kelly-Moore, but if he was, the exposure was so minimal as to be incapable of causing the injury, damage, or loss complained of.

FAILURE TO MITIGATE DAMAGES

13. Kelly-Moore alleges that Plaintiff failed to mitigate his losses, injuries, or damages and is barred from recovering any damages that could have been avoided by reasonable mitigation efforts.

LACK OF NOTICE

14. Kelly-Moore alleges that Plaintiff has failed to give reasonable, timely, sufficient, and adequate notice to Kelly-Moore of the alleged liability, damage, or injury, if any.

LACHES

15. Kelly-Moore alleges that Plaintiff has unreasonably delayed filing this case without good cause. This delay has directly resulted in prejudice to Kelly-Moore, and this action is barred by laches.

UNCLEAN HANDS

16. Kelly-Moore alleges that Plaintiff is precluded from maintaining any cause of action against Kelly-Moore because Plaintiff's actions preclude equitable relief under the doctrine of unclean hands.

SOPHISTICATED USER

17. At all relevant times, Kelly-Moore alleges that Plaintiff's employer(s), because of the advice, information, warnings, and use, handling, and storage information given to him, and because of their own long-standing and continuous experience with the products, substances, and equipment referred to in Plaintiff's Complaint, were sophisticated users, handlers, and storers of any and all products, substances, and equipment. As such, Plaintiff's employer(s) acquired a separate and

1 affirmative duty to warn, advise and inform Plaintiff of any potential harmful effects from the
2 mishandling, misstorage or misuse of any injury-producing products. The employers' failure to
3 provide a safe workplace or warn Plaintiff was a superseding and intervening cause of Plaintiff's
4 injuries, if any. Additionally, because Plaintiff was a user who was fully aware of any hazards
5 associated with the products he worked with, Kelly-Moore had no duty to warn him of dangers of
6 which he was already aware. Further, Plaintiff's election to work with and around the products that
7 allegedly injured Plaintiff, without taking any precautions to protect his health and safety was a
8 superseding cause of Plaintiff's injuries, if any.

9 **NO WARRANTY**

10 18. Kelly-Moore gave no warranties, either express or implied, to Plaintiff, and neither
11 Plaintiff nor anyone else ever notified Kelly-Moore of any claim of breach of warranty that resulted
12 in Plaintiff's alleged injuries.

13 **LACK OF PRIVITY**

14 19. At all times and places mentioned in Plaintiff's Complaint, Kelly-Moore alleges that
15 Plaintiff was not in privity of contract with Kelly-Moore and is therefore barred from asserting a
16 warranty claim against Kelly-Moore.

17 **VAGUENESS OF DEFECT STANDARDS**

18 20. The State of California's judicially created definitions of "manufacturing" and
19 "design defects" and the standards for determining whether there has been an actionable failure to
20 warn are unconstitutional in that, among other things, they are void for vagueness and place an
21 undue burden upon interstate commerce. They also constitute an impermissible effort to regulate in
22 an area that has previously been preempted by the federal government.

23 **NO MARKET SHARE OR ENTERPRISE LIABILITY**

24 21. Kelly-Moore alleges that each and every cause of action of Plaintiff's Complaint fails
25 to state facts sufficient to constitute a cause of action under *Sindell*, "market share", or any theory of
26 enterprise liability. Kelly-Moore further alleges that Plaintiff has failed to join as Defendants in this
27 action the producers of a substantial market share of the product or products which allegedly injured
28 Plaintiffs.

1 **WORKERS' COMPENSATION — EXCLUSIVE REMEDY**

2 22. Kelly-Moore alleges that:

3 A. Plaintiff has received or will receive disability and medical benefits under a
4 workers' compensation law, or similar laws, from Plaintiff's employers or former employers or their
5 workers' compensation or similar insurers, on account of the injuries and damages allegedly
6 sustained by Plaintiff which give rise to this lawsuit, and therefore Plaintiff's claim is barred by the
7 statute of limitations per 45 U.S.C. section 56 and the exclusive remedy provisions of California
8 Labor Code section 3601, et seq.;

9 B. At the time of any alleged injury, each and every one of Plaintiff's employers
10 and former employers were careless and negligent in and about the matters alleged in Plaintiff's
11 Complaint, and the carelessness and negligence of each and every of the employers contributed
12 directly and proximately to any alleged injuries or damages sustained by Plaintiff; and

13 C. Any judgment or verdict that might be rendered in favor of Plaintiff should be
14 reduced by the amount of all the payments by the employers or insurers, and that each of the
15 employers or insurers should be barred from any recovery by lien or otherwise in connection with
16 this matter under the authority of *Witt v. Jackson*, 57 Cal.2d 57 [17 Cal.Rptr. 369, 360 P.2d 641]
17 (1961).

18 **STATE OF THE ART**

19 23. The state of the medical, scientific, and industrial knowledge and practices was, at all
20 material times, such that Kelly-Moore neither breached any alleged duty owed to Plaintiff, nor knew,
21 or could have known, that the product it allegedly distributed presented a foreseeable risk of harm to
22 Plaintiff in its normal and expected use. Any products, substances, or equipment manufactured,
23 formulated, sold, or distributed by Kelly-Moore were made consistent with the state of the art
24 applicable to the products, substances, or equipment at the time of their manufacture, sale,
25 formulation, or distribution.

26 **APPLICABLE LAW**

27 24. Defendant alleges that as between Plaintiff and Kelly-Moore, the law applicable to
28 this action is the law as it existed during the period Kelly-Moore engaged, if at all, in the distribution

1 or sale of the product which Plaintiff claims caused injury. It is unlawful, inequitable, and in
2 violation of Kelly-Moore's contractual, statutory, and constitutional rights to apply principles of law
3 other than or in a manner different from those, which existed for the period in which Kelly-Moore
4 sold or distributed the products in issue.

5 **OFFSET**

6 25. Kelly-Moore is entitled to an offset for the total amount of all settlements entered
7 into, or to be entered into by Plaintiff and any person or entity, including Defendants, relating to
8 Plaintiff's claims and allegations in this proceeding.

9 **FAILURE TO JOIN INDISPENSABLE PARTIES**

10 26. Kelly-Moore alleges Plaintiff failed to join indispensable parties under the *Code of*
11 *Civil Procedure* section 389.

12 **PUNITIVE DAMAGES — FAILURE TO STATE A CAUSE OF ACTION**

13 27. Kelly-Moore alleges that Plaintiff's Complaint in its entirety, and each cause of
14 action, fails to state a cause of action against Kelly-Moore for punitive or exemplary damages.

15 **UNCONSTITUTIONALITY OF PUNITIVE DAMAGES**

16 28. Kelly-Moore alleges that, to the extent that it seeks exemplary or punitive damages
17 under *California Civil Code* section 3294, the Complaint violates Kelly-Moore's right to procedural
18 due process under the Fourteenth Amendment of the United States Constitution and Article I, section
19 7, of the California State Constitution and therefore fails to state a cause of action that either punitive
20 or exemplary damages can be awarded.

21 **PUNITIVE DAMAGES — EXCESSIVE FINES**

22 29. Kelly-Moore alleges that, to the extent that it seeks punitive or exemplary damages
23 under *California Civil Code* section 3294, the Complaint violates Kelly-Moore's right to protection
24 from "excessive fines" as provided in the Eighth Amendment of the United States Constitution and
25 Article I, section 17 of the Constitution of the State of California, and violates Kelly-Moore's right
26 to substantive due process as provided in the Fifth and Fourteenth Amendments of the United States
27 Constitution and the Constitution of the State of California, and therefore fails to state facts
28 sufficient to support an award of either punitive or exemplary damages.

1 **VIOLATION OF COMMERCE CLAUSE**

2 30. Kelly-Moore alleges that the Commerce Clause of the United States Constitution,
3 U.S. Const. art. I, section 8, cl. 3, precludes the application of a state statute to commerce that takes
4 place wholly outside of a state's borders, whether or not the commerce has effects within the state,
5 and protects against inconsistent legislation arising from the projection of one state regulatory
6 regime into the jurisdiction of another state.

7 **PLEAS IN ABATEMENT**

8 31. Kelly-Moore alleges as pleas in abatement:

9 A. That another action is pending between the Plaintiff and the same or similar
10 Defendants on the same transactions and occurrences; and

11 B. That Plaintiff has improperly joined parties in this action.

12 **UNCONSTITUTIONAL TAKING OF PRIVATE**

13 **PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION**

14 32. Each cause of action in the Complaint that is based upon a lack of identification of the
15 manufacturer of, or the contractor using or disturbing, the alleged injury-causing product, fails to
16 state facts sufficient to constitute a cause of action because Plaintiff have asserted claims for relief
17 which, if granted, would constitute the taking of private property for public use without just
18 compensation in contravention of the Fifth and Fourteenth Amendments to the United States
19 Constitution and by Article I, Sections 7 and 19, of the Constitution of the State of California, and
20 the applicable California statutes.

21 **UNCERTAINTY**

22 33. Kelly-Moore alleges that Plaintiff's Complaint and all purported causes of action are
23 vague, ambiguous and uncertain.

24 **FORUM NON CONVENIENS**

25 34. Kelly-Moore alleges on information and belief that substantial justice requires that
26 this action be dismissed or stayed under Section 410.30 of the *Code of Civil Procedure* because the
27 facts alleged in the Complaint occurred outside of California, and California is thus not the
28 appropriate forum for the action.

1 **CHOICE OF LAW**

2 35. Kelly-Moore alleges on information and belief that all of some of the claims or legal
3 issues raised in the Complaint are governed by the substantive laws of another state or foreign
4 country.

5 **ESTOPPEL**

6 36. Kelly-Moore alleges that because of the acts, conduct, or omissions of Plaintiff or
7 their agents, each cause of action presented in the Complaint is barred by the Doctrine of Estoppel.

8 **COMPLIANCE WITH STATUTES**

9 37. Kelly-Moore alleges that all of its conduct and activities as alleged in the Complaint
10 conformed to statutes, government regulations, and industry standards based upon the state of
11 knowledge existing at all relevant times.

12 **DUE CARE AND DILIGENCE**

13 38. Kelly-Moore alleges that it exercised due care and diligence in all of the matters
14 alleged in the Complaint, and no act or omission by it was the proximate cause of any damage,
15 injury or loss to Plaintiff.

16 **CONTRIBUTION/EQUITABLE INDEMNITY**

17 39. Kelly-Moore alleges that in the event it is held liable to Plaintiff, which liability is
18 expressly denied, and any other co-defendants are likewise held liable, Kelly-Moore is entitled to a
19 percentage contribution of the total liability from the co-defendants in accordance with the principles
20 of equitable indemnity and comparative contribution.

21 **ASSUMPTION OF RISK BY PLAINTIFF'S EMPLOYERS**

22 40. Kelly-Moore alleges that each cause of action asserted is barred because Plaintiff's
23 employer or employers knowingly entered into and engaged in the operations, acts and conduct
24 alleged in the Complaint, and voluntarily and knowingly assumed all of the risks incident to the
25 operations, acts and conduct at the times and places mentioned in the Complaint.

26 **UNUSUAL SUSCEPTIBILITY**

27 41. Kelly-Moore alleges that Plaintiff's injuries and damages, if any, were proximately
28 caused or contributed to by Plaintiff's unforeseeable idiosyncratic condition, unusual susceptibility,

1 or hypersensitive reactions for which Kelly-Moore is not liable.

2 **GOOD FAITH**

3 42. Kelly-Moore alleges that Plaintiff's claim for punitive damages is barred because
4 Kelly-Moore at all times and places mentioned in the Complaint acted reasonably and in good faith,
5 and without fraud, malice, or oppression toward Plaintiff.

6 **NO CONCERT OF ACTION**

7 43. There is no concert of action between Kelly-Moore and any of the other named
8 Defendants. Defendants are not joint tortfeasors and accordingly, Kelly-Moore may not be held
9 jointly and severally liable with the other named Defendants.

10 **FRAUD, OPPRESSION, OR MALICE**

11 44. Kelly-Moore alleges that the Complaint does not state sufficient facts to constitute
12 "fraud," "oppression," or "malice," as these terms are used in *Civil Code* section 3294.

13 **SPOILIATION OF EVIDENCE**

14 45. On information and belief, Kelly-Moore alleges that Plaintiff's agents negligently or
15 intentionally failed to preserve, and permitted the spoliation of, material evidence, including but not
16 limited to the products which Plaintiff alleges give rise to Plaintiff's Complaint. Such conduct bars
17 Plaintiff's action and/or gives rise to liability on the part of Plaintiff for damages payable to Kelly-
18 Moore.

19 **RES JUDICATA/COLLATERAL ESTOPPEL**

20 46. Kelly-Moore alleges that the causes of action in Plaintiff's Complaint are barred in
21 whole or in part by *res judicata* and/or collateral estoppel.

22 **NO LIABILITY FOR PRODUCTS OF OTHERS**

23 47. Kelly-Moore is not liable to Plaintiff for products manufactured, distributed, or
24 supplied by third parties. (*Taylor v. Elliott Turbomachinery Company, Inc.* (2009) 171 Cal.App.4th
25 564.)

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PREEMPTION

48. Kelly-Moore alleges that Plaintiff's claims in their entirety and each of them individually, as well as this action are preempted by federal statutes and regulations governing work place exposure to asbestos.

RESERVATION OF RIGHTS

49. Kelly-Moore alleges that it presently has insufficient knowledge or information on which to form a belief as to whether it may have additional, as yet unstated, defenses available. Kelly-Moore reserves the right to assert additional defenses in the event that they would be appropriate.

PRAYER


Kelly-Moore prays:

1. That Plaintiff takes nothing because of Plaintiff's Complaint on file;
2. For judgment in favor of Kelly-Moore and against Plaintiff on each and every cause of action of Plaintiff's Complaint;
3. That Kelly-Moore be awarded its costs of suit, including its attorneys' fees;
4. That Kelly-Moore be awarded appropriate credits and setoffs arising out of any payment of workers' compensation settlements as alleged above; and
5. That Kelly-Moore be awarded any other relief the Court may deem proper and equitable.

Dated: February 10, 2015

HAWKINS PARNELL THACKSTON & YOUNG LLP

By:



Todd N. Wade
Stephanie S. Spangler
Attorneys for Defendant,
KELLY-MOORE PAINT COMPANY, INC.

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I, the undersigned, declare as follows:

I am employed in the County of San Francisco, California, and I am over the age of 18 years and not a party to the within action. My business address is 345 California Street, Suite 2850, San Francisco, CA 94104.

**DEFENDANT KELLY-MOORE PAINT COMPANY, INC.'S ANSWER TO PLAINTIFF'S
COMPLAINT FOR PERSONAL INJURY –ASBESTOS**

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Scheryl Warr