

1 Reuben Yeroushalmi (SBN 193981)
2 Daniel D. Cho (SBN 105409)
3 Ben Yeroushalmi (SBN 232540)
4 **YEROUSHALMI & ASSOCIATES**
5 9100 Wilshire Boulevard, Suite 610E
6 Beverly Hills, California 90212
7 Telephone: 310.623.1926
8 Facsimile: 310.623.1930

9 Attorneys for Plaintiff,
10 Consumer Advocacy Group, Inc.

CONFORMED COPY
ORIGINAL FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

JUN 05 2012

John A. Clarke, Executive Officer/Clerk
BY Rugena Jiliano Deputy

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13
14 COUNTY OF LOS ANGELES – CENTRAL DISTRICT

15 CONSUMER ADVOCACY GROUP, INC.,
16 in the public interest,

17 Plaintiff,

18 v.

19 CONSOLIDATED PROPERTY
20 HOLDINGS, INC., a Nevada Corporation,
21 BIG LOTS STORES, INC., an Ohio
22 Corporation, and DOES 1-50;

23 Defendants.

CASE NO.

BC485960

COMPLAINT FOR PENALTY,
INJUNCTION, AND RESTITUTION

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

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

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

26 ///

27 ///

28 ///

///

///

///

COPY

THE PARTIES

1. Plaintiff Consumer Advocacy Group, Inc. ("Plaintiff" or "CAG") is an organization qualified to do business in the State of California. CAG is a person within the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting as a private attorney general, brings this action in the public interest as defined under Health and Safety Code section 25249.7, subdivision (d).
2. Defendant BIG LOTS STORES, INC. ("Big Lots Stores") is an Ohio corporation, qualified to do business and doing business in the State of California at all relevant times herein.
3. Defendant CONSOLIDATED PROPERTY HOLDINGS, INC. ("Consolidated") is a Nevada corporation, doing business in the State of California.
4. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-50, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed, believes, and thereon alleges that each fictitiously named defendant is responsible in some manner for the occurrences herein alleged and the damages caused thereby.
5. At all times mentioned herein, the term "Defendants" includes BIG LOTS STORES, INC., CONSOLIDATED PROPERTY HOLDINGS, INC., and Does 1-50.
6. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all times mentioned herein have conducted business within the State of California.
7. At all times relevant to this action, each of the Defendants, including Does 1-50, was an agent, servant, or employee of each of the other Defendants. In conducting the activities alleged in this Complaint, each of the Defendants was acting within the course and scope of this agency, service, or employment, and was acting with the consent, permission, and authorization of each of the other Defendants. All actions of each of the Defendants alleged in this Complaint were ratified and approved by every other Defendant or their

1 officers or managing agents. Alternatively, each of the Defendants aided, conspired with
2 and/or facilitated the alleged wrongful conduct of each of the other Defendants.

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

7 **JURISDICTION**

- 8 9. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
9 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
10 those given by statute to other trial courts. This Court has jurisdiction over this action
11 pursuant to Health and Safety Code section 25249.7, which allows enforcement of
12 violations of Proposition 65 in any Court of competent jurisdiction.
- 13 10. This Court has jurisdiction over Defendants named herein because Defendants either
14 reside or are located in this State or are foreign corporations authorized to do business in
15 California, are registered with the California Secretary of State, or who do sufficient
16 business in California, have sufficient minimum contacts with California, or otherwise
17 intentionally avail themselves of the markets within California through their manufacture,
18 distribution, promotion, marketing, or sale of their products within California to render
19 the exercise of jurisdiction by the California courts permissible under traditional notions
20 of fair play and substantial justice.
- 21 11. Venue is proper in the County of Los Angeles because one or more of the instances of
22 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
23 because Defendants conducted, and continue to conduct, business in the County of Los
24 Angeles with respect to the consumer product that is the subject of this action.

25 **BACKGROUND AND PRELIMINARY FACTS**

- 26 12. In 1986, California voters approved an initiative to address growing concerns about
27 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to
28

1 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
2 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
3 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
4 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
5 from contamination, to allow consumers to make informed choices about the products
6 they buy, and to enable persons to protect themselves from toxic chemicals as they see
7 fit.

8 13. Proposition 65 requires the Governor of California to publish a list of chemicals known to
9 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
10 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
11 chemicals and chemical families. Proposition 65 imposes warning requirements and
12 other controls that apply to Proposition 65-listed chemicals.

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

19 15. Proposition 65 provides that any person "violating or threatening to violate" the statute
20 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.
21 "Threaten to violate" means "to create a condition in which there is a substantial
22 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).
23 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
24 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

25 16. Plaintiff identified certain practices of manufacturers and distributors of DEHP-bearing
26 products of exposing, knowingly and intentionally, persons in California to the
27 Proposition 65-listed chemicals of such products without first providing clear and
28

1 reasonable warnings of such to the exposed persons prior to the time of exposure.

2 Plaintiff later discerned that Defendants engaged in such practice.

3 17. Plaintiff identified certain practices of manufacturers and distributors of Diethyl Hexyl
4 Phthalate ("DEHP")-bearing products, of exposing, knowingly and intentionally, persons
5 in California to the Proposition 65-listed chemicals of such products without first
6 providing clear and reasonable warnings of such to the exposed persons prior to the time
7 of exposure. Plaintiff later discerned that Defendants engaged in such practice.

8 18. On January 1, 1988, the Governor of California added DEHP to the list of chemicals
9 known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP
10 to the list of chemicals known to the State to cause developmental male reproductive
11 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
12 months after addition of DEHP to the list of chemicals known to the State to cause
13 reproductive toxicity, DEHP became fully subject to Proposition 65 warning
14 requirements and discharge prohibitions.

15 **SATISFACTION OF PRIOR NOTICE**

16 19. On or about June 15, 2011, Plaintiff gave notice of alleged violations of Health and
17 Safety Code section 25249.6, concerning consumer products exposures and occupational
18 exposures, subject to a private action to Big Lots Stores, Inc., Consolidated Property
19 Holdings, Inc., and to the California Attorney General, County District Attorneys, and
20 City Attorneys for each city containing a population of at least 750,000 people in whose
21 jurisdictions the violations allegedly occurred, concerning the consumer product Pick-Up
22 Tools.

23 20. Before sending the notices of alleged violations, Plaintiff investigated the consumer
24 products involved, the likelihood that such products would cause users to suffer
25 significant exposures to DEHP, and the corporate structure of each of the Defendants.

26 21. Plaintiff's notices of alleged violation included Certificates of Merit executed by the
27 attorney for the noticing party, CAG. The Certificates of Merit stated that the attorney
28 for Plaintiff who executed the certificates had consulted with at least one person with

1 relevant and appropriate expertise who reviewed data regarding the exposures to DEHP,
2 which are the subject Proposition 65-listed chemicals of this action. Based on that
3 information, the attorney for Plaintiff who executed the Certificates of Merit believed
4 there was a reasonable and meritorious case for this private action. The attorney for
5 Plaintiff attached to the Certificates of Merit served on the Attorney General the
6 confidential factual information sufficient to establish the basis of the Certificates of
7 Merit.

8 22. Plaintiff's notices of alleged violations also included a Certificates of Service and a
9 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
10 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

11 23. Plaintiff is commencing this action more than sixty (60) days from the date that Plaintiff
12 gave notice of the alleged violations to Big Lots Stores, Inc., Consolidated Property
13 Holdings, Inc. and the public prosecutors referenced in Paragraph 19.

14 24. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
15 any applicable district attorney or city attorney has commenced and is diligently
16 prosecuting any action against any of the Defendants.

17 FIRST CAUSE OF ACTION

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

21 **Pick-Up Tools**

22 25. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference
23 paragraphs 1 through 24 of this complaint as though fully set forth herein.

24 26. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
25 distributor, promoter, or retailer of Pick-Up Tools (hereinafter "Tools"), including but not
26 limited to 1) ProSource™ Claw and Magnet Pick-Up Tool Set, Item # HS230020185, V
27 #1008347 and 2) Shop Basics™ Claw and Magnet Pick-Up Tool Set, Item #
28 HS230020185, V #1008347.

1 27. Plaintiff is informed, believes, and thereon alleges that Pick-Up Tools contains DEHP.

2 28. Defendants knew or should have known that DEHP has been identified by the State of
3 California as a chemical known to cause cancer and reproductive toxicity and therefore
4 was subject to Proposition 65 warning requirements. Defendants were also informed of
5 the presence of DEHP in the Pick-Up Tools within Plaintiff's notice of alleged violations
6 further discussed above at Paragraph 23.

7 29. Plaintiff's allegations regarding Pick-Up Tools concern "[c]onsumer products
8 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
9 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
10 exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, §*
11 *25602(b)*. Pick-Up Tools are consumer products, and, as mentioned herein, exposures to
12 DEHP took place as a result of such normal and foreseeable consumption and use.

13 30. Plaintiff is informed, believes, and thereon alleges that between June 15, 2008 and the
14 present, each of the Defendants knowingly and intentionally exposed California
15 consumers and users of Pick-Up Tools, which Defendants manufactured, distributed, or
16 sold as mentioned above, to DEHP, without first providing any type of clear and
17 reasonable warning of such to the exposed persons before the time of exposure.
18 Defendants have distributed and sold Pick-Up Tools in California. Defendants know and
19 intend that California consumers will use and consume Pick-Up Tools thereby exposing
20 them to DEHP. Defendants thereby violated Proposition 65.

21 31. The principal routes of exposure are through dermal contact, ingestion and inhalation.
22 Persons sustain exposures by handling Pick-Up Tools without wearing gloves or any
23 other personal protective equipment, or by touching bare skin or mucous membranes with
24 gloves after handling Pick-Up Tools, as well as through direct and indirect hand to mouth
25 contact, hand to mucous membrane, or breathing in particulate matter dispersed from
26 Pick-Up Tools. And as to Defendants' employees, employees may be exposed to DEHP
27 in the course of their employment by handling, distributing, and selling Pick-Up Tools.
28

1 32. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
2 Proposition 65 as to Pick-Up Tools have been ongoing and continuous to the date of the
3 signing of this complaint, as Defendants engaged and continue to engage in conduct
4 which violates Health and Safety Code section 25249.6, including the manufacture,
5 distribution, promotion, and sale of Pick-Up Tools, so that a separate and distinct
6 violation of Proposition 65 occurred each and every time a person was exposed to DEHP
7 by Pick-Up Tools as mentioned herein.

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

11 34. Based on the allegations herein, Defendants are liable for civil penalties of up to
12 \$2,500.00 per day per individual exposure to DEHP from Pick-Up Tools, pursuant to
13 Health and Safety Code section 25249.7(b).

14 35. In the absence of equitable relief, the general public will continue to be involuntarily
15 exposed to DEHP that is contained in the Pick-Up Tools, creating a substantial risk of
16 irreparable harm. Thus, by committing the acts alleged herein, Defendants have caused
17 irreparable harm for which there is no plain, speedy, or adequate remedy at law.

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

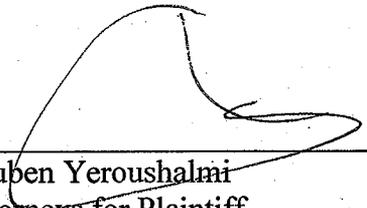
20 **PRAYER FOR RELIEF**

21 Plaintiff demands against each of the Defendants as follows:

- 22 1. A permanent injunction mandating Proposition 65-compliant warnings;
 - 23 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
 - 24 3. Costs of suit;
 - 25 4. Reasonable attorney fees and costs; and
 - 26 5. Any further relief that the court may deem just and equitable.
- 27
28

1 Dated: June 1, 2012

YEROUSHALMI & ASSOCIATES

2
3
4 BY: 
5 Reuben Yeroushalmi
6 Attorneys for Plaintiff,
7 Consumer Advocacy Group, Inc.

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28