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18 Attorneys for Defendant
19 U.S. TAPE COMPANY, INC.

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

23 RUSSELL BRIMER,
24
25 Plaintiff,
26
27 v.
28 U.S. TAPE COMPANY, INC.; and DOES 1-
150, inclusive,
29
30 Defendants.

Case No. RG10543473

**[PROPOSED] AMENDED
CONSENT JUDGMENT**

Health & Safety Code § 25249.6

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Defendant U.S. Tape Company, Inc.**

3 This Consent Judgment is entered into by and between Russell Brimer (“Brimer”) and U.S.
4 Tape Company, Inc. (“U.S. Tape”). Brimer and U.S. Tape are collectively referred to as the
5 “Parties.”

6 **1.2 Plaintiff**

7 Brimer is an individual residing in California who seeks to promote awareness of exposures to
8 toxic chemicals and improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant U.S. Tape**

11 U.S. Tape employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety
13 Code § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that U.S. Tape has manufactured, distributed, and/or sold in the State of
16 California tape measures with accessible components containing lead without providing the requisite
17 Proposition 65 warnings. U.S. Tape denies this allegation. Lead is listed pursuant to Proposition 65
18 as a chemical known to the State of California to cause birth defects and other reproductive harm.
19 Lead is referred to herein as the “Listed Chemical.”

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as follows: tape measures
22 with accessible components containing the Listed Chemical including, but not limited to, the *U.S.*
23 *Tape Center Point 25’ Measuring Tape (#7 27659 50070 4)*. All such items shall be referred to
24 herein as the “Products.”

25 **1.6 Notice of Violation**

26 On August 5, 2010, Brimer served U.S. Tape and various public enforcement agencies with a
27 document entitled “60-Day Notice of Violation” (“Notice”) that provided U.S. Tape and such public
28 enforcers with notice that U.S. Tape was alleged to be in violation of California Health & Safety

1 Code § 25249.6 for failing to warn consumers and customers that the Products exposed users in
2 California to the Listed Chemical. To the best of the Parties' knowledge, no public enforcer has
3 diligently prosecuted the allegations set forth in the 60-Day Notice of Violation.

4 **1.7 Complaint**

5 On October 25, 2010, Brimer, acting in the interest of the general public in California, filed
6 the instant action naming U.S. Tape as a defendant and alleging violations of Health & Safety Code §
7 25249.6 based on, *inter alia*, the exposures to Listed Chemical contained in the Products it sold in
8 California ("Complaint") without the clear and reasonable warning required by Proposition 65.

9 **1.8 No Admission**

10 U.S. Tape denies the material, factual, and legal allegations contained in Brimer's Notice and
11 Complaint, and maintains that all of the products it has manufactured, distributed, and/or sold in
12 California, including the Products, have been, and are, in compliance with all laws. Nothing in this
13 Consent Judgment shall be construed as an admission by U.S. Tape of any fact, finding, conclusion
14 of law, issue of law, or violation of law; nor shall compliance with this Consent Judgment constitute
15 or be construed as an admission by U.S. Tape of any fact, finding, conclusion of law, issue of law, or
16 violation of law, the same being specifically denied by U.S. Tape. However, this section shall not
17 diminish or otherwise affect the obligations, responsibilities and duties of U.S. Tape under this
18 Consent Judgment.

19 **1.9 Consent to Jurisdiction**

20 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
21 jurisdiction over U.S. Tape and Russell Brimer as to the allegations contained in the Complaint, that
22 venue is proper in the County of Alameda, and that this Court has jurisdiction to enter and enforce the
23 provisions of this Consent Judgment.

24 **1.10 Effective Date**

25 For purposes of this Consent Judgment, the term "Effective Date" shall mean February 28,
26 2011.

27 **1.11 Court**

28 For purposes of this Consent Judgment, the term "Court" shall mean the department of the

1 Superior Court of California for the County of Alameda presiding over case RG10543473.

2 **2. INJUNCTIVE RELIEF: REFORMULATION & WARNINGS**

3 **2.1 Reformulated Products**

4 “Reformulated Products” are defined as those Products that contain no more than 100 parts
5 per million lead content when analyzed pursuant to Environmental Protection Agency testing
6 methodologies 3050B and 6010B (Digest Test) and that yield no more than 1.0 micrograms of lead
7 when analyzed pursuant to NIOSH Test Method 9100 (Wipe Test) performed on any accessible
8 component (i.e. any portion of the Product that may be handled, touched, or mouthed by a user during
9 reasonably foreseeable use or misuse).

10 **2.2 Product Warnings**

11 Commencing on the Effective Date, U.S. Tape shall, for all Products that are not
12 Reformulated Products, provide clear and reasonable warnings as set forth in subsections 2.2(a) and
13 (b) below. Such labeling is not in any manner required for Reformulated Products. Each warning
14 shall be prominently placed with such conspicuousness as compared with other words, statements,
15 designs, or devices as to render it likely to be read and understood by an ordinary individual under
16 customary conditions before purchase or use. Each warning shall be provided in a manner such that
17 the consumer or user understands to which *specific* Product the warning applies, so as to minimize
18 the risk of consumer confusion.

19 **(a) Retail Store Sales.**

20 **(i) Product Labeling.** U.S. Tape may affix a warning to the packaging,
21 labeling, or directly on each Product sold in retail outlets in California by U.S. Tape or any person
22 selling its Products, that states:

23 **WARNING:** This product contains lead, a chemical known
24 to the State of California to cause birth defects
and other reproductive harm.

25 **(ii) Point-of-Sale Warnings.** Alternatively, U.S. Tape may provide
26 warning signs in the form below to its customers in California with instructions to post the
27 warnings in close proximity to the point of display of the Products.

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WARNING: This product contains lead, a chemical known to the State of California to cause birth defects and other reproductive harm.

Where more than one Product is sold in proximity to other like items or to those that do not require a warning (e.g., Reformulated Products as defined in Section 2.1), the following statement must be used:¹

WARNING: The following products contain lead, a chemical known to the State of California to cause birth defects and other reproductive harm:

[list products for which warning is required]

(b) Mail Order Catalog and Internet Sales. In the event that U.S. Tape sells Products via mail order catalog or internet to customers located in California after the Effective Date that are not Reformulated Products, U.S. Tape shall provide a warning for Products sold via mail order catalog or the Internet to California residents: (1) in the mail order catalog; or (2) on the website. Warnings given in the mail order catalog or on the website shall identify the *specific* Product to which the warning applies as further specified in Sections 2.2(b)(i) and (ii).

(i) Mail Order Catalog Warning. Any warning provided in a mail order catalog must be in the same type size or larger than the Product description text within the catalog. The following warning shall be provided on the same page and in the same location as the display and/or description of the Product:

WARNING: This product contains lead, a chemical known to the State of California to cause birth defects and other reproductive harm.

Where it is impracticable to provide the warning on the same page and in the same location as the display and/or description of the Product, U.S. Tape may utilize a designated symbol to cross reference the applicable warning and shall define the term “designated symbol” with the following language on the inside of the front cover of the catalog or on the same page as any order form for the Product(s):

¹For purposes of the Consent Judgment, “sold in proximity” shall mean that the Product and another product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

1 **WARNING:** Certain products identified with this symbol
2 ▼ and offered for sale in this catalog contain
3 lead, a chemical known to the State of
4 California to cause birth defects and other
 reproductive harm.

5 The designated symbol must appear on the same page and in close proximity to the display and/or
6 description of the Product. On each page where the designated symbol appears, U.S. Tape must
7 provide a header or footer directing the consumer to the warning language and definition of the
8 designated symbol.

9 If U.S. Tape elects to provide warnings in the mail order catalog, then the warnings must be
10 included in all catalogs offering to sell one or more Products printed after the Effective Date.

11 (ii) **Internet Website Warnings.** A warning may be given in conjunction
12 with the sale of the Products via the Internet, provided it appears either: (a) on the same web page on
13 which a Product is displayed; (b) on the same web page as the order form for a Product; (c) on the
14 same page as the price for any Product; or (d) on one or more web pages displayed to a purchaser
15 during the checkout process. The following warning statement shall be used and shall appear in any
16 of the above instances adjacent to or immediately following the display, description, or price of the
17 Product for which it is given in the same type size or larger than the Product description text:

18 **WARNING:** This product contains lead, a chemical known
19 to the State of California to cause birth defects
20 and other reproductive harm.

21 Alternatively, the designated symbol may appear adjacent to or immediately following the
22 display, description, or price of the Product for which a warning is being given, provided that the
23 following warning statement also appears elsewhere on the same web page, as follows:

24 **WARNING:** Products identified on this page with the
25 following symbol ▼ contain lead, a chemical
26 known to the State of California to cause birth
27 defects and other reproductive harm.

28 **3. MONETARY PAYMENTS**

3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)

 Pursuant to California Health & Safety Code §25249.7(b), U.S. Tape shall pay a total civil
penalty of \$20,000 in settlement of all of the claims alleged in the Notice and Complaint. This

1 \$20,000 amount is comprised of the initial civil payment of \$5,000, plus the \$15,000 referenced in
2 section 3.1.3, below. The penalty amount was determined according to the factors set forth in
3 California Health & Safety Code § 25249.7(b)(2), including, without limitation, the nature and extent
4 of the violation, the economic effect of the penalty on the violator, and whether the violator took
5 good faith measures to comply with Proposition 65 and the time such measures were taken.

6 **3.1.1 Initial Civil Penalty**

7 In settlement of all the claims referred to in this Consent Judgment and alleged in the
8 Notice and Complaint, U.S. Tape shall pay an Initial Civil Penalty of \$5,000 to be apportioned in
9 accordance with California Health & Safety Code §§ 25249.12 (c)(1) and (d), with seventy-five
10 percent of these funds remitted to the State of California's Office of Environmental Health Hazard
11 Assessment ("OEHHA") and the remaining twenty-five percent of the penalty paid to Brimer. U.S.
12 Tape shall issue two checks for the penalty payment: (a) one made payable to "The Chanler Group in
13 Trust for OEHHA" in the amount of \$3,750.00; and (b) one check to "The Chanler Group in Trust for
14 Russell Brimer" in the amount of \$1,250.00.

15 The payment of the Initial Civil Penalty shall be delivered within ten days of the
16 Effective Date, to the following address:

17 The Chanler Group
18 Attn: Proposition 65 Controller
19 2560 Ninth Street
20 Parker Plaza, Suite 214
21 Berkeley, CA 94710

22 Two 1099 forms shall be provided for the above payments, one to: (a) California
23 Office of Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA, 95814 (EIN:
24 68-0284486); and one to (b) Russell Brimer.

25 **3.1.2 Final Civil Penalty; Waiver Upon Certification**

26 U.S. Tape shall pay a Final Civil Penalty of \$15,000 on May 31, 2011. However, as
27 an incentive to achieve one hundred percent reformulation of the Products, Brimer agrees and the
28 Court orders that the full \$15,000 Final Civil Penalty shall be waived, in its entirety, upon
certification in writing by an officer of U.S. Tape that, as of June 1, 2011, it will only distribute, ship,

1 sell, or offer for sale in California Reformulated Products. The written certification of reformulation
2 must be received by The Chanler Group on or before May 15, 2011.

3 In the event that it is not waived as described above, the Final Civil Penalty shall be
4 allocated between Brimer and OEHHA according to California Health & Safety Code §§ 25249.12
5 (c)(1) and (d). Payment of the Final Civil Penalty shall be in the form of two checks made out as
6 follows: (a) "The Chanler Group in trust Russell Brimer" for the sum of \$3,750; and (b) "The
7 Chanler Group in Trust for OEHHA" for the sum of \$11,250. Tax information for both Brimer and
8 OEHHA shall be provided according section 3.1.1 above. Payment of the Final Civil Penalty, if not
9 waived, shall be delivered to The Chanler Group at the address provided in Section 3.1.1 on or before
10 May 15, 2011.

11 **4. REIMBURSEMENT OF FEES AND COSTS**

12 **4.1 Attorney Fees and Costs**

13 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
14 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
15 issue to be resolved after the material terms of the agreement had been settled. U.S. Tape then
16 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
17 finalized. The Parties then attempted to (and did) reach an accord on the compensation due to Brimer
18 and his counsel under general contract principles and the private attorney general doctrine codified at
19 California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of
20 this agreement. U.S. Tape shall pay \$30,000 for fees and costs incurred as a result of investigating,
21 bringing this matter to U.S. Tape's attention, litigating and negotiating a settlement in the public
22 interest, and seeking judicial approval of this settlement. U.S. Tape shall issue a separate 1099 for
23 fees and costs (EIN: 94-3171522), make the check payable to "The Chanler Group" and deliver
24 payment within ten days of the Effective Date to the following address:

25 The Chanler Group
26 Attn: Proposition 65 Controller
27 2560 Ninth Street
28 Parker Plaza, Suite 214
Berkeley, CA 94710

1 **5. RELEASE OF ALL CLAIMS**

2 **5.1 Brimer's Release**

3 In further consideration of the promises and agreements herein contained, and for the
4 payments to be made pursuant to Sections 3.1 and 4.1 above, Brimer, on behalf of himself, his past
5 and current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
6 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of
7 legal action and releases all claims, including, without limitation, all actions, and causes of action, in
8 law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or
9 expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees) of any
10 nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against
11 U.S. Tape and its parents, subsidiaries, affiliates, officers, directors, attorneys, representatives,
12 shareholders, agents, and employees, and each of their downstream distributors, wholesalers,
13 licensors, licensees, auctioneers, retailers, franchisors, franchisees, dealers, customers, owners,
14 purchasers, users, parent companies, corporate affiliates, subsidiaries, and their respective officers,
15 directors, attorneys, representatives, shareholders, agents, and employees, and sister, affiliated, and
16 parent entities (collectively "Releasees"). This release is limited to those Claims arising under
17 Proposition 65 for unwarned exposures to the Listed Chemical in the Products sold by U.S. Tape.

18 With respect to this release, Brimer on behalf of himself, his past and current agents,
19 representatives, attorneys, successors and/or assignees, and *not* in the interest of the general public,
20 hereby waives the application and protections of California Civil Code Section 1542, after careful
21 explanation of the effects of such waiver by his counsel, the Chanler Group. The releases in this
22 Consent Judgment are limited to those claims that arise under Proposition 65, as such claims relate to
23 U.S. Tape's or any Releasee's alleged failure to warn about exposures to the Listed Chemical in the
24 Products sold by U.S. Tape.

25 Brimer agrees and the Court rules that compliance with this Consent Judgment shall be
26 deemed to constitute compliance with Proposition 65 for the Products with respect to Listed
27 Chemical, both in the past and in the future. The Court shall retain jurisdiction with respect to all
28 parties' compliance with this Consent Judgment. Any alleged violation of Proposition 65, with

1 respect to the Products, allegedly occurring after the Effective Date, shall remain within the
2 jurisdiction of the Court, and be resolved under the terms of this Consent Judgment. The Parties
3 further agree that this release shall not generally extend upstream to any entities that manufactured
4 the Products or any component parts thereof, or to any distributors or suppliers who sold Products or
5 any component parts thereof to U.S. Tape, except to the limited extent those entities' Products were
6 sold or distributed by U.S. Tape and are subject to this Consent Judgment.

7 **5.2 U.S. Tape's Release of Brimer**

8 U.S. Tape waives any and all claims against Brimer, his attorneys and other representatives,
9 for any and all actions taken or statements made (or those that could have been taken or made) by
10 Brimer and his attorneys and other representatives, whether in the course of investigating the Claims
11 or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the
12 Products.

13 **6. COURT APPROVAL**

14 This Consent Judgment is not effective until it is approved and entered by the Court and shall
15 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
16 has been fully executed by all Parties, in which event any monies that have been provided to Brimer,
17 or his counsel pursuant to Section 3.1 and/or Section 4.1 above, shall be refunded within fifteen days
18 of receiving written notice from U.S. Tape that the one-year period has expired.

19 **7. SEVERABILITY**

20 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
21 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions
22 remaining shall not be adversely affected.

23 **8. GOVERNING LAW**

24 The terms of this Consent Judgment shall be governed by the laws of the State of California
25 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or is
26 otherwise rendered inapplicable by reason of law generally, or as to the Products, then U.S. Tape
27 shall provide written notice to Brimer of any asserted change in the law, and shall have no further
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1 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
2 so affected.

3 **9. NOTICES**

4 Unless specified herein, all correspondence and notices required to be provided pursuant to
5 this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
6 registered or certified mail, return receipt requested; or (ii) overnight courier on any party by the
7 other party at the following addresses:

8 For U.S. Tape:

9 Peter Rosenquist, President
10 U.S. Tape Company, Inc.
11 2452 Quakertown Road
Suite 300
Pennsburg, PA 18073

with a copy to:

Michael J. Partos, Esq.
Cozen O'Connor
777 South Figueroa Street
Suite 2850
Los Angeles, CA 90017

12 For Brimer:

13 Proposition 65 Coordinator
14 The Chanler Group
15 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

16 Any party, from time to time, may specify in writing to the other party a change of address to which
17 all notices and other communications shall be sent.

18 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

19 This Consent Judgment may be executed in counterparts and by facsimile, each of which shall
20 be deemed an original, and all of which, when taken together, shall constitute one and the same
21 document.

22 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

23 Brimer agrees to comply with the reporting form requirements referenced in California Health
24 & Safety Code § 25249.7(f).

25 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

26 The Parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a noticed motion
27 is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such
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1 approval, Brimer and U.S. Tape and their respective counsel agree to mutually employ their best
2 efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the
3 Consent Judgment by the Court in a timely manner. For purposes of this paragraph, "best efforts"
4 shall include, at a minimum, cooperating on the drafting and filing of any papers in support of the
5 required motion for judicial approval.

6 **13. MODIFICATION**

7 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
8 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of
9 any party and entry of a modified consent judgment by the Court.

10 **14. AUTHORIZATION**

11 The undersigned are authorized to execute this Consent Judgment and have read, understood,
12 and agree to all of the terms and conditions hereof.

13
14 **AGREED TO:**

15 Date: 6-10-11

16 By: 
17 RUSSELL BRIMER

AGREED TO:

Date: _____

By: _____
Peter Rosenquist, President
U.S. TAPE COMPANY, INC.

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