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12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 FOR THE COUNTY OF ALAMEDA
15 UNLIMITED CIVIL JURISDICTION

16 RUSSELL BRIMER,

17 Plaintiff,

18 v.

19 KMART CORPORATION; and DOES 1-150,
20 inclusive,

21 Defendants.

22 Case No. B G 10535325

23 **COMPLAINT FOR CIVIL PENALTIES
24 AND INJUNCTIVE RELIEF**

25 (Cal. Health & Safety Code § 25249.6 *et seq.*)

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CLERK OF THE SUPERIOR COURT
BARBARA CLERK

NATURE OF THE ACTION

1
2 1. This Complaint is a representative action brought by plaintiff RUSSELL
3 BRIMER, in the public interest of the citizens of the State of California, to enforce the People’s
4 right to be informed of the presence of lead, a toxic chemical found in or on vinyl coated tape
5 measures sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failures to
7 warn California citizens about their exposure to lead, present in or on certain vinyl coated tape
8 measures that defendants manufacture, distribute, and/or offer for sale to consumers throughout
9 the State of California.

10 3. High levels of lead are commonly found in and on vinyl coated tape measures that
11 defendants manufacture, distribute, and/or offer for sale to consumers throughout the State of
12 California.

13 4. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986,
14 California Health & Safety Code § 25249.6 *et seq.* (“Proposition 65”), “[n]o person in the course
15 of doing business shall knowingly and intentionally expose any individual to a chemical known
16 to the state to cause cancer or reproductive toxicity without first giving clear and reasonable
17 warning to such individual ...” (Cal. Health & Safety Code § 25249.6.)

18 5. On February 27, 1987, California identified and listed lead as a chemical known
19 to cause birth defects and other reproductive harm. Lead became subject to the warning
20 requirement one year later and was therefore subject to the “clear and reasonable warning”
21 requirements of Proposition 65, beginning on February 27, 1988. (27 Cal. Code Regs. §
22 27001(c); Cal. Health & Safety Code § 25249.8.) Lead shall be referred to hereinafter as the
23 “LISTED CHEMICAL.”

24 6. Defendants manufacture, distribute, and/or sell vinyl coated tape measures
25 containing excessive levels of the LISTED CHEMICAL including, but not limited to, those
26 found in the *Animal Tape Measure Monkey, Model # ATM-MONK, Item #1990000000086504*.
27 All such vinyl coated tape measures containing the LISTED CHEMICAL shall hereinafter be
28 referred to as the “PRODUCTS.”

1 7. Defendants' failures to warn consumers and/or other individuals in the State of
2 California about their exposure to the LISTED CHEMICAL in conjunction with defendants' sale
3 of the PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinder of
4 such conduct as well as civil penalties for each such violation.

5 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive
6 and permanent injunctive relief to compel defendants to provide purchasers or users of the
7 PRODUCTS with the required warning regarding the health hazards of the LISTED
8 CHEMICAL. (Cal. Health & Safety Code § 25249.7(a).)

9 9. Plaintiff also seeks civil penalties against defendants for their violations of
10 Proposition 65, as provided for by California Health & Safety Code § 25249.7(b).

11 **PARTIES**

12 10. Plaintiff RUSSELL BRIMER, is a citizen of the County of Alameda in the State
13 of California who is dedicated to protecting the health of California citizens through the
14 elimination or reduction of toxic exposures from consumer products, and brings this action in the
15 public interest pursuant to California Health & Safety Code § 25249.7.

16 11. Defendant KMART CORPORATION ("KMART") is a person doing business
17 within the meaning of California Health & Safety Code § 25249.11.

18 12. Defendant KMART manufactures, distributes, and/or offers the PRODUCTS for
19 sale or use in the State of California, or implies by its conduct that it manufactures, distributes,
20 and/or offers the PRODUCTS for sale or use in the State of California.

21 13. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each
22 persons doing business within the meaning of California Health & Safety Code § 25249.11.

23 14. MANUFACTURER DEFENDANTS engage in the process of research, testing,
24 designing, assembling, fabricating, and/or manufacturing, or imply by their conduct that they
25 engage in the process of research, testing, designing, assembling, fabricating, and/or
26 manufacturing, one or more of the PRODUCTS for sale or use in the State of California.

27 15. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons
28 doing business within the meaning of California Health & Safety Code § 25249.11.

1 16. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and/or
2 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use in
3 the State of California.

4 17. Defendants DOES 101-150 ("RETAIL DEFENDANTS") are each persons doing
5 business within the meaning of California Health & Safety Code § 25249.11.

6 18. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the
7 State of California.

8 19. At this time, the true names of Defendants DOES 1 through 150, inclusive, are
9 unknown to plaintiff, who therefore sues said defendants by their fictitious names pursuant to
10 Code of Civil Procedure § 474. Plaintiff is informed and believes, and on that basis alleges, that
11 each of the fictitiously named defendants is responsible for the acts and occurrences herein
12 alleged. When ascertained, their true names shall be reflected in an amended complaint.

13 20. KMART, MANUFACTURER DEFENDANTS, DISTRIBUTOR
14 DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be referred
15 to herein as "DEFENDANTS."

16 VENUE AND JURISDICTION

17 21. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
18 Procedure §§ 394, 395, and 395.5, because this Court is a court of competent jurisdiction,
19 because one or more instances of wrongful conduct occurred, and continues to occur, in the
20 County of Alameda and/or because DEFENDANTS conducted, and continue to conduct,
21 business in this County with respect to the PRODUCTS.

22 22. The California Superior Court has jurisdiction over this action pursuant to
23 California Constitution, Article VI, § 10, which grants the Superior Court "original jurisdiction
24 in all causes except those given by statute to other trial courts." The statute under which this
25 action is brought does not specify any other basis of subject matter jurisdiction.

26 23. The California Superior Court has jurisdiction over DEFENDANTS based on
27 plaintiff's information and good faith belief that each defendant is a person, firm, corporation or
28 association that either is a citizen of the State of California, has sufficient minimum contacts in

1 the State of California, or otherwise purposefully avails itself of the California market.

2 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California
3 courts consistent with traditional notions of fair play and substantial justice.

4 **FIRST CAUSE OF ACTION**

5 **(Violation of Proposition 65 - Against All Defendants)**

6 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
7 Paragraphs 1 through 23, inclusive.

8 25. The citizens of the State of California have expressly stated in the Safe Drinking
9 Water and Toxic Enforcement Act of 1986, California Health & Safety Code section 25249.5 *et*
10 *seq.* ("Proposition 65") that they must be informed "about exposures to chemicals that cause
11 cancer, birth defects and other reproductive harm." (Health & Safety Code § 25249.6.)

12 26. Proposition 65 states "[n]o person in the course of doing business shall knowingly
13 and intentionally expose any individual to a chemical known to the state to cause cancer or
14 reproductive toxicity without first giving clear and reasonable warning to such individual...."
15 (*Ibid.*)

16 27. On March 19, 2010, a sixty-day notice of violation, together with the requisite
17 certificate of merit, was provided to KMART, and various public enforcement agencies stating
18 that as a result of the DEFENDANTS' sales of the PRODUCTS, purchasers and users in the
19 State of California were being exposed to lead resulting from the reasonably foreseeable uses of
20 the PRODUCTS, without the individual purchasers and users first having been provided with a
21 "clear and reasonable warning" regarding such toxic exposures.

22 28. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
23 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and
24 DEFENDANTS' manufacture, distribution, and/or offering of the PRODUCTS for sale or use in
25 violation of California Health & Safety Code § 25249.6 has continued to occur beyond
26 DEFENDANTS' receipt of plaintiff's sixty-day notice of violation. Plaintiff further alleges and
27 believes that such violations will continue to occur into the future.

28

1 29. After receipt of the claims asserted in the sixty-day notices of violation, the
2 appropriate public enforcement agencies have failed to commence and diligently prosecute a
3 cause of action against DEFENDANTS under Proposition 65.

4 30. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
5 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state
6 limits.

7 31. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
8 distributed, and/or offered for sale or use by DEFENDANTS in California contained the
9 LISTED CHEMICAL.

10 32. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as
11 to expose individuals to the LISTED CHEMICAL through dermal contact and/or ingestion
12 during the reasonably foreseeable use of the PRODUCTS.

13 33. The normal and reasonably foreseeable use of the PRODUCTS has caused and
14 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined
15 by Title 27 California Code of Regulations (“C.C.R.”) section 25602(b).

16 34. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
17 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact
18 and/or ingestion.

19 35. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
20 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-
21 accidental participation in the manufacture, distribution and/or offer for sale or use of
22 PRODUCTS to individuals in the State of California.

23 36. DEFENDANTS failed to provide a “clear and reasonable warning” to those
24 consumers and/or other individuals in the State of California who were or who could become
25 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
26 reasonably foreseeable use of the PRODUCTS.

27 37. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
28 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal

1 contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS, sold
2 by DEFENDANTS without a "clear and reasonable warning," have suffered, and continue to
3 suffer, irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

4 38. As a consequence of the above-described acts, DEFENDANTS are liable for a
5 maximum civil penalty of \$2,500 per day for each violation pursuant to California Health &
6 Safety Code § 25249.7(b).

7 39. As a consequence of the above-described acts, California Health & Safety Code
8 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
9 DEFENDANTS.

10 **PRAYER FOR RELIEF**

11 Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

12 1. That the Court, pursuant to California Health & Safety Code § 25249.7(b), assess
13 civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation
14 alleged herein;

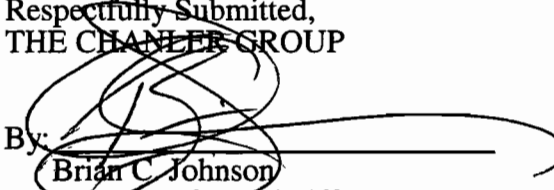
15 2. That the Court, pursuant to California Health & Safety Code § 25249.7(a),
16 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing or
17 offering the PRODUCTS for sale or use in California, without providing "clear and reasonable
18 warnings" as defined by 27 C.C.R. § 25601, as to the harms associated with exposures the
19 LISTED CHEMICAL;

20 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and

21 4. That the Court grant such other and further relief as may be just and proper.

22
23 Dated: September 8th, 2010

Respectfully Submitted,
THE CHANLER GROUP

24
25 By: 
26 Brian C. Johnson
27 Attorneys for Plaintiff
28 RUSSELL BRIMER