

1 Clifford A. Chanler, State Bar No. 135534
2 Brian C. Johnson, State Bar No. 235965
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 RUSSELL BRIMER

ENDORSED
FILED
San Francisco County Superior Court

NOV 10 2010

CLERK OF THE COURT
BY: PARAM NATT
Deputy Clerk

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF SAN FRANCISCO
14 UNLIMITED CIVIL JURISDICTION
15

16 RUSSELL BRIMER,

17 Plaintiff,

18 v.

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

21 Defendants.

Case No. CGC - 10 - 505320

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

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

25 CASE MANAGEMENT CONFERENCE SET

26 APR 15 2011 9⁰⁰ AM

27 DEPARTMENT 212
28

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 tape measures with hand
5 straps 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 tape measures with
8 hand straps that defendants manufacture, import, distribute, and/or offer for sale to consumers
9 throughout the State of California.

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

13 4. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986,
14 California Health & Safety Code Section 25249.6 *et seq.* ("Proposition 65"), "No person in the
15 course of doing business shall knowingly and intentionally expose any individual to a chemical
16 known to the state to cause cancer or reproductive toxicity without first giving clear and
17 reasonable warning to such individual. . . ." (*Cal. Health & Safety Code § 25249.6.*)

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

24 6. Defendants manufacture, import, distribute, and/or sell tape measures with hand
25 straps containing excessive levels of the LISTED CHEMICAL including, but not limited to, the
26 *HomeTools Florals 10 ft. Tape Measure, HT-212 (#0 18239 33169 7)*. All such tape measures
27 with hand straps containing the LISTED CHEMICAL shall hereinafter be referred to as the
28 "PRODUCTS."

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

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

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

PARTIES

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

11. Defendant FPC CORPORATION (“FPC”) is a person in the course of doing business within the meaning of California Health & Safety Code Section 25249.11.

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

13. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each persons doing business within the meaning of California Health & Safety Code Section 25249.11.

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

1 jurisdiction in all causes except those given by statute to other trial courts.” The statute under
2 which this action is brought does not specify any other basis of subject matter jurisdiction.

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

9 **FIRST CAUSE OF ACTION**

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

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

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

16 26. Proposition 65 states, “No person in the course of doing business shall knowingly
17 and intentionally expose any individual to a chemical known to the state to cause cancer or
18 reproductive toxicity without first giving clear and reasonable warning to such individual....”
19 (*Id.*)

20 27. On June 17, 2010, a sixty-day notice of violation, together with the requisite
21 certificate of merit, was provided to FPC and various public enforcement agencies stating that
22 as a result of the DEFENDANTS’ sales of the PRODUCTS, purchasers and users in the State of
23 California were being exposed to lead resulting from the reasonably foreseeable uses of the
24 PRODUCTS, without the individual purchasers and users first having been provided with a
25 “clear and reasonable warning” regarding such toxic exposures.

26 28. DEFENDANTS have engaged in the manufacture, importation, distribution,
27 and/or offering of the PRODUCTS for sale or use in violation of California Health & Safety
28 Code Section 25249.6 and DEFENDANTS’ manufacture, importation, distribution, and/or

1 offering of the PRODUCTS for sale or use in violation of California Health & Safety Code
2 Section 25249.6 has continued to occur beyond DEFENDANTS' receipt of plaintiff's sixty-day
3 notices of violation. Plaintiff further alleges and believes that such violations will continue to
4 occur into the future.

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

8 30. The PRODUCTS manufactured, imported, distributed, and/or offered for sale or
9 use in California by DEFENDANTS contained the LISTED CHEMICAL above the allowable
10 State limits.

11 31. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
12 imported, distributed, and/or offered for sale or use by DEFENDANTS in California contained
13 the LISTED CHEMICAL.

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

17 33. The normal and reasonably foreseeable use of the PRODUCTS has caused and
18 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is
19 defined by 27 CCR Section 25602(b).

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

23 35. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
24 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-
25 accidental participation in the manufacture, importation, distribution, and/or offering of the
26 PRODUCTS for sale or use to individuals in the State of California.

27 36. DEFENDANTS failed to provide a "clear and reasonable warning" to those
28 consumers and/or other individuals in the State of California who were or who could become

1 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
2 reasonably foreseeable use of the PRODUCTS.

3 37. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
4 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal
5 contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS, sold
6 by DEFENDANTS without a "clear and reasonable warning," have suffered, and continue to
7 suffer, irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

11 39. As a consequence of the above-described acts, California Health & Safety Code
12 Section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
13 DEFENDANTS.

14 **PRAYER FOR RELIEF**

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

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

19 2. That the Court, pursuant to California Health & Safety Code Section 25249.7(a),
20 preliminarily and permanently enjoin DEFENDANTS from manufacturing, importing,
21 distributing, or offering the PRODUCTS for sale or use in California, without providing "clear
22 and reasonable warnings" as defined by 27 CCR Section 25601, as to the harms associated with
23 exposures the LISTED CHEMICAL;

24 ///

25 ///

26 ///

27 ///

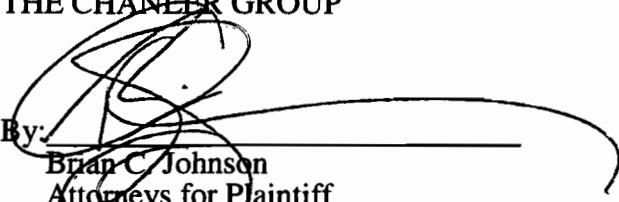
28 ///

- 1 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
2 4. That the Court grant such other and further relief as may be just and proper.
3

4
5 Dated: November 10 2010
6

Respectfully Submitted,

THE CHANLER GROUP

7 By: 
8 Brian C. Johnson
9 Attorneys for Plaintiff
10 RUSSELL BRIMER
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28