

FILED
IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

2009 APR -3 P 3:25

THE SHERWIN WILLIAMS COMPANY,
101 Prospect Avenue, N.W.
Cleveland, OH 44115

CASE NO. _____

JOHN P O'DONNELL *Complaint*
CV 09 689237

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

Plaintiff,

v.

COMPLAINT

MOTLEY RICE LLC
Motley Rice LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29464

JURY TRIAL DEMANDED

And

JOHN DOES,

Defendants.

5000 overpayment

\$ <i>5000</i>	DEPOSITED
APR 03 2009	
SECURE COSTS	
GERALD E. FUERST, Clerk of Courts	
DEPUTY	

The Sherwin-Williams Company ("Sherwin-Williams"), for its Complaint against Motley Rice LLC ("Motley Rice") and other unknown persons, alleges as follows:

INTRODUCTION AND NATURE OF CLAIM

1. The law firm of Motley Rice has represented since 1999 the Rhode Island Attorney General, other government officials, and private individuals in highly contentious public nuisance and personal injury lawsuits filed against Sherwin-Williams and other former manufacturers of lead paint and pigments.

2. Without the knowledge or consent of Sherwin-Williams, Motley Rice has somehow obtained stolen copies of PowerPoint slides used by Sherwin-Williams' Associate General Counsel – Litigation to advise the Company's Board of Directors on the costs of defending the lead paint and pigment litigation, among other information, and his analysis of potentially available insurance coverage for that litigation – an issue that Sherwin-Williams was

actively litigating with its insurers in a separate action. Those documents contain highly confidential, proprietary business information and are also protected by the attorney-client privilege and the attorney work product doctrine.

3. It appears that Motley Rice, at the time it received those slides, wrongfully obtained other Sherwin-Williams' confidential, proprietary, and privileged documents from the same person who is unknown to Sherwin-Williams. All of Sherwin-Williams' confidential, proprietary, and privileged documents taken without authorization will be referred to as "Documents" in this Complaint.

4. Despite repeated requests by Sherwin-Williams, and despite Motley Rice's admission that it obtained Sherwin-Williams' Documents through its own efforts, Motley Rice has refused to reveal how it obtained Sherwin-Williams' stolen Documents; to identify all Sherwin-Williams' Documents in its possession; to provide them to a court for *in camera* review; or to return Sherwin-Williams' Documents.

5. By this action, Sherwin-Williams seeks to uncover how Motley Rice obtained the Documents, to protect and secure the return of its stolen Documents from Motley Rice, to prevent any use of those Documents or information contained in them, and to be compensated for the harm caused to Sherwin-Williams by Motley Rice's wrongful acquisition and use of those Documents.

THE PARTIES

6. Sherwin-Williams is a corporation organized under the laws of the State of Ohio, with its principal place of business in Cleveland, Ohio.

7. Motley Rice LLC is a limited liability company incorporated under the laws of South Carolina. It has its principal place in Mt. Pleasant, South Carolina and has another office in Providence, Rhode Island.

8. The John Does are persons presently unknown to Sherwin-Williams who assisted, aided, and abetted Motley Rice in the tortious acts alleged in this Complaint. The John Does are believed to be residents of the State of Ohio.

JURISDICTION AND VENUE

9. Motley Rice has caused tortious injury in this State by an act or omission in Ohio and by acts outside of Ohio committed with the purpose of injuring Sherwin-Williams, which resides in Ohio. Motley Rice also regularly conducted business in Ohio during the time of the alleged tortious acts. Thus, this Court has jurisdiction over Motley Rice pursuant to Ohio Revised Code § 2307.382(A)(3)-(4), (6), (7).

10. Venue is proper in Cuyahoga County because part of the activity that gave rise to the claim for relief took place in this County. Ohio R. Civ. Pro. 3(B)(3). Additionally, venue is proper in Cuyahoga County because all or part of the claim for relief arose in this County. Ohio R. Civ. Pro. 3(B)(6).

FACTS

11. In the course of conducting its business, Sherwin-Williams creates and maintains confidential, proprietary, and privileged information and documents. Included among those documents are materials generated by Sherwin-Williams' attorneys to provide advice to Sherwin-Williams' Board of Directors concerning ongoing litigation strategy, anticipation of litigation, developments and costs of defense as well as potentially available insurance coverage for litigation liabilities and defense costs.

12. Sherwin-Williams' attorneys have frequently met with the Board of Directors to discuss the lead paint and pigment litigation and the disputes and litigation with its insurers to obtain reimbursement of defense costs and any potential judgments in the lead paint and pigment litigation. The oral and written presentations by Sherwin-Williams' attorneys to the Company's

Board of Directors are intended to be confidential and protected by the attorney-client privilege and attorney work product doctrine. Presentations to the Board of Directors may also contain confidential and proprietary business information, such as strategies for other litigation, trade secrets for new products, acquisition plans, employment policies, and other sensitive, competitive information. For these reasons, all minutes of and presentations at Sherwin-Williams' Board of Directors' meetings are kept strictly confidential and are securely maintained with restricted access at the company.

13. Since October 1999, the State of Rhode Island, through its Attorney General, has retained Motley Rice to sue certain former manufacturers of lead pigments used in architectural paints decades ago, including Sherwin-Williams, for allegedly creating a public nuisance ("Rhode Island Litigation"). Under a contingency fee agreement with the Rhode Island Attorney General, Motley Rice and other counsel are responsible for all costs and expenses of prosecuting the claims in the Rhode Island Litigation.

14. Since the commencement of the Rhode Island Litigation, Motley Rice has been retained by local governments in California, New Jersey, and Ohio to bring similar public nuisance lawsuits against Sherwin-Williams and other former lead pigment manufacturers. Motley Rice also tried unsuccessfully to obtain representation of the cities of St. Louis and Milwaukee as part of its continuing campaign to launch public nuisance lawsuits against Sherwin-Williams and other former lead pigment manufacturers all across the country. The public nuisance lawsuits seek to require several, out of many, former lead pigment manufacturers, including Sherwin-Williams, to remediate all lead paint in all buildings.

15. Also, since 1999, Motley Rice has represented dozens of individual plaintiffs in Wisconsin who have sued Sherwin-Williams and other former lead pigment manufacturers alleging personal injuries from elevated blood lead levels.

16. Motley Rice attorneys frequently came into Ohio in 2006 to meet and communicate with mayors and members of the executive and legislative branches of local governments in order to persuade them to retain Motley Rice to bring public nuisance lawsuits against Sherwin-Williams and other former lead pigment manufacturers. Beginning in September 2006, Motley Rice was retained to sue Sherwin-Williams and others on behalf of the cities of Akron, Athens, Canton, Cincinnati, Columbus, Dayton, East Cleveland, Massillon, Lancaster, Toledo, and Youngstown and the Stark County Housing Authority. It signed a contingency fee agreement for each city. Motley Rice moved for, and was allowed, leave to appear as counsel *pro hac vice* in state court for each Ohio plaintiff. Motley Rice wrote, appeared as counsel, and submitted complaints for each Ohio plaintiff. It wrote and submitted briefs in every Ohio case in which defendants filed a motion to dismiss or other pre-trial papers. Motley Rice attorneys appeared in Ohio Common Pleas Courts located in Canton, Cincinnati, Cleveland, and Toledo to argue motions, and it responded to public records requests on behalf of various cities.

17. Through the public nuisance and personal injury litigation against Sherwin-Williams and others, Motley Rice was and still is attempting to gain millions of dollars in fees for itself.

18. Motley Rice's representation of cities in Ohio continued until at least July 2008. Its representation was ultimately unsuccessful, as every Ohio city's complaint was either voluntarily dismissed or dismissed by court order.

19. In or about 2006, while Motley Rice was soliciting Ohio cities to retain it, one or more attorneys from Motley Rice, including Fidelma Fitzpatrick, met with a former Sherwin-Williams employee at Cleveland Hopkins Airport. This former employee had been responsible for preparing the PowerPoint slides and other graphics used during presentations made to Sherwin-Williams' Board of Directors in 2004, 2005, and earlier years. Sherwin-Williams did not know of this secret meeting.

20. At no time in meeting with the former Sherwin-Williams employee did any Motley Rice attorney caution him not to disclose or discuss any confidential, privileged, or proprietary information or document belonging to Sherwin-Williams.

21. During the meeting, the former Sherwin-Williams employee provided Motley Rice with the names of other former employees, several of whom may have had a role in preparing, or would likely have had access to, Board presentation materials.

22. On July 1, 2008, the Rhode Island Supreme Court unanimously ruled in favor of Sherwin-Williams and other defendants in the Rhode Island Litigation, reversing a jury verdict in favor of the State and holding that the complaint should have been dismissed at the outset.

23. After the Rhode Island Supreme Court's ruling, Sherwin-Williams filed a motion in the trial court, called the Superior Court, for entry of final judgment in its favor, including an award of costs incurred in defending the lawsuit. Although Sherwin-Williams has not yet submitted an itemized bill of costs, Motley Rice submitted a bill of costs for the State exceeding \$1.9 million when it initially prevailed in the trial court.

24. On September 24, 2008, Motley Rice, on behalf of the State of Rhode Island, filed in the Superior Court a Supplemental Memorandum in Opposition to Defendants' Motion for Costs ("Supplemental Memorandum"). Because Motley Rice is obligated under its contingency

fee agreement with the Rhode Island Attorney General to pay all costs of the Rhode Island Litigation, it has a direct, personal financial self-interest in whether the Rhode Island Superior Court awards costs to Sherwin-Williams and, if so, the amount of costs.

25. The State's Supplemental Memorandum, which Motley Rice prepared, signed, and filed, contained as an exhibit a copy of the PowerPoint slides used by Sherwin-Williams' Associate General Counsel – Litigation during his presentation to the Board of Directors in October 2004. The first slide identified the speaker as Sherwin-Williams' Associate General Counsel – Litigation. The second slide showed the company's cost to that date of defending the lead paint and pigment litigation. The third slide presented the Associate General Counsel's analysis and opinion regarding potentially available insurance coverage for that litigation, a matter then and still in dispute with its insurers. The presentation contained confidential information, was prepared to provide legal advice to the Board of Directors, and was intended to be confidential and privileged. The Directors were not allowed to keep copies of those slides (hereinafter "October 2004 Confidential Board Slides"). Because Sherwin-Williams considered the information in the October 2004 Confidential Board Slides to be confidential, proprietary, and privileged, it has not publicly disclosed that information.

26. Sherwin-Williams never produced in any lawsuit the documents or information contained in the October 2004 Confidential Board Slides. Nor has Sherwin-Williams knowingly produced the October 2004 Confidential Board Slides to any person outside the company. On their face, the October 2004 Confidential Board Slides show that they contain confidential and proprietary information and that they were created and used for the purpose of providing legal advice and analysis.

27. The copy of the October 2004 Confidential Board Slides that Motley Rice attached to its Supplemental Memorandum bears a fax line at the top reflecting that it was one page of a 34-page fax sent by an unidentified person from a FedexKinko's in Akron, Ohio. The 34-page fax containing the October 2004 Confidential Board Slides was sent on September 12, 2006 from the fax number (330) 668-1105; the receiving number is not identified.

28. On information and belief, the other 33 pages of the fax contain highly confidential and proprietary business information, including information regarding strategies in other litigation, proposed business strategies, plans for geographic expansion and market growth, potential mergers or acquisitions, retail partnerships, and sensitive information regarding the company's finances.

29. On information and belief, the other 33 pages of this fax are or were in the possession of Motley Rice.

30. To this date, despite Sherwin-Williams' request, Motley Rice has refused to (a) explain how it came into possession of the October 2004 Confidential Board Slides; (b) confirm if it has the other 33 pages of the fax; and (c) identify and return Sherwin-Williams' Documents.

31. Motley Rice deliberately obtained, kept, and used copies of the October 2004 Confidential Board Slides and other documents belonging to Sherwin-Williams while it knew or should have known that those documents had been taken without Sherwin-Williams' authorization and were confidential, proprietary, and privileged. Motley Rice acted for its own financial self-interest and gain and in conscious disregard of Sherwin-Williams' legal rights and property interests.

COUNT I

CONVERSION

32. Sherwin-Williams incorporates by reference its allegations in Paragraph 1 through 31 of this Complaint.

33. Sometime before September 24, 2008, Motley Rice intentionally and wrongfully obtained and kept without Sherwin-Williams' knowledge or permission its Documents, including the October 2004 Confidential Board Slides and, on information and belief, the documents sent with the September 16, 2006 fax. Motley Rice may also have additional Sherwin-Williams' Documents.

34. Motley Rice knew, or should have known, that the October 2004 Confidential Board Slides and the Documents sent with the September 12, 2006 fax are the property of Sherwin-Williams.

35. Motley Rice knew, or should have known, that the Documents were taken from Sherwin-Williams and provided to Motley Rice without Sherwin-Williams' knowledge or permission.

36. Motley Rice also knew, or should have known, that it had no right to possess or use Sherwin-Williams' stolen Documents. Nevertheless, in conscious disregard of Sherwin-Williams' legal rights and property interests, Motley Rice chose to obtain, keep and use those Documents for its own financial benefit in the Rhode Island Litigation and to attempt to cause substantial harm to Sherwin-Williams.

37. At all relevant times until present Motley Rice has acted with malice and conscious disregard of Sherwin-Williams' legal rights and property interests. By wrongfully obtaining, retaining possession of, and using Sherwin-Williams' stolen Documents for Motley

Rice's own advantage and self-interest with the intent to harm Sherwin-Williams, Motley Rice has converted and continues to convert Sherwin-Williams' property.

38. By refusing to return Sherwin-Williams' Documents despite Sherwin-Williams' request to identify and return those Documents, Motley Rice continues to the present day to wrongfully convert Sherwin-Williams' property.

39. Wherefore, Sherwin-Williams requests compensatory damages in an amount in excess of \$25,000, punitive damages, costs, and reasonable attorneys' fees.

COUNT II

REPLEVIN

40. Sherwin-Williams incorporates by reference the allegations in Paragraphs 1 through 39 of this Complaint.

41. Sherwin-Williams created and is the sole rightful owner of its Documents now wrongfully obtained, possessed, and used by Motley Rice without Sherwin-Williams' permission, including, but not limited to, the October 2004 Confidential Board Slides and, on information and belief, the documents sent with the September 12, 2006 fax.

42. No one has the right to possess, retain, or use Sherwin-Williams' Documents without the permission of its Board or management.

43. Motley Rice has wrongfully obtained, kept, and used Sherwin-Williams' Documents without Sherwin-Williams' permission.

44. Motley Rice knew or should have known that those Documents were taken from Sherwin-Williams without Sherwin-Williams' knowledge or permission, and that it was wrongfully obtaining, keeping, and using property belonging to Sherwin-Williams.

45. Sherwin-Williams has requested Motley Rice to return Sherwin-Williams' Documents.

46. Motley Rice has deliberately and wrongfully refused to return Sherwin-Williams' property, and it has chosen to use Sherwin-Williams' Documents for its own financial advantage and to the substantial detriment of Sherwin-Williams.

47. Motley Rice continues to retain and refuses to identify and return Sherwin-Williams' Documents without any right or privilege to do so.

48. At all relevant times until present, Motley Rice has acted with malice and conscious disregard of Sherwin-Williams' legal rights and property interests. Motley Rice wrongfully obtained, kept, and used Sherwin-Williams' stolen Documents for the purpose of harming Sherwin-Williams and for Motley Rice's own economic gain.

49. Wherefore, Sherwin-Williams is entitled to the immediate identification and recovery of its Documents in the possession, custody, and control of Motley Rice or its attorneys, employees, and agents, damages in an amount exceeding \$25,000, punitive damages, costs, and reasonable attorneys' fees.

COUNT III

AIDING AND ABETTING TORTIOUS CONDUCT

50. Sherwin-Williams incorporates by reference the allegations of Paragraphs 1 through 49 of the Complaint.

51. Each John Doe owed to Sherwin-Williams the duty of loyalty and good faith and the duty to maintain the confidentiality of Sherwin-Williams' proprietary and privileged documents.

52. Each John Doe breached these duties by wrongfully converting Sherwin-Williams' Documents and providing them without Sherwin-Williams' knowledge or permission to Motley Rice, which had no privilege or right to obtain or possess those Sherwin-Williams' Documents.

53. Motley Rice wrongfully obtained, kept, and used Sherwin-Williams' Documents that Motley Rice knew, or should have known, were taken or obtained without Sherwin-Williams' knowledge or permission and in breach of each John Doe's duties to Sherwin-Williams.

54. By using Sherwin-Williams' Documents in the Rhode Island Litigation, Motley Rice assisted, aided, and abetted each John Doe, and each John Doe assisted, aided, and abetted Motley Rice, in tortious conduct harming Sherwin-Williams.

55. By wrongfully obtaining, keeping, and using Sherwin-Williams' Documents that it knew, or should have known, were stolen or wrongfully obtained by each John Doe without Sherwin-Williams' knowledge or permission, Motley Rice assisted, aided and abetted each John Doe's tortious conduct.

56. By wrongfully taking or obtaining Sherwin-Williams' Documents and providing those Documents to Motley Rice without Sherwin-Williams' knowledge or permission, each John Doe assisted, aided, and abetted Motley Rice in its tortious conduct.

57. By wrongfully retaining without permission and refusing to identify and return Sherwin-Williams' Documents, each John Doe has assisted, aided, and abetted Motley Rice's tortious conduct.

58. Each John Doe and Motley Rice have acted at all relevant times until present with conscious disregard for Sherwin-Williams' legal rights and property interests and for the purpose of causing substantial harm to Sherwin-Williams.

59. Wherefore, Sherwin-Williams requests compensatory damages in an amount exceeding \$25,000, punitive damages, costs, and reasonable attorneys' fees.

COUNT IV

**REQUEST FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY
INJUNCTION, AND PERMANENT INJUNCTION**

60. Sherwin-Williams incorporates by reference the allegations of Paragraphs 1 through 59 of the Complaint.

61. Pursuant to Ohio Rule of Civil Procedure 65(A), Sherwin-Williams requests the Court to issue a Temporary Restraining Order prohibiting Motley Rice, any of its attorneys, employees, or agents, and each John Doe from:

- (a) Using or reproducing Sherwin-Williams' Documents;
- (b) transferring, conveying, disclosing, or communicating in any manner Sherwin-Williams' Documents or their contents to any person;
- (c) destroying any Sherwin-Williams' Documents or any copies of any such Documents, including electronically stored information;
- (d) destroying or disposing of any Documents, including electronically stored information, that constitute, show, or discuss how Motley Rice obtained, received, disclosed, used, or communicated Sherwin-Williams Documents.

In addition, Sherwin-Williams requests that a Temporary Restraining Order require Motley Rice to:

- (e) immediately file with the Clerk of Court under seal all originals and copies of Sherwin-Williams' Documents in the possession, custody, or control of Motley Rice or any of its attorneys, employees, or agents; and
- (f) identify all persons (i) who have possession, custody, or control of Sherwin-Williams' Documents, or (ii) who provided or sent those Documents directly or indirectly to Motley Rice or any of its attorneys, employees, or agents.

62. A temporary restraining order is necessary to preserve Sherwin-Williams' valuable property rights in its Documents and confidential business information.


63. Sherwin-Williams will suffer irreparable harm if Defendants are permitted to transfer, release, possess, use, disclose, or communicate in any manner Sherwin-Williams' Documents and confidential business information.

64. Sherwin-Williams further requests the Court, after appropriate hearing, to enter a preliminary and permanent injunction granting the same relief requested in paragraph 60 (a), (b), (e) and (f) and, in addition, requiring Motley Rice to immediately return all originals and copies of Sherwin-Williams' Documents, all documents discussing the contents of those Documents, and all documents reporting or discussing confidential, proprietary or privileged communications between Sherwin-Williams' attorneys and its directors, officers or employees, in the possession, custody, or control of Motley Rice or any of its attorneys, employees, or agents.

65. Pursuant to Ohio Revised Code § 2737.03, Sherwin-Williams requests this Court to issue an order requiring Motley Rice to return all of Sherwin-Williams' Documents, all documents discussing the contents of those Documents, and all documents reporting or discussing confidential, proprietary or privileged communications between Sherwin-Williams' attorneys and its directors, officers or employees, in the possession, custody, or control of Motley Rice or any of its attorneys, employees, or agents.

Dated: April 3, 2009

Respectfully Submitted,


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