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

RUSSELL BRIMER,) Case No.: RG11575578
Plaintiff,)
v.) **SECOND AMENDED COMPLAINT FOR**
OMAHA DISTRIBUTING CO., INC.;) **CIVIL PENALTIES AND INJUNCTIVE**
GIOVANETTI, INC., *et al.*,) **RELIEF**
Defendants.) (*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 di(2-ethylhexyl)phthalate (“DEHP”) and/or lead, toxic
5 chemicals found in tape measures with grips and hand straps, vinyl/PVC hand tool grips, and
6 glue guns with vinyl/PVC cords sold in California.

7 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failures to
8 warn California citizens about their exposure to lead, present in or on: (i) certain tape measures
9 with grips and hand straps; (ii) vinyl/PVC hand tool grips; and/or (iii) glue guns with vinyl/PVC
10 cords; and DEHP present in, or on: (i) vinyl/PVC hand tool grips; and/or (ii) glue guns with
11 vinyl/PVC cords that defendants manufacture, distribute, and/or offer for sale to consumers
12 throughout the State of California.

13 3. High levels of: (i) lead are commonly found in and on tape measures with grips
14 and hand straps that defendants manufacture, distribute, and/or offer for sale to consumers
15 throughout the State of California; and (ii) DEHP and/or lead are commonly found in, or on,
16 vinyl/PVC hand tool grips and glue guns with vinyl/PVC cords that Omaha Distributing, Co.,
17 Inc. manufactures, distributes, and/or offers for sale to consumers throughout the State of
18 California.

19 4. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986,
20 California Health & Safety Code § 25249.6 *et seq.* (“Proposition 65”), “No person in the course
21 of doing business shall knowingly and intentionally expose any individual to a chemical known
22 to the state to cause cancer or reproductive toxicity without first giving clear and reasonable
23 warning to such individual. . . .” (*Cal. Health & Safety Code § 25249.6.*)

24 5. On February 27, 1987, California identified and listed lead as a chemical known
25 to cause birth defects and other reproductive harm. Lead became subject to the warning
26 requirement one year later and was therefore subject to the “clear and reasonable warning”
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1 requirements of Proposition 65, beginning on February 27, 1988. (27 CCR § 27001 (c); Cal.
2 *Health & Safety Code § 25249.8.*)

3 6. On October 24, 2003, California listed DEHP as a chemical known to cause birth
4 defects and other reproductive harm. DEHP became subject to the warning requirement one
5 year later and was therefore subject to the “clear and reasonable warning” requirements of
6 Proposition 65, beginning on October 24, 2004. (27 CCR § 27001 (c); Cal. *Health & Safety*
7 *Code § 25249.8.*)

8 7. DEHP and lead shall collectively be referred to hereinafter as the “LISTED
9 CHEMICALS.” As to each specific defendant, however, LISTED CHEMICALS shall refer
10 only to those specific chemicals listed for each specific defendant in paragraphs 8 through 10
11 below.

12 8. Defendants manufacture, distribute, and/or sell tape measures with grips and hand
13 straps containing excessive levels of lead including, but not limited to, the *Omaha Distributing*
14 *¾” x 16’ Tape Measure, #07030 (#0 97427 07030 3)*. All such tape measures with grips and
15 hand straps containing lead shall hereinafter be referred to as the “TAPE MEASURES.”

16 9. Omaha Distributing, Co., Inc. manufactures, distributes, and/or sells vinyl/PVC
17 hand tool grips containing DEHP and/or lead including, but not limited to, *Omaha Distributing*
18 *6 in 1 Screwdriver, #07034 (# 0 97427 07034 1)*. All such vinyl/PVC hand tool grips
19 containing DEHP and/or lead shall hereinafter be referred to as the “HAND TOOL GRIPS.”

20 10. Omaha Distributing, Co., Inc. manufactures, distributes, and/or sells glue guns
21 with vinyl/PVC cords containing DEHP and/or lead including, but not limited to, *Tool Mart Hot*
22 *Melt Glue Gun 110 V, Item# 10551 (#6 43117 10551 2)*. All such vinyl/PVC cords containing
23 DEHP and/or lead shall hereinafter be referred to as the “GLUE GUNS.”

24 11. The TAPE MEASURES, HAND TOOL GRIPS AND GLUE GUNS shall
25 hereinafter collectively be referred to as the “PRODUCTS.” As to each specific defendant,
26 however, PRODUCTS shall refer only to those specific products listed for each specific
27 defendant in paragraphs 8 through 10 above.

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1 12. Defendants’ failures to warn consumers and/or other individuals in the State of
2 California about their exposure to the LISTED CHEMICALS 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 violation.

5 13. 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 CHEMICALS. (*Cal. Health & Safety Code § 25249.7(a).*)

9 14. 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 15. 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
15 the public interest pursuant to California Health & Safety Code § 25249.7.

16 16. Defendant OMAHA DISTRIBUTING CO., INC. (“OMAHA”), is a person doing
17 business within the meaning of California Health & Safety Code § 25249.11.

18 17. Defendant OMAHA 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 18. Defendant GIOVANETTI, INC. (“GIOVANETTI”), is a person doing business
22 within the meaning of California Health & Safety Code § 25249.11.

23 19. Defendant GIOVANETTI manufactures, distributes, and/or offers the TAPE
24 MEASURES for sale or use in the State of California or implies by its conduct that it
25 manufactures, distributes, and/or offers the TAPE MEASURES for sale or use in the State of
26 California.

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

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

7 22. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons
8 doing business within the meaning of California Health & Safety Code § 25249.11.

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

12 24. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each persons
13 doing business within the meaning of California Health & Safety Code § 25249.11.

14 25. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
15 State of California.

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

21 27. OMAHA, GIOVANETTI, MANUFACTURER DEFENDANTS,
22 DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate,
23 collectively be referred to hereinafter as “DEFENDANTS.”

24 **VENUE AND JURISDICTION**

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

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

7 30. The California Superior Court has jurisdiction over DEFENDANTS based on
8 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
9 association that either are citizens of the State of California, have sufficient minimum contacts
10 in the State of California, or otherwise purposefully avail themselves of the California market.
11 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by
12 California courts consistent with traditional notions of fair play and substantial justice.

13 **FIRST CAUSE OF ACTION**

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

15 31. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
16 Paragraphs 1 through 30, inclusive.

17 32. The citizens of the State of California have expressly stated in the Safe Drinking
18 Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.5, *et seq.*
19 (Proposition 65) that they must be informed “about exposures to chemicals that cause cancer,
20 birth defects and other reproductive harm.” (*Cal. Health & Safety Code § 25249.6.*)

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

25 34. On or about February 1, 2011, a sixty-day notice of violation, together with the
26 requisite certificate of merit, was provided to OMAHA and various public enforcement agencies
27 stating that as a result of the OMAHA’S sales of the TAPE MEASURES, purchasers and users
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1 in the State of California were being exposed to lead resulting from the reasonably foreseeable
2 uses of the TAPE MEASURES, without the individual purchasers and users first having been
3 provided with a “clear and reasonable warning” regarding such toxic exposures (“NOTICE”).

4 35. On or about October 26, 2012, a supplemental sixty-day notice of violation,
5 together with the requisite certificate of merit, was provided to the DEFENDANTS, and various
6 public enforcement agencies stating that as a result of the DEFENDANTS’ sales of the TAPE
7 MEASURES, purchasers and users in the State of California were being exposed to lead
8 resulting from the reasonably foreseeable uses of the TAPE MEASURES, without the individual
9 purchasers and users first having been provided with a “clear and reasonable warning” regarding
10 such toxic exposures (“SUPPLEMENTAL NOTICE”).

11 36. On or about April 19, 2013, a second supplemental sixty-day notice of violation,
12 together with the requisite certificate of merit, was provided to the DEFENDANTS, and various
13 public enforcement agencies stating that as a result of the DEFENDANTS’ sales of the
14 PRODUCTS, purchasers and users in the State of California were being exposed to lead
15 resulting from the reasonably foreseeable uses of the PRODUCTS, without the individual
16 purchasers and users first having been provided with a “clear and reasonable warning”
17 regarding such toxic exposures (“SECOND SUPPLEMENTAL NOTICE”).

18 37. The NOTICE, SUPPLEMENTAL NOTICE and SECOND SUPPLEMENTAL
19 NOTICE shall hereinafter collectively be referred to as the “NOTICES.”

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

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1 39. After receipt of the claims asserted in the NOTICES, the appropriate public
2 enforcement agencies have failed to commence and diligently prosecute a cause of action
3 against DEFENDANTS under Proposition 65.

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

7 41. 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 CHEMICALS.

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

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

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

19 45. DEFENDANTS intended that such exposures to the LISTED CHEMICALS 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 46. 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 CHEMICALS through dermal contact and/or ingestion during the
26 reasonably foreseeable use of the PRODUCTS.

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1 47. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
2 directly by California voters, individuals exposed to the LISTED CHEMICALS 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 48. 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 pursuant to California Health &
8 Safety Code § 25249.7(b).

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

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PRAYER FOR RELIEF

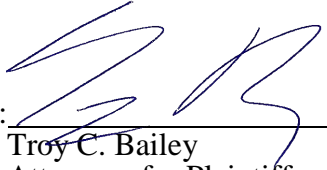
Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

1. That the Court, pursuant to California Health & Safety Code § 25249.7(b), assess civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation alleged herein;
2. That the Court, pursuant to California Health & Safety Code § 25249.7(a), preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or offering the PRODUCTS for sale or use in California, without providing “clear and reasonable warnings” as defined by 27 CCR § 25601, as to the harms associated with exposures the LISTED CHEMICALS;
3. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and
4. That the Court grant such other and further relief as may be just and proper.

Respectfully Submitted,

Dated: December 30, 2013

THE CHANLER GROUP

By: 

Troy C. Bailey
Attorneys for Plaintiff
RUSSELL BRIMER