

ENDORSED  
FILED  
ALAMEDA COUNTY

MAY 13 2011

CLERK OF THE SUPERIOR COURT  
By Christina M. Bush, Deputy

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7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF ALAMEDA  
10 UNLIMITED CIVIL JURISDICTION

11  
12 RUSSELL BRIMER,

13 Plaintiff,

14 v.

15 OMAHA DISTRIBUTING CO., INC.; and  
DOES 1-150, inclusive,

16 Defendants.  
17

Case No. RG 11575578

**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 and Lead Compounds ("Lead"), a toxic chemical  
5 found in tape 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 tape measures that  
8 defendants manufacture, import, distribute, and/or offer for sale to consumers and businesses  
9 throughout the State of California.

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

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

21 5. Defendants manufacture, import, distribute, and/or sell tape measures containing  
22 Lead including, but not limited to, *Omaha Distributing 3/4" x 16' Tape Measure # 07030 (#0*  
23 *97427 07030 3).*

24 6. All such tape measures containing Lead, shall hereinafter be collectively referred  
25 to as the "PRODUCTS."

26 7. Defendants' failure to warn consumers and/or other individuals in the State of  
27 California not covered by California's Occupational Safety Health Act, Labor Code § 6300 *et*  
28 *seq.* about their exposure to Lead in conjunction with Defendants' distribution, importation,

1 manufacture, and/or sale of the PRODUCTS is a violation of Proposition 65 and subjects  
2 Defendants to enjoinder of such conduct as well as civil penalties for each such violation.

3 8. For Defendants' violation of Proposition 65, plaintiff seeks preliminary injunctive  
4 and permanent injunctive relief to compel Defendants to provide purchasers or users of the  
5 PRODUCTS with the required warning regarding the health hazards of Lead. (*Cal. Health &*  
6 *Safety Code § 25249.7(a).*)

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

9 **PARTIES**

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

14 11. OMAHA DISTRIBUTING CO., INC. ("OMAHA") is a person doing business  
15 within the meaning of California Health & Safety Code § 25249.11.

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

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

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

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

6 18. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the  
7 State of California and, in some circumstances, may also be manufacturers and/or distributors.

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 name 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. OMAHA, MANUFACTURER DEFENDANTS, DISTRIBUTOR  
14 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be  
15 referred to hereinafter 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, 395.5, because this Court is a court of competent jurisdiction, because  
19 one or more instances of wrongful conduct occurred, and continues to occur, in the County of  
20 Alameda, and/or because DEFENDANTS conducted, and continue to conduct, business in this  
21 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 in  
24 all causes except those given by statute to other trial courts.” The statute under which this action  
25 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 are citizens of the State of California, have sufficient minimum contacts in

1 the State of California, or otherwise purposefully avail themselves 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 25, inclusive.

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

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

14 (*Id.*)

15 27. On or about February 1, 2011, a sixty-day notice of violation (the "Notice"),  
16 together with the requisite Certificate of Merit, was provided to OMAHA, and various public  
17 enforcement agencies stating that as a result of DEFENDANTS manufacture and/or distribution  
18 of the PRODUCTS, purchasers and users in the State of California were being exposed to Lead  
19 resulting from the reasonably foreseeable uses of the PRODUCTS, without the individual  
20 purchasers and users first having been provided with a "clear and reasonable warning" regarding  
21 such toxic exposures.

22 28. DEFENDANTS have engaged in the manufacture, importation, distribution, and/or  
23 offering of the PRODUCTS for sale or use in violation of California Health & Safety Code §  
24 25249.6 and DEFENDANTS' manufacture, importation, distribution, and/or offering of the  
25 PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 has  
26 continued to occur beyond OMAHA's receipt of the Notice. 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 Notice, the appropriate public  
2 enforcement agencies have failed to commence and diligently prosecute a cause of action against  
3 DEFENDANTS under Proposition 65.

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

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

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

12           33.    The normal and reasonably foreseeable use of the PRODUCTS has caused and  
13 continues to cause consumer and workplace exposures to Lead, as such exposure is defined by  
14 27 CCR § 25602(b).

15           34.    DEFENDANTS had knowledge that the normal and reasonably foreseeable use of  
16 the PRODUCTS would expose individuals to Lead through dermal contact and ingestion.

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

21           36.    DEFENDANTS failed to provide a "clear and reasonable warning" to those  
22 consumers and/or other individuals in the State of California who were or who could become  
23 exposed to Lead through dermal contact and ingestion during the reasonably foreseeable use of  
24 the PRODUCTS.

25           37.    Contrary to the express policy and statutory prohibition of Proposition 65, enacted  
26 directly by California voters, individuals exposed to Lead through dermal contact and ingestion,  
27 resulting from the reasonably foreseeable use of the PRODUCTS, sold by DEFENDANTS  
28

1 without a "clear and reasonable warning," have suffered, and continue to suffer, irreparable  
2 harm, for which harm they have no plain, speedy, or adequate remedy at law.

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

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

9 **PRAYER FOR RELIEF**

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

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

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

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

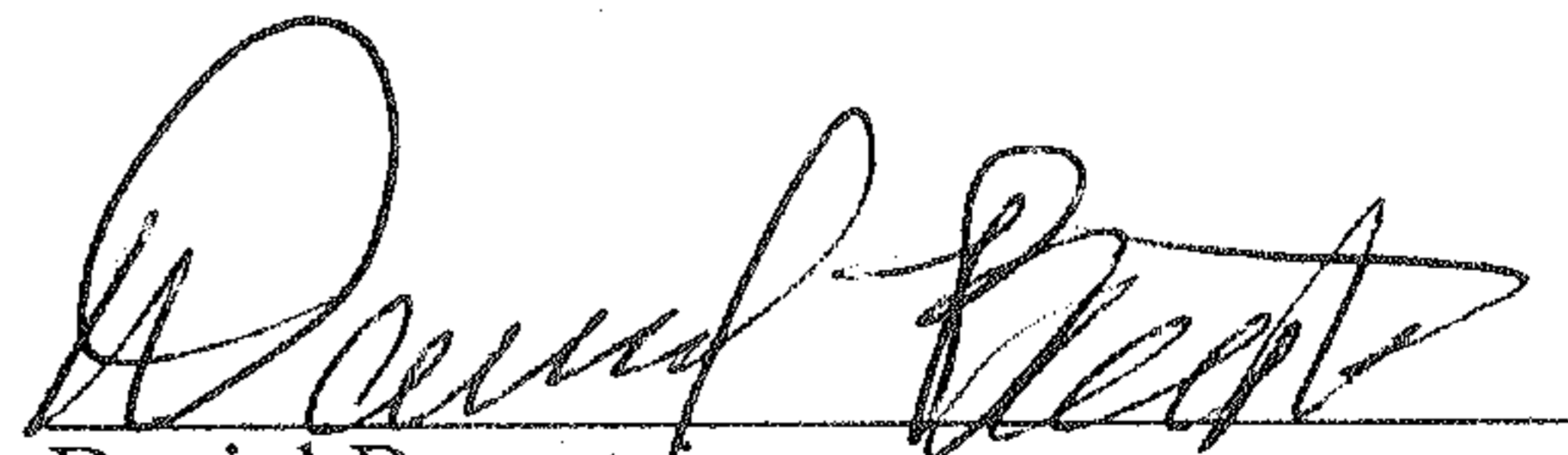
19 4. That the Court grant such other and further relief as may be just and proper.  
20

21 Dated: May 12, 2011

Respectfully Submitted,

THE CHANLER GROUP

22  
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24  
25 By:



Daniel Bornstein  
Attorneys for Plaintiff  
RUSSELL BRIMER