

1 Keuben 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.

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 EARHUGGER, INC., a Utah Corporation,
20 EMPIRE BRANDS, INC., a Utah
21 Corporation, M-SQUARED, INC., a Utah
22 Corporation, BIG LOTS STORES, INC., an
23 Ohio Corporation; and DOES 1-50;

24 Defendants.

CASE NO.

BC482586

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)

25 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
26 Defendants as follows:

27 ///

28 ///

///

///

CONFIRMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles

APR 09 2012

John A. Clarke, Executive Officer/Clerk
By *Moses Soto* Deputy
MOSES SOTO

COPY

THE PARTIES

- 1
2 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" OR "CAG") is a
3 corporation qualified to do business in the State of California. CAG is a person within
4 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting
5 as a private attorney general, brings this action in the public interest as defined under
6 Health and Safety Code section 25249.7, subdivision (d).
- 7 2. Defendant EARHUGGER, INC. ("EARHUGGER"), is a company incorporated in the
8 State of Utah.
- 9 3. Defendant EMPIRE BRANDS, INC. ("EMPIRE"), is a company incorporated in the
10 State of Utah.
- 11 4. Defendant M-SQUARED, INC. ("M-SQUARED") is a company incorporated in the
12 State of Utah.
- 13 5. Defendant BIG LOTS STORES, INC. ("BIG LOTS") is a company incorporated in the
14 State of Ohio
- 15 6. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-50,
16 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
17 complaint to allege their true names and capacities when ascertained. Plaintiff is
18 informed, believes, and thereon alleges that each fictitiously named defendant is
19 responsible in some manner for the occurrences herein alleged and the damages caused
20 thereby.
- 21 7. At all times mentioned herein, the term "Defendants" includes EARHUGGER, EMPIRE,
22 M-SQUARED, BIG LOTS, and DOES 1-50.
- 23 8. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
24 times mentioned herein have conducted business within the State of California.
- 25 9. At all times relevant to this action, each of the Defendants, including DOES 1-50, was an
26 agent, servant, or employee of each of the other Defendants. In conducting the activities
27 alleged in this Complaint, each of the Defendants was acting within the course and scope
28 of this agency, service, or employment, and was acting with the consent, permission, and

1 authorization of each of the other Defendants. All actions of each of the Defendants
2 alleged in this Complaint were ratified and approved by every other Defendant or their
3 officers or managing agents. Alternatively, each of the Defendants aided, conspired with
4 and/or facilitated the alleged wrongful conduct of each of the other Defendants.

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

9 **JURISDICTION**

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

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

23 13. Venue is proper in the County of Los Angeles because one or more of the instances of
24 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
25 because Defendants conducted, and continue to conduct, business in the County of Los
26 Angeles with respect to the consumer product that is the subject of this action.

27 **BACKGROUND AND PRELIMINARY FACTS**

1 14. In 1986, California voters approved an initiative to address growing concerns about
2 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to
3 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
4 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
5 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
6 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
7 from contamination, to allow consumers to make informed choices about the products
8 they buy, and to enable persons to protect themselves from toxic chemicals as they see
9 fit.

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

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

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

27 18. Plaintiff identified certain practices of manufacturers and distributors of lead-bearing
28 products of exposing, knowingly and intentionally, persons in California to the

1 Proposition 65-listed chemicals of such products without first providing clear and
2 reasonable warnings of such to the exposed persons prior to the time of exposure.
3 Plaintiff later discerned that Defendants engaged in such practice.

4 19. On October 1, 1992, the Governor of California added Lead and Lead Compounds to the
5 list of chemicals known to the State to cause cancer (*Cal. Code Regs. tit. 27, § 27001(b)*).
6 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
7 after addition of Lead and lead compounds to the list of chemicals known to the State to
8 cause cancer, Lead and lead compounds became fully subject to Proposition 65 warning
9 requirements and discharge prohibitions.

10 20. On February 27, 1987, the Governor of California added Lead to the list of chemicals
11 known to the State to cause reproductive toxicity (*Cal. Code Regs. tit. 27, § 27001(c)*).
12 Lead is known to the State to cause developmental, female, and male reproductive
13 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
14 months after addition of Lead to the list of chemicals known to the State to cause
15 reproductive toxicity, Lead became fully subject to Proposition 65 warning requirements
16 and discharge prohibitions.

17 **SATISFACTION OF PRIOR NOTICE**

18 21. On or about July 6, 2011, Plaintiff gave notice of alleged violations of Health and Safety
19 Code section 25249.6, concerning consumer products exposures, subject to a private
20 action to EARHUGGER, INC., EMPIRE BRANDS, INC., M-SQUARED, INC., and
21 BIG LOTS STORES, INC., and to the California Attorney General, County District
22 Attorneys, and City Attorneys for each city containing a population of at least 750,000
23 people in whose jurisdictions the violations allegedly occurred, concerning the consumer
24 products Headsets and Headphones.

25 22. Before sending the notice of alleged violation, Plaintiff investigated the consumer
26 products involved, the likelihood that such products would cause users to suffer
27 significant exposures to lead, and the corporate structure of each of the Defendants.
28

1 23. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
2 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
3 Plaintiff who executed the certificate had consulted with at least one person with relevant
4 and appropriate expertise who reviewed data regarding the exposures to lead, which is the
5 subject Proposition 65-listed chemical of this action. Based on that information, the
6 attorney for Plaintiff who executed the Certificate of Merit believed there was a
7 reasonable and meritorious case for this private action. The attorney for Plaintiff attached
8 to the Certificate of Merit served on the Attorney General the confidential factual
9 information sufficient to establish the basis of the Certificate of Merit.

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

13 25. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
14 gave notice of the alleged violations to EARHUGGER, EMPIRE, M-SQUARED, BIG
15 LOTS, and the public prosecutors referenced in Paragraph 21.

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

19
20 **FIRST CAUSE OF ACTION**

21 **(By CONSUMER ADVOCACY GROUP, INC. and against EARHUGGER, EMPIRE, M-
22 SQUARED, and BIG LOTS for Violations of Proposition 65, The Safe Drinking Water and
23 Toxic Enforcement Act of 1986 (*Health & Safety Code, §§ 25249.5, et seq.*))**

24 **"Headphones"**

25 27. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference
26 paragraphs 1 through 26 of this complaint as though fully set forth herein.

27 28. Each of the Defendants are, and at all times mentioned herein were, a manufacturer,
28 distributor, promoter, or retailer of **"Headphones"**, including but not limited to

1 "EarHugger® Stereo Headphones, Model # A-1000", a consumer product designed for
2 use as an audio device

3 29. Plaintiff is informed, believes, and thereon alleges that Headphones contain Lead.

4 30. Defendants knew or should have known that Lead has been identified by the State of
5 California as a chemical known to cause cancer and reproductive toxicity and therefore
6 was subject to Proposition 65 warning requirements. Defendants were also informed of
7 the presence of Lead in the Headphones within Plaintiff's notice of alleged violations
8 further discussed above at Paragraph 21.

9 31. Plaintiff's allegations regarding Headphones concern "consumer products exposure[s],"
10 which "is an exposure that results from a person's acquisition, purchase, storage,
11 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
12 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*.
13 Headphones are a consumer product, and, as mentioned in herein, exposures to Lead took
14 place as a result of such normal and foreseeable consumption and use.

15 32. Plaintiff is informed, believes, and thereon alleges that between July 6, 2008 and the
16 present, each of the Defendants knowingly and intentionally exposed California
17 consumers and users of Headphones, which Defendants manufactured, distributed, or
18 sold as mentioned above, to Lead, without first providing any type of clear and
19 reasonable warning of such to the exposed persons before the time of exposure.

20 Defendants have distributed and sold Headphones in California. Defendants know and
21 intend that California consumers will use and consume Headphones thereby exposing
22 them to Lead. Defendants thereby violated Proposition 65.

23 33. The principal routes of exposure were through inhalation, oral ingestion, including hand
24 to mouth pathways, and trans-dermal absorption. Persons sustain exposures by handling
25 the Headphones without wearing gloves or by touching bare skin or mucous membranes
26 with gloves after handling the Headphones, as well as hand to mouth contact, hand to
27 mucous membrane, or breathing in particulate matter emanating from the Headphones
28 during installation and use.

1 34. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
2 Proposition 65 as to Headphones 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 Headphones, so that a separate and distinct violation
6 of Proposition 65 occurred each and every time a person was exposed to Lead by
7 Headphones as mentioned herein.

8 35. 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 36. Based on the allegations herein, Defendants are liable for civil penalties of up to
12 \$2,500.00 per day per individual exposure to Lead from Headphones, pursuant to Health
13 and Safety Code section 25249.7(b).

14 37. In the absence of equitable relief, the general public and Defendants' employees will
15 continue to be involuntarily exposed to Lead that is contained in Headphones, creating a
16 substantial risk of irreparable harm. Thus, by committing the acts alleged herein,
17 Defendants have caused irreparable harm for which there is no plain, speedy, or adequate
18 remedy at law.

19
20 **SECOND CAUSE OF ACTION**

21 **(By CONSUMER ADVOCACY GROUP, INC. and against EARHUGGER, EMPIRE, and**
22 **M-SQUARED for Violations of Proposition 65, The Safe Drinking Water and Toxic**
23 **Enforcement Act of 1986 (*Health & Safety Code, §§ 25249.5, et seq.*))**

24 **"Headsets"**

25 38. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference
26 paragraphs 1 through 37 of this complaint as though fully set forth herein.

27 39. Each of the Defendants are, and at all times mentioned herein were, a manufacturer,
28 distributor, promoter, or retailer of "**Headsets**", including but not limited to

1 "EarHugger® All-in-One Cellular Headset, Model # C-8110", a consumer product
2 designed for use as an audio device.

3 40. Plaintiff is informed, believes, and thereon alleges that Headsets contain Lead.

4 41. Defendants knew or should have known that Lead has been identified by the State of
5 California as a chemical known to cause cancer and reproductive toxicity and therefore
6 was subject to Proposition 65 warning requirements. Defendants were also informed of
7 the presence of Lead in the Headsets within Plaintiff's notice of alleged violations further
8 discussed above at Paragraph 21.

9 42. Plaintiff's allegations regarding Headsets concern "consumer products exposure[s],"
10 which "is an exposure that results from a person's acquisition, purchase, storage,
11 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
12 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*.
13 Headsets are a consumer product, and, as mentioned in herein, exposures to Lead took
14 place as a result of such normal and foreseeable consumption and use.

15 43. Plaintiff is informed, believes, and thereon alleges that between July 6, 2008 and the
16 present, each of the Defendants knowingly and intentionally exposed California
17 consumers and users of Headsets, which Defendants manufactured, distributed, or sold as
18 mentioned above, to Lead, without first providing any type of clear and reasonable
19 warning of such to the exposed persons before the time of exposure. Defendants have
20 distributed and sold Headsets in California. Defendants know and intend that California
21 consumers will use and consume Headsets thereby exposing them to Lead. Defendants
22 thereby violated Proposition 65.

23 44. The principal routes of exposure were through inhalation, oral ingestion, including hand
24 to mouth pathways, and trans-dermal absorption. Persons sustain exposures by handling
25 the Headsets without wearing gloves or by touching bare skin or mucous membranes
26 with gloves after handling the Headsets, as well as hand to mouth contact, hand to
27 mucous membrane, or breathing in particulate matter emanating from the Headsets
28 during installation and use.

1 45. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
2 Proposition 65 as to Headsets 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 Headsets, so that a separate and distinct violation of
6 Proposition 65 occurred each and every time a person was exposed to Lead by Headsets
7 as mentioned herein.

8 46. 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 47. Based on the allegations herein, Defendants are liable for civil penalties of up to
12 \$2,500.00 per day per individual exposure to Lead from Headsets, pursuant to Health and
13 Safety Code section 25249.7(b).

14 48. In the absence of equitable relief, the general public and Defendants' employees will
15 continue to be involuntarily exposed to Lead that is contained in Headsets, creating a
16 substantial risk of irreparable harm. Thus, by committing the acts alleged herein,
17 Defendants have caused irreparable harm for which there is no plain, speedy, or adequate
18 remedy at law.

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

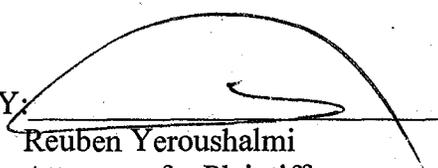
21 **PRAYER FOR RELIEF**

22 Plaintiff demands against each of the Defendants as follows:

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

1 Dated: April 6, 2012

YEROUSHALMI & ASSOCIATES

2
3 BY: 

4 Reuben Yeroushalmi
5 Attorneys for Plaintiff,
6 Consumer Advocacy Group, Inc.
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28