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ENDORSED
FILED
ALAMEDA COUNTY

APR - 4 2011

CLERK OF THE SUPERIOR COURT
By **JAME HARRIS** Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ALAMEDA
11 UNLIMITED CIVIL JURISDICTION
12

13 RUSSELL BRIMER,

14 Plaintiff,

15 v.

16 KMART CORPORATION; NOTIONS
MARKETING CORPORATION; and DOES
17 1-150, inclusive,

18 Defendants.
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Case No.: RG10535325

**FIRST AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELIEF**

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

1 NATURE OF THE ACTION

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 failure 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 “clear and
20 reasonable warning” requirements of Proposition 65 one year later on February 27, 1988. (Cal.
21 Code Regs. (“C.C.R.”), tit. 27, § 27001, subd. (c); Health & Safety Code §§ 25249.8 &
22 25249.10(c).)

23 6. Lead shall be referred to hereinafter as the “LISTED CHEMICAL.”

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

1 16. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are persons in
2 the course of doing business within the meaning of California Health & Safety Code §§ 25249.6
3 & 25249.11(c).

4 17. MANUFACTURER DEFENDANTS engage in the process of research, testing,
5 designing, assembling, fabricating, and/or manufacturing, or imply by their conduct that they
6 engage in the process of research, testing, designing, assembling, fabricating, and/or
7 manufacturing, one or more of the PRODUCTS for sale or use in the State of California.

8 18. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are persons in the
9 course of doing business within the meaning of California Health & Safety Code §§ 25249.6 &
10 25249.11(c).

11 19. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and/or
12 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use in
13 the State of California.

14 20. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are persons in the
15 course of doing business within the meaning of California Health & Safety Code §§ 25249.6 &
16 25249.11(c).

17 21. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
18 State of California.

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

24 23. KMART, NOTIONS, MANUFACTURER DEFENDANTS, DISTRIBUTOR
25 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be
26 referred to herein as “DEFENDANTS.”
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1 **VENUE AND JURISDICTION**

2 24. Venue is proper in the Alameda County Superior Court, pursuant to California
3 Code of Civil Procedure §§ 394, 395, & 395.5, because this Court is a court of competent
4 jurisdiction, because one or more instances of wrongful conduct occurred, and continue to occur
5 in the County of Alameda, and/or because DEFENDANTS conducted, and continue to conduct,
6 business in this County with respect to the PRODUCTS.

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

11 26. The California Superior Court has jurisdiction over DEFENDANTS based on
12 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
13 association that either is a citizen of the State of California, has sufficient minimum contacts in
14 the State of California, or otherwise purposefully avails itself of the California market.
15 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by California
16 courts consistent with traditional notions of fair play and substantial justice.

17 **FIRST CAUSE OF ACTION**

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

19 27. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
20 Paragraphs 1 through 26, inclusive.

21 28. The citizens of the State of California have expressly stated in Proposition 65 that
22 they must be informed “about exposures to chemicals that cause cancer, birth defects and other
23 reproductive harm.” (Cal. Health & Safety Code § 25249.6.)

24 29. Proposition 65 states “[n]o person in the course of doing business shall knowingly
25 and intentionally expose any individual to a chemical known to the state to cause cancer or
26 reproductive toxicity without first giving clear and reasonable warning to such individual....”

27 (*Ibid.*)
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1 30. On or about March 19, 2010, plaintiff served a sixty-day notice of violation,
2 together with the requisite certificate of merit, on KMART and various public enforcement
3 agencies stating that, as a result of the KMART'S, MANUFACTURING DEFENDANTS',
4 DISTRIBUTOR DEFENDANTS', and RETAILER DEFENDANTS' sales of the PRODUCTS,
5 purchasers and users in the State of California were being exposed to the LISTED CHEMICAL
6 resulting from the reasonably foreseeable use of the PRODUCTS, without the individual
7 purchasers and users first having been provided with a "clear and reasonable warning" regarding
8 such toxic exposures.

9 31. On or about December 21, 2010, plaintiff served a supplemental sixty-day notice
10 of violation, together with the requisite certificate, on KMART, NOTIONS, and various public
11 enforcement agencies stating that, as a result of the DEFENDANTS' sales of the PRODUCTS,
12 purchasers and users in the State of California were being exposed to the LISTED CHEMICAL
13 resulting from the reasonably foreseeable use of the PRODUCTS, without the individual
14 purchasers and users first having been provided with a "clear and reasonable warning" regarding
15 such toxic exposures.

16 32. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
17 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and
18 DEFENDANTS' manufacture, distribution, and/or offering of the PRODUCTS for sale or use in
19 violation of California Health & Safety Code § 25249.6 has continued to occur beyond
20 DEFENDANTS' receipt of plaintiff's sixty-day notice and supplemental sixty-day notice of
21 violation. Plaintiff further alleges and believes that such violations will continue to occur into
22 the future.

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

26 34. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
27 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state
28 limits.

1 35. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
2 distributed, and/or offered for sale or use by DEFENDANTS in California contained the
3 LISTED CHEMICAL.

4 36. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as
5 to expose individuals to the LISTED CHEMICAL through dermal contact and/or ingestion
6 during the reasonably foreseeable use of the PRODUCTS.

7 37. The normal and reasonably foreseeable use of the PRODUCTS has caused and
8 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined
9 by 27 C.C.R. § 25602(b).

10 38. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
11 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact
12 and/or ingestion.

13 39. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
14 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-
15 accidental participation in the manufacture, distribution, and/or offering of the PRODUCTS for
16 sale to individuals in the State of California.

17 40. DEFENDANTS failed to provide a “clear and reasonable warning” to those
18 consumers and/or other individuals in the State of California who were or who could become
19 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
20 reasonably foreseeable use of the PRODUCTS.

21 41. Contrary to the express policy and statutory prohibition contained in Proposition
22 65, as enacted directly by California voters, individuals exposed to the LISTED CHEMICAL
23 through dermal contact and/or ingestion resulting from the reasonably foreseeable use of the
24 PRODUCTS sold by DEFENDANTS without a “clear and reasonable warning” have suffered,
25 and continue to suffer, irreparable harm, for which they have no plain, speedy, or adequate
26 remedy at law.

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

4 43. As a consequence of the above-described acts, California Health & Safety Code
5 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
6 DEFENDANTS.

7 **PRAYER FOR RELIEF**

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

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

12 2. That the Court, pursuant to California Health & Safety Code § 25249.7(a),
13 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, and/or
14 offering the PRODUCTS for sale or use in California without first providing a “clear and
15 reasonable warning” as defined by 27 C.C.R. § 25601, as to the harms associated with exposure
16 the LISTED CHEMICAL;

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

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

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20 Dated: March 31, 2011

21 Respectfully Submitted,
22 THE CHANLER GROUP

23 By: 

24 Brian E. Johnson
25 Attorneys for Plaintiff
26 RUSSELL BRIMER
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