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ALAMEDA COUNTY

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

15 RUSSELL BRIMER,

16 Plaintiff,

17 v.

18 THE HILLMAN GROUP, INC.;;
19 and DOES 1-150, inclusive,

20 Defendants.

Case No. CG 10544367

**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 tape measures with grips
5 sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failures to
7 warn California citizens about their exposures to lead, present in or on certain tape measures
8 with grips 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 tape measures with grips 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 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 hereinafter be referred to as the
23 "LISTED CHEMICAL".

24 6. Defendants manufacture, distribute, and/or sell tape measures with grips
25 containing excessive levels of the LISTED CHEMICAL including, but not limited to, the *Tape*
26 *Measure Key Chain, #701402 (#0 18714 20015 9)*. All such tape measures with grips
27 containing the LISTED CHEMICAL shall hereinafter be referred to as the "PRODUCTS".

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

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 Section 25249.7(b).

11 **PARTIES**

12 10. Plaintiff RUSSELL BRIMER is a citizen of the County of Alameda in the State of
13 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
15 the public interest pursuant to California Health & Safety Code Section 25249.7.

16 11. Defendant THE HILLMAN GROUP, INC. (“HILLMAN”), is a person doing
17 business within the meaning of California Health & Safety Code Section 25249.11.

18 12. Defendant HILLMAN manufactures, distributes, and/or offers the PRODUCTS
19 for sale or use in the State of California or implies by its conduct that it manufactures,
20 distributes, 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 Section
23 25249.11.

24 14. MANUFACTURER DEFENDANTS engage in the process of research, testing,
25 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
26 engage in the process of research, testing, designing, assembling, fabricating, and/or
27 manufacturing, one or more of the PRODUCTS for sale or use in the State of California.
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1 15. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons
2 doing business within the meaning of California Health & Safety Code Section 25249.11.

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

6 17. Defendants DOES 101-150 (“RETAIL DEFENDANTS”) are each persons doing
7 business within the meaning of California Health & Safety Code Section 25249.11.

8 18. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the
9 State of California.

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

15 20. HILLMAN, MANUFACTURER DEFENDANTS, DISTRIBUTOR
16 DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be
17 referred to hereinafter as “DEFENDANTS”.

18 VENUE AND JURISDICTION

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

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

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

7 **FIRST CAUSE OF ACTION**

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

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

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

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

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

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

1 occur beyond DEFENDANTS' receipt of plaintiff's sixty-day notices of violation. Plaintiff
2 further alleges and believes that such violations will continue to occur into the future.

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

6 30. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
7 California by DEFENDANTS contain the LISTED CHEMICAL in amounts above the
8 allowable State limits.

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

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

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

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

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

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

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

6 38. As a consequence of the above-described acts, DEFENDANTS are liable for a
7 maximum civil penalty of \$2,500 per day for each violation of Proposition 65 pursuant to
8 California Health & Safety Code Section 25249.7(b).

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

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1 **PRAYER FOR RELIEF**

2 Wherefore, plaintiff prays for judgment against DEFENDANTS, and each of them, as
3 follows:

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

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

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

13 4. That the Court grant such other and further relief as may be just and proper.
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15 Dated: October 28, 2010

Respectfully submitted,

16 THE CHANLER GROUP

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18 By: 

19 Stephen S. Sayad
20 Attorneys for Plaintiff
21 RUSSELL BRIMER
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