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10 Consumer Advocacy Group, Inc.

INFORMED
Superior Court of California
County of Los Angeles
NOV 19 2010
John A. Clarke, Executive Officer/Clerk
By RUGENA LOPEZ, Deputy

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF LOS ANGELES

13 CONSUMER ADVOCACY GROUP, INC.,
14 in the public interest,

15 Plaintiff,

16 v.

17 BIG LOTS STORES, INC., an Ohio
18 corporation, MIDWESTERN HOME
19 PRODUCTS, INC., a Delaware corporation,
20 and DOES 1-50;

21 Defendants.

22 CASE NO.

BC449679

23 COMPLAINT FOR PENALTY,
24 INJUNCTION, AND RESTITUTION

25 Violation of Proposition 65, the Safe
26 Drinking Water and Toxic Enforcement
27 Act of 1986 (*Cal. Health & Safety Code*, §
28 25249.5, *et seq.*)

ACTION IS AN UNLIMITED CIVIL
CASE (exceeds \$25,000)

29 Plaintiff Consumer Advocacy Group, Inc. alleges a cause of action against defendants as
30 follows:

31 **THE PARTIES**

- 32 1. Plaintiff Consumer Advocacy Group, Inc. ("Plaintiff" OR "CAG") is a non-profit
33 corporation qualified to do business in the State of California. CAG is a person within
34 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting

1 as a private attorney general, brings this action in the public interest as defined under
2 Health and Safety Code section 25249.7, subdivision (d).

- 3
4 2. Plaintiff, Big Lots, Inc. is a corporation duly organized and existing under the laws of the
5 state of Ohio.
- 6 3. Plaintiff, Midwestern Home Products, Inc. is a corporation duly organized and existing
7 under the laws of the state of Delaware.
- 8 4. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-50,
9 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
10 Complaint to allege their true names and capacities when ascertained. Plaintiff is
11 informed, believes, and thereon alleges that each fictitiously named defendant is
12 responsible in some manner for the occurrences herein alleged and the damages caused
13 thereby.
- 14 5. As to the first cause of action only, the term "Defendants" includes Big Lots Stores, Inc.,
15 Midwestern Home Products, Inc. and Does 1-25.
- 16 6. As to the second cause of action only, the term "All" includes Big Lots Stores, Inc. and
17 Does 26-50.
- 18 7. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
19 times mentioned herein has conducted business within the State of California.
- 20 8. At all times relevant to this action, each of the Defendants, including Does 1-50, was an
21 agent, servant, or employee of each of the other Defendants. In conducting the activities
22 alleged in this Complaint, each of the Defendants was acting within the course and scope
23 of this agency, service, or employment, and was acting with the consent, permission, and
24 authorization of each of the other Defendants. All actions of each of the Defendants
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1 alleged in this Complaint were ratified and approved by every other Defendant or their
2 officers or managing agents. Alternatively, each of the Defendants aided, conspired with
3 and/or facilitated the alleged wrongful conduct of each of the other Defendants.

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5 9. Alternatively, at times relevant to this action, Defendant Big Lots Stores, Inc. so
6 controlled Defendant Midwestern Home Products, Inc. as to render Midwestern Home
7 Products, Inc. the mere instrumentality of Big Lots Stores, Inc.. Therefore, it is in
8 furtherance of the ends of justice, that the Corporate form of Defendant Midwestern
9 Home Products, Inc. should be disregarded.

10 10. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
11 Defendants was a person doing business within the meaning of Health and Safety Code
12 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
13 employees at all relevant times.

14 JURISDICTION

15 11. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
16 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
17 those given by statute to other trial courts. This Court has jurisdiction over this action
18 pursuant to Health and Safety Code section 25249.7, which allows enforcement of
19 violations of Proposition 65 in any Court of competent jurisdiction.

20
21 12. This Court has jurisdiction over Defendants named herein because Defendants either
22 reside or are located in this State or are foreign corporations authorized to do business in
23 California, are registered with the California Secretary of State, or who do sufficient
24 business in California, have sufficient minimum contacts with California, or otherwise
25 intentionally avail themselves of the markets within California through their manufacture,
26 distribution, promotion, marketing, or sale of their products within California to render
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1 the exercise of jurisdiction by the California courts permissible under traditional notions
2 of fair play and substantial justice.

- 3
4 13. Venue is proper in the County of Los Angeles because one or more of the instances of
5 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
6 because Defendants conducted, and continue to conduct, business in the County of Los
7 Angeles with respect to the consumer product that is the subject of this action.

8 **BACKGROUND AND PRELIMINARY FACTS**

- 9
10 14. In 1986, California voters approved an initiative to address growing concerns about
11 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to
12 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
13 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
14 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
15 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
16 from contamination, to allow consumers to make informed choices about the products
17 they buy, and to enable persons to protect themselves from toxic chemicals as they see
18 fit.

- 19
20 15. Proposition 65 requires the Governor of California to publish a list of chemicals known to
21 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
22 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
23 chemicals and chemical families. Proposition 65 imposes warning requirements and
24 other controls that apply to Proposition 65-listed chemicals.

- 25
26 16. All businesses with ten (10) or more employees that operate or sell products in California
27 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
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1 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
2 water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and
3 reasonable" warnings before exposing a person, knowingly and intentionally, to a
4 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

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6 17. Proposition 65 provides that any person "violating or threatening to violate" the statute
7 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.

8 "Threaten to violate" means "to create a condition in which there is a substantial
9 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).

10 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
11 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

12
13 18. Through research and investigation, Plaintiff identified certain practices of Defendants of
14 exposing, knowingly and intentionally, persons in California to the Proposition 65-listed
15 chemicals of the consumer products discussed below without first providing clear and
16 reasonable warnings of such to the exposed persons prior to the time of exposure.

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18 **SATISFACTION OF PRIOR NOTICE**

19 19. On or about December 3, 2009, Plaintiff gave notice of alleged violations of Health and
20 Safety Code section 25249.6, concerning consumer products exposures, subject to a
21 private action to Big Lots Stores, Inc., and to the California Attorney General, County
22 District Attorneys, and City Attorneys for each city containing a population of at least
23 750,000 people in whose jurisdictions the violations allegedly occurred concerning the
24 consumer product Santa's Boutique Indoor/Outdoor 80 Foot Garland (Product No. 4080-
25 AS).
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1 20. On or about December 3, 2009, Plaintiff gave notice of alleged violations of Health and
2 Safety Code section 25249.6, concerning consumer products exposures, subject to a
3 private action to Midwestern Home Products, Inc., and to the California Attorney
4 General, County District Attorneys, and City Attorneys for each city containing a
5 population of at least 750,000 people in whose jurisdictions the violations allegedly
6 occurred concerning the consumer product Santa's Boutique Indoor/Outdoor 80 Foot
7 Garland (Product No. 4080-AS).
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9 21. On or about July 9, 2010, Plaintiff gave notice of alleged violations of Health and Safety
10 Code section 25249.6, concerning consumer products exposures, subject to a private
11 action to Big Lots Stores, Inc., and to the California Attorney General, County District
12 Attorneys, and City Attorneys for each city containing a population of at least 750,000
13 people in whose jurisdictions the violations allegedly occurred, concerning the consumer
14 product Citrus Autoworks Steering Wheel Cover Optimum Protection Against Hot &
15 Cold CIT-1R.
16

17 22. Before sending the notice of alleged violations, Plaintiff investigated the consumer
18 product involved, and the likelihood that such product would cause users to suffer
19 significant exposures to the relevant Proposition 65-listed chemical at issue.
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21 23. Plaintiff's notice of alleged violations included a Certificate of Merit executed by the
22 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
23 Plaintiff who executed the certificate had consulted with at least one person with relevant
24 and appropriate expertise who reviewed data regarding the exposures to lead, which is the
25 subject Proposition 65-listed chemical of this action. Based on that information, the
26 attorney for Plaintiff who executed the Certificate of Merit believed there was a
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1 reasonable and meritorious case for this private action. The attorney for Plaintiff attached
2 to the Certificate of Merit served on the Attorney General the confidential factual
3 information sufficient to establish the bases of the Certificate of Merit.

4
5 24. Plaintiff's notice of alleged violation also included a Certificate of Service and a
6 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
7 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

8
9 25. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
10 gave notice of the alleged violations to Big Lots Stores, Inc., Midwestern Home Products,
11 Inc. and the public prosecutors referenced in Paragraph 20.

12 26. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
13 any applicable district attorney or city attorney has commenced and is diligently
14 prosecuting an action against the Defendants.

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17 **FIRST CAUSE OF ACTION**

18 **(By Consumer Advocacy Group, Inc. and against Big Lots Stores, Inc., Midwestern Home**
19 **Products, Inc., and Does 1-50 for Violations of Proposition 65, The Safe Drinking Water**
20 **and Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, *et seq.*))**

21 **Santa's boutique Indoor/Outdoor 80 Foot Garland**

22 27. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
23 distributor, promoter, or retailer of Santa's Boutique Indoor/Outdoor 80 Foot Garland.
24 (hereinafter "Garland") a consumer product designed for use to decorate a dwelling or
25 commercial structure.

26 28. Plaintiff is informed, believes, and thereon alleges that Garland contains lead.

1 29. On February 27, 1987, the Governor of California added lead to the list of chemicals
2 known to the State to cause reproductive toxicity (*Cal. Code Regs. tit. 27, § 27001(c)*).

3 30. On October 1, 1992 the Governor added lead and lead components to the list of
4 chemicals known to the State to cause cancer (*Cal. Code Regs. tit. 27, § 27001(b)*).

5 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
6 after addition of lead to the list of chemicals known to the State to cause cancer, lead
7 became fully subject to Proposition 65 warning requirements and discharge prohibitions.
8

9 31. Defendants knew or should have known that lead has been identified by the State of
10 California as a chemical known to cause cancer and therefore were subject to Proposition
11 65 warning requirements. Defendants were also informed of the presence of lead in the
12 Garland within Plaintiff's notice of alleged violation further discussed above at
13 Paragraphs 19 and 20.
14

15 32. Plaintiff's allegations regarding Garland concern "[c]onsumer products exposure[s],"
16 which "is an exposure that results from a person's acquisition, purchase, storage,
17 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
18 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*.
19 Garland is a consumer product, and, as mentioned in herein, exposures to lead took place
20 as a result of such normal and foreseeable consumption and use.
21

22 33. Plaintiff is informed, believes, and thereon alleges that between November 30, 2006 and
23 the present, each of the Defendants knowingly and intentionally exposed California
24 consumers and users of Garland, which Defendants manufactured, distributed, or sold as
25 mentioned above, to lead, without first providing any type of clear and reasonable
26 warning of such to the exposed persons before the time of exposure. Defendants have
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1 distributed and sold Garland in California. Defendants know and intend that California
2 consumers will use and consume Garland thereby exposing them to lead. Defendants
3 thereby violated Proposition 65.
4

5 34. The principal routes of exposure are through dermal contact, ingestion, and inhalation.
6 Persons sustain exposures by handling the Garland without wearing gloves or by
7 touching bare skin or mucous membranes with gloves after handling Garland, as well as
8 hand to mouth contact, hand to mucous membrane, or breathing in particulate matter
9 emanating from the Garland during application and installation, as well as through
10 environmental mediums that carry the lead and lead compounds once contained within
11 the Garland.
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13 35. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
14 Proposition 65 as to Garland have been ongoing and continuous to the date of the signing
15 of this Complaint, as Defendants engaged and continue to engage in conduct which
16 violates Health and Safety Code section 25249.6, including the manufacture, distribution,
17 promotion, and sale of Garland, so that a separate and distinct violation of Proposition 65
18 occurred each and every time a person was exposed to lead by Garland as mentioned
19 herein.
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21 36. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
22 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
23 violations alleged herein will continue to occur into the future.
24

25 37. Based on the allegations herein, Defendants are liable for civil penalties of up to
26 \$2,500.00 per day per individual exposure to lead from Garland, pursuant to Health and
27 Safety Code section 25249.7(b).
28

1 38. In the absence of equitable relief, California consumers, the general public, and others
2 will continue to be involuntarily exposed to lead that is contained in Garland, creating a
3 substantial risk of irreparable harm. Thus, by committing the acts alleged herein,
4 Defendants have caused irreparable harm for which there is no plain, speedy, or adequate
5 remedy at law.
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7 39. Plaintiff has engaged in good faith efforts to resolve the claim alleged herein prior to
8 filing this Complaint.
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11 SECOND CAUSE OF ACTION

12 **(By Consumer Advocacy Group, Inc. and against Big Lots Stores, Inc., and Does 1-**
13 **50 for Violations of Proposition 65, The Safe Drinking Water and Toxic**
14 **Enforcement Act of 1986 (Health & Safety Code, §§ 25249.5, et seq.))**

15 Citrus Autoworks Steering Wheel Cover

16 40. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference
17 paragraphs 1 through 26.

18 41. Defendants Big Lots, Inc., and Does 26-50 were and are manufacturers, distributors, or
19 retailers of Citrus Autoworks Steering Wheel Cover, a consumer product designed for
20 use in automobiles.

21 42. Plaintiff is informed, believes, and thereon alleges that Steering Wheel contains lead.

22 43. On October 1, 1992, the Governor of California added Lead and lead compounds to the
23 list of chemicals known to the State to cause cancer (Cal. Code Regs. tit. 27, § 27001(b)).
24 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
25 after addition of Lead and lead compounds to the list of chemicals known to the State to
26 cause cancer, Lead and lead compounds became fully subject to Proposition 65 warning
27 requirements and discharge prohibitions.
28

1 44. On February 27, 1987, the Governor of California added Lead to the list of chemicals
2 known to the State to cause reproductive toxicity (Cal. Code Regs. tit. 27, § 27001(c)).
3 Lead is known to the State to cause developmental, female, and male reproductive
4 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
5 months after addition of Lead to the list of chemicals known to the State to cause
6 reproductive toxicity, Lead became fully subject to Proposition 65 warning requirements
7 and discharge prohibitions.

8 45. Defendant Big Lots, Inc., and Does 26-50 knew or should have known that Lead has been
9 identified by the State of California as a chemical known to cause cancer and
10 reproductive toxicity and therefore was subject to Proposition 65 warning requirements.
11 Defendants were also informed of the presence of Lead in the Steering Wheel within
12 Plaintiff's notice of alleged violations further discussed above at Paragraph 21.

13 46. Plaintiff's allegations regarding Steering Wheel concern "[c]onsumer products
14 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
15 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
16 exposure that results from receiving a consumer service." Cal. Code Regs. tit. 27, §
17 25602(b). Steering Wheel is a consumer product, and, as mentioned in herein, exposures
18 to Lead took place as a result of such normal and foreseeable consumption and use.

19 47. Plaintiff's allegations regarding Steering Wheel also concern "[o]ccupational
20 exposure[s]," which are exposures "to any employees in his or her employer's
21 workplace." Cal. Code Reg. tit. 27, § 25602(f). As mentioned in herein, employees were
22 exposed to Lead in their employer's workplace as a result of handling Steering Wheel, in
23 conjunction with importing, distributing, packaging, promoting and selling Steering
24 Wheel, among other activities, without having first been given clear and reasonable
25 warnings that such handling would cause exposures to Lead.

26 48. Plaintiff's allegations also concern "[e]nvironmental exposure[s]," which are exposures
27 "that may foreseeably occur as a result of contact with an environmental medium,
28 including, but not limited to, ambient air, indoor air, drinking water, standing water,

1 running water, soil, vegetation, or manmade or natural substances, either through
2 inhalation, ingestion, skin contact, or otherwise. Environmental exposures include all
3 exposures that are not consumer products exposures, or occupational exposures." Cal.
4 Code Reg. tit. 27, § 25602(e). As mentioned in herein, Defendants Big Lots, Inc. and
5 Does 26-50, caused environmental exposures by not providing clear and reasonable
6 warnings at their facilities, and other locations where such exposures would foreseeably
7 occur to persons who could foreseeably come into contact with Steering Wheel through
8 environmental mediums.

9 49. Plaintiff is informed, believes, and thereon alleges that between April 19, 2007 and the
10 present, Defendants Big Lots, Inc. and Does 1-26, knowingly and intentionally exposed
11 their employees and California consumers and users of Steering Wheel, which
12 Defendants Big Lots, Inc. and Does 1-26 manufactured, distributed, or sold as mentioned
13 above, to Lead, without first providing any type of clear and reasonable warning of such
14 to the exposed persons before the time of exposure. Defendants have distributed and sold
15 Steering Wheel in California. Defendants Big Lots, Inc., and Does 26-50, know and
16 intend that California consumers will use and consume Steering Wheel thereby exposing
17 them to Lead. Defendants big Lots, Inc. and Does 26-50 thereby violated Proposition 65.

18 50. The principal routes of exposure are through dermal contact, ingestion and inhalation.
19 Persons sustain exposures by handling Steering Wheel without wearing gloves or any
20 other personal protective equipment, or by touching bare skin or mucous membranes with
21 gloves after handling the Steering Wheel, as well as hand to mouth contact (e.g., by
22 inserting surfaces, such as hands, that have contacted Steering Wheel into their mouths),
23 hand to mucous membrane, or breathing in particulate matter dispersed from Steering
24 Wheel from placing and manipulating the Steering Wheel, or as to Defendants'
25 employees, in the course of their employment handling, distributing, and selling Steering
26 Wheel.

27 51. Plaintiff is informed, believes, and thereon alleges that the violations of Defendant Big
28 Lots, Inc.. and Does 26-50, as to Steering Wheel have been ongoing and continuous to

1 the signing of this Complaint, as said Defendants engaged and continue to engage in
2 conduct which violates Health and Safety Code section 25249.6, including the
3 manufacture, distribution, promotion, and sale of Steering Wheel, so that a separate and
4 distinct violation of Proposition 65 occurred each and every time a person was exposed to
5 Lead by Steering Wheel as mentioned herein.

6 52. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
7 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
8 violations alleged herein will continue to occur into the future.

9 53. Based on the allegations herein, Defendant Big Lots, Inc., and Does 26-50, are liable for
10 civil penalties of up to \$2,500.00 per day per individual exposure to Lead from Steering,
11 pursuant to Health and Safety Code section 25249.7(b).

12 54. In the absence of equitable relief, California consumers, the general public, and
13 Defendants' employees will continue to be involuntarily exposed to Lead that is
14 contained in Steering Wheel, creating a substantial risk of irreparable harm. Thus, by
15 committing the acts alleged herein, Defendant Big Lots, Inc., and Does 26-50 have
16 caused irreparable harm for which there is no plain, speedy, or adequate remedy at law.

17 55. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
18 filing this Complaint.

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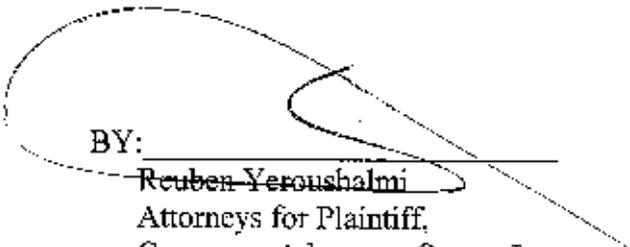
1 **PRAYER FOR RELIEF**

2 Plaintiff demands against each of the Defendants, including Big Lots, Midwestern Home
3 and Does 1-50, as follows:

- 4 1. A permanent injunction mandating Proposition 65-compliant warnings as to the
5 respective consumer product of each defendant;
6
7 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
8
9 3. Costs of suit;
10
11 4. Reasonable attorney fees and costs; and
12
13 5. Any further relief that the court may deem just and equitable.

14 Dated: 11/17/10

YEROUSHALMI & ASSOCIATES

15
16
17 BY: 
18 Reuben Yeroushalmi
19 Attorneys for Plaintiff,
20 Consumer Advocacy Group, Inc.
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