

FILED

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MARIN COUNTY SUPERIOR COURT  
at Tiburon, Calif.

1 Laurence D. Haveson, State Bar No. 152631  
Josh Voorhees, State Bar No. 241436  
2 THE CHANLER GROUP  
2560 Ninth Street  
3 Parker Plaza, Suite 214  
Berkeley, CA 94710-2565  
4 Telephone: (510) 848-8880  
Facsimile: (510) 848-8118

5  
6 Attorneys for Plaintiff  
RUSSELL BRIMER

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

11 RUSSELL BRIMER,  
12 Plaintiff,

13 v.

14 AMASH IMPORTS, INC.; MICHIGAN  
INDUSTRIAL TOOLS; O'REILLY  
15 AUTOMOTIVE, INC.; O'REILLY  
AUTOMOTIVE STORES, INC.; BIG LOTS,  
16 INC.; BIG LOTS STORES, INC.; and DOES  
1-150, inclusive,  
17 Defendants.

) Case No. CIV1104615  
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) **FIRST AMENDED COMPLAINT FOR**  
) **CIVIL PENALTIES AND INJUNCTIVE**  
) **RELIEF**

) (Cal. Health & Safety Code § 25249.6 et seq.)  
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BY FAX

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 tools with grips sold in  
5 California.

6 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to warn  
7 California citizens about reproductive harms associated with their exposure to lead, present in or  
8 on certain tools with grips that defendants manufacture, import, distribute, sell, and/or offer for  
9 sale to consumers 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”), “[n]o 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 to  
16 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 Cal. Code Regs. (“CCR”)  
19 § 27001 (c); Cal. Health & Safety Code § 25249.8.)

20 5. Defendants manufacture, import, distribute, sell, and/or offer for sale tools with  
21 grips containing lead including, but not limited to, the *Adjustable Rapid Wrench, #2318 (#0*  
22 *20209 02318 1).*

23 6. All such tools with grips containing lead on the exterior shall hereinafter be  
24 collectively referred to as the “PRODUCTS”.

25 7. Defendants’ failure to warn consumers and/or other individuals in the State of  
26 California not covered by California’s Occupational Safety Health Act, Labor Code § 6300 *et*  
27 *seq.* about their exposure to lead and its potential to cause birth defects and other reproductive  
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1 harm in conjunction with defendants' distribution, importation, manufacture, sale, and/or offer of  
2 the PRODUCTS for sale is a violation of Proposition 65 and subjects defendants to enjoinder  
3 of such conduct as well as civil penalties for each such violation.

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

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

10 **PARTIES**

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

15 11. Defendant AMASH IMPORTS, INC. ("AMASH" or "Defendant") is a person  
16 doing business within the meaning of California Health & Safety Code § 25249.11(c).

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

20 13. Defendant MICHIGAN INDUSTRIAL TOOLS ("MIT" or "Defendant") is a  
21 person doing business within the meaning of California Health & Safety Code § 25249.11(c).

22 14. MIT manufactures, imports, distributes, sells, and/or offers the PRODUCTS for  
23 sale or use in the State of California or implies by its conduct that it manufactures, imports,  
24 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

25 15. Defendant O'REILLY AUTOMOTIVE, INC. ("O'REILLY" or "Defendant") is a  
26 person doing business within the meaning of California Health & Safety Code § 25249.11(c).

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1           16. O'REILLY manufactures, imports, distributes, sells, and/or offers the PRODUCTS  
2 for sale or use in the State of California or implies by its conduct that it manufactures, imports,  
3 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

4           17. Defendant O'REILLY AUTOMOTIVE STORES, INC. ("O'REILLY STORES"  
5 or "Defendant") is a person doing business within the meaning of California Health & Safety  
6 Code § 25249.11(c).

7           18. O'REILLY STORES manufactures, imports, distributes, sells, and/or offers the  
8 PRODUCTS for sale or use in the State of California or implies by its conduct that it  
9 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the  
10 State of California.

11           19. Defendant BIG LOTS, INC. ("BIG LOTS" or "Defendant") is a person doing  
12 business within the meaning of California Health & Safety Code § 25249.11(c).

13           20. BIG LOTS manufactures, imports, distributes, sells, and/or offers the PRODUCTS  
14 for sale or use in the State of California or implies by its conduct that it manufactures, imports,  
15 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

16           21. Defendant BIG LOTS STORES, INC. ("BIG LOTS STORES" or "Defendant") is  
17 a person doing business within the meaning of California Health & Safety Code § 25249.11(c).

18           22. BIG LOTS STORES manufactures, imports, distributes, sells, and/or offers the  
19 PRODUCTS for sale or use in the State of California or implies by its conduct that it  
20 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the  
21 State of California.

22           23. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each persons  
23 in the course of doing business within the meaning of California Health & Safety Code  
24 § 25249.11(c).

25           24. MANUFACTURER DEFENDANTS engage in the process of researching, testing,  
26 designing, assembling, fabricating, and/or manufacturing, or imply by their conduct that they  
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1 engage in the process of researching, testing, designing, assembling, fabricating, and/or  
2 manufacturing, one or more PRODUCTS offered for sale or use in the State of California.

3 25. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons  
4 in the course of doing business within the meaning of California Health & Safety Code  
5 § 25249.11(c).

6 26. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and/or  
7 transport one or more PRODUCTS to individuals, businesses, or retailers for sale or use in the  
8 State of California.

9 27. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each persons in  
10 the course of doing business within the meaning of California Health & Safety Code  
11 § 25249.11(c).

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

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

19 30. AMASH, MIT, O’REILLY, O’REILLY STORES, BIG LOTS, BIG LOTS  
20 STORES, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, and  
21 RETAILER DEFENDANTS shall, where appropriate, collectively be referred to hereinafter as  
22 “DEFENDANTS.”

23 **VENUE AND JURISDICTION**

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

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

7 33. 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 is a citizen of the State of California, has sufficient minimum contacts in the  
10 State of California, or otherwise purposefully avails itself of the California market.  
11 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by California  
12 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 34. Plaintiff realleges and incorporates by reference, as if fully set forth herein,  
16 Paragraphs 1 through 33, inclusive.

17 35. The citizens of the State of California have expressly stated in Proposition 65 that  
18 they must be informed “about exposures to chemicals that cause cancer, birth defects and other  
19 reproductive harm.” (*Cal. Health & Safety Code § 25249.6.*)

20 36. Proposition 65 states, “[n]o person in the course of doing business shall knowingly  
21 and intentionally expose any individual to a chemical known to the state to cause cancer or  
22 reproductive toxicity without first giving clear and reasonable warning to such individual....”  
23 (*Id.*)

24 37. On February 1, 2011, a 60-Day Notice of Violation, together with the requisite  
25 Certificate of Merit (the “Notice”), was provided to AMASH, MIT, and various public  
26 enforcement agencies stating that as a result of DEFENDANTS’ manufacture, importation,  
27 distribution, sale and/or offering of the PRODUCTS for sale, purchasers and users in the State of  
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1 California were being exposed to lead resulting from the reasonably foreseeable uses of the  
2 PRODUCTS, without the individual purchasers and users first having been provided with a  
3 “clear and reasonable warning” regarding such toxic exposures.

4 38. On November 22, 2011, a Supplemental 60-Day Notice of Violation, together with  
5 the requisite Certificate of Merit (the “Supplemental Notice”), was provided to AMASH, MIT,  
6 O’REILLY, O’REILLY STORES, BIG LOTS, BIG LOTS STORES, and various public  
7 enforcement agencies stating that as a result of DEFENDANTS’ manufacture, importation,  
8 distribution, sale and/or offering of the PRODUCTS for sale, purchasers and users in the State of  
9 California were being exposed to lead resulting from the reasonably foreseeable uses of the  
10 PRODUCTS, without the individual purchasers and users first having been provided with a  
11 “clear and reasonable warning” regarding such toxic exposures.

12 39. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,  
13 and/or offering of the PRODUCTS for sale or use in violation of California Health & Safety  
14 Code § 25249.6 and DEFENDANTS’ manufacture, importation, distribution, sale, and/or  
15 offering of the PRODUCTS for sale or use in violation of California Health & Safety Code  
16 § 25249.6 has continued to occur beyond DEFENDANTS’ receipt of plaintiff’s Notice and  
17 Supplemental Notice. Plaintiff further alleges and believes that such violations will continue to  
18 occur into the future.

19 40. After receipt of the claims asserted in the Notice and Supplemental Notice, the  
20 appropriate public enforcement agencies have failed to commence and diligently prosecute a  
21 cause of action against DEFENDANTS under Proposition 65.

22 41. The PRODUCTS manufactured, imported, distributed, sold, and/or offered for sale  
23 or use in California by DEFENDANTS contained lead in an amount above the allowable state  
24 limits.

25 42. DEFENDANTS knew or should have known that the PRODUCTS manufactured,  
26 imported, distributed, sold, and/or offered for sale or use by DEFENDANTS in California  
27 contained lead.

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1           43. Lead was present in or on the PRODUCTS in such a way as to expose individuals  
2 to lead through dermal contact and/or ingestion during the reasonably foreseeable use of the  
3 PRODUCTS.

4           44. The normal and reasonably foreseeable use of the PRODUCTS has caused, and  
5 continues to cause, consumer exposures to lead, as such exposure is defined by 27 CCR  
6 § 25602(b).

7           45. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of  
8 the PRODUCTS would expose individuals to lead through dermal contact and/or ingestion.

9           46. DEFENDANTS intended that such exposures to lead from the reasonably  
10 foreseeable use of the PRODUCTS would occur by their deliberate, non-accidental participation  
11 in the manufacture, importation, distribution, sale, and/or offer for sale or use of PRODUCTS to  
12 individuals in the State of California.

13           47. DEFENDANTS failed to provide a “clear and reasonable warning” to those  
14 consumers and/or other individuals in the State of California who were or who could become  
15 exposed to lead through dermal contact and/or ingestion during the reasonably foreseeable use of  
16 the PRODUCTS.

17           48. Contrary to the express policy and statutory prohibition of Proposition 65, enacted  
18 directly by California voters, individuals exposed to lead through dermal contact and/or  
19 ingestion, resulting from the reasonably foreseeable use of the PRODUCTS, sold by  
20 DEFENDANTS without a “clear and reasonable warning,” have suffered, and continue to suffer,  
21 irreparable harm, for which harm they have no plain, speedy, or adequate remedy at law.

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

25           50. As a consequence of the above-described acts, California Health & Safety Code  
26 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against  
27 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, and/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 to lead;
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.

Dated: February 7, 2012

Respectfully Submitted,  
THE CHANLER GROUP

By:   
Josh Voorhees  
Attorneys for Plaintiff  
RUSSELL BRIMER