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ORIGINAL FILED  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES

MAR 13 2013

John A. Clarke, Executive Officer/Clerk  
BY Mary Flores, 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 BAM BROKERAGE, INC. dba ON THE  
18 EDGE MARKETING, a California  
19 Corporation, BIG LOTS STORES, INC., an  
20 Ohio Corporation, and DOES 1-20;

21 Defendants.

CASE NO.

BC 502825

COMPLAINT FOR PENALTY AND  
INJUNCTION

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)

22 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against  
23 defendants BAM BROKERAGE, INC. dba ON THE EDGE MARKETING, BIG LOTS  
24 STORES, INC., an Ohio Corporation, and DOES 1-20 as follows:

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## 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 BAM BROKERAGE, INC. dba ON THE EDGE MARKETING ("BAM BROKERAGE") is a California Corporation, qualified to do business and doing business in the State of California at all relevant times herein.
3. Defendant BIG LOTS STORES, INC. ("BIG LOTS") is an Ohio Corporation, qualified to do business and doing business in the State of California at all relevant times herein.
4. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20, 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 BAM BROKERAGE, BIG LOTS and DOES 1-20.
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. Upon information and belief, at all times relevant to this action, each of the Defendants, including DOES 1-20, 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

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

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

### 8 JURISDICTION

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

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## BACKGROUND AND PRELIMINARY FACTS

12. In 1986, California voters approved an initiative to address growing concerns about exposure to toxic chemicals and declared their right "[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp., Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources from contamination, to allow consumers to make informed choices about the products they buy, and to enable persons to protect themselves from toxic chemicals as they see fit.
13. Proposition 65 requires the Governor of California to publish a list of chemicals known to the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code* § 25249.8. The list, which the Governor updates at least once a year, contains over 700 chemicals and chemical families. Proposition 65 imposes warning requirements and other controls that apply to Proposition 65-listed chemicals.
14. All businesses with ten (10) or more employees that operate or sell products in California must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited from knowingly discharging Proposition 65-listed chemicals into sources of drinking water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and reasonable" warnings before exposing a person, knowingly and intentionally, to a Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).
15. Proposition 65 provides that any person "violating or threatening to violate" the statute may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7. "Threaten to violate" means "to create a condition in which there is a substantial probability that a violation will occur." *Health & Safety Code* § 25249.11(e). Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation, recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

1 16. Plaintiff identified certain practices of manufacturers and distributors of DEHP-bearing  
2 products of exposing, knowingly and intentionally, persons in California to the  
3 Proposition 65-listed chemicals of such products without first providing clear and  
4 reasonable warnings of such to the exposed persons prior to the time of exposure.  
5 Plaintiff later discerned that Defendants engaged in such practice.

6 17. On January 1, 1988, the Governor of California added DEHP to the list of chemicals  
7 known to the State to cause cancer and developmental male reproductive toxicity (*Cal.*  
8 *Code Regs.* tit. 27, § 27001(b)). Pursuant to Health and Safety Code sections 25249.9  
9 and 25249.10, twenty (20) months after addition of DEHP to the list of chemicals known  
10 to the State to cause cancer and developmental male reproductive toxicity, DEHP became  
11 fully subject to Proposition 65 warning requirements and discharge prohibitions.

12 **SATISFACTION OF PRIOR NOTICE**

13 18. On or about November 15, 2011, Plaintiff gave notice of alleged violations of Health and  
14 Safety Code section 25249.6, concerning consumer products exposures, subject to a  
15 private action to BAM BROKERAGE, BIG LOTS, and to the California Attorney  
16 General, County District Attorneys, and City Attorneys for each city containing a  
17 population of at least 750,000 people in whose jurisdictions the violations allegedly  
18 occurred, concerning the product Bar Stool "On the Edge Marketing" "Swivel Base"  
19 "Non-Skid Foot Pads".

20 19. On or about December 14, 2012, Plaintiff gave notice of alleged violations of Health and  
21 Safety Code section 25249.6, concerning consumer products exposures, subject to a  
22 private action to BAM BROKERAGE, BIG LOTS, and to the California Attorney  
23 General, County District Attorneys, and City Attorneys for each city containing a  
24 population of at least 750,000 people in whose jurisdictions the violations allegedly  
25 occurred, concerning the product Vinyl Barstool Seat.

- 1 20. Before sending the notices of alleged violation, Plaintiff investigated the consumer  
2 products involved, the likelihood that such products would cause users to suffer  
3 significant exposures to DEHP, and the corporate structure of each of the Defendants.
- 4 21. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the  
5 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for  
6 Plaintiff who executed the certificate had consulted with at least one person with relevant  
7 and appropriate expertise who reviewed data regarding the exposures to DEHP, the  
8 subject Proposition 65-listed chemical of this action. Based on that information, the  
9 attorney for Plaintiff who executed the Certificate of Merit believed there was a  
10 reasonable and meritorious case for this private action. The attorney for Plaintiff attached  
11 to the Certificate of Merit served on the Attorney General the confidential factual  
12 information sufficient to establish the basis of the Certificate of Merit.
- 13 22. Plaintiff's notices of alleged violations also included a Certificate of Service and a  
14 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986  
15 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).
- 16 23. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
17 gave notices of the alleged violations to BAM BROKERAGE, BIG LOTS, and the public  
18 prosecutors referenced in Paragraph 18 and Paragraph 19.
- 19 24. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor  
20 any applicable district attorney or city attorney has commenced and is diligently  
21 prosecuting an action against the Defendants.

22 **FIRST CAUSE OF ACTION**

23 (By CONSUMER ADVOCACY GROUP, INC. and against BAM BROKERAGE,  
24 BIG LOTS, and DOES 1-20 for Violations of Proposition 65, The Safe Drinking  
25 Water and Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, *et*  
*seq.*))

26 **Bar Stool "On the Edge Marketing" "Swivel Base" "Non-Skid Foot Pads"**

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1 25. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by  
2 reference paragraphs 1 through 24 of this complaint as though fully set forth herein.

3 26. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,  
4 distributor, promoter, or retailer of Bar Stool "On the Edge Marketing" "Swivel Base"  
5 "Non-Skid Foot Pads" ("Bar Stools").

6 27. Bar Stools contains DEHP.

7 28. Defendants knew or should have known that DEHP has been identified by the State of  
8 California as a chemical known to cause cancer and developmental male reproductive  
9 toxicity and therefore was subject to Proposition 65 warning requirements. Defendants  
10 were also informed of the presence of DEHP in Bar Stools within Plaintiff's notice of  
11 alleged violations further discussed above at Paragraph 18.

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

18 30. Plaintiff is informed, believes, and thereon alleges that between November 15, 2008 and  
19 the present, each of the Defendants knowingly and intentionally exposed California  
20 consumers and users of Bar Stools, which Defendants manufactured, distributed, or sold  
21 as mentioned above, to DEHP, without first providing any type of clear and reasonable  
22 warning of such to the exposed persons before the time of exposure. Defendants have  
23 distributed and sold Bar Stools in California. Defendants know and intend that California  
24 consumers will use and consume Bar Stools, thereby exposing them to DEHP.

25 Defendants thereby violated Proposition 65.

26 31. The principal routes of exposure are through dermal contact, ingestion and inhalation.  
27 Persons sustain exposures by handling Bar Stools without wearing gloves or any other  
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1 personal protective equipment, or by touching bare skin or mucous membranes with  
2 gloves after handling Bar Stools, as well as through direct and indirect hand to mouth  
3 contact, hand to mucous membrane, or breathing in particulate matter dispersed from Bar  
4 Stools.

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

#### 12 SECOND CAUSE OF ACTION

13 (By CONSUMER ADVOCACY GROUP, INC. and against BAM BROKERAGE,  
14 BIG LOTS, and DOES 1-20 for Violations of Proposition 65, The Safe Drinking  
15 Water and Toxic Enforcement Act of 1986 (*Health & Safety Code, §§ 25249.5, et*  
*seq.*))

#### 16 Vinyl Barstool Seat

17 33. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by  
18 reference paragraphs 1 through 35 of this complaint as though fully set forth herein.

19 34. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,  
20 distributor, promoter, or retailer of Vinyl Barstool Seat ("Barstools"), including Coca-  
21 Cola® Custom Barstool, UPC #811799010688, SKU #1452200134403.

22 35. Barstools contains DEHP.

23 36. Defendants knew or should have known that DEHP has been identified by the State of  
24 California as a chemical known to cause cancer and developmental male reproductive  
25 toxicity and therefore was subject to Proposition 65 warning requirements. Defendants  
26 were also informed of the presence of DEHP in Barstools within Plaintiff's notice of  
27 alleged violations further discussed above at Paragraph 19.



1 37. Plaintiff's allegations regarding Barstools concerns "[c]onsumer products exposure[s],"  
2 which "is an exposure that results from a person's acquisition, purchase, storage,  
3 consumption, or other reasonably foreseeable use of a consumer good, or any exposure  
4 that results from receiving a consumer service." *Cal. Code Regs.* tit. 27, § 25602(b).  
5 Barstools is a consumer product, and, as mentioned herein, exposures to DEHP took  
6 place as a result of such normal and foreseeable consumption and use.

7 38. Plaintiff is informed, believes, and thereon alleges that between December 14, 2009 and  
8 the present, each of the Defendants knowingly and intentionally exposed California  
9 consumers and users of Barstools, which Defendants manufactured, distributed, or sold as  
10 mentioned above, to DEHP, without first providing any type of clear and reasonable  
11 warning of such to the exposed persons before the time of exposure. Defendants have  
12 distributed and sold Barstools in California. Defendants know and intend that California  
13 consumers will use and consume Barstools, thereby exposing them to DEHP. Defendants  
14 thereby violated Proposition 65.

15 39. The principal routes of exposure are through dermal contact, ingestion and inhalation.  
16 Persons sustain exposures by handling Barstools without wearing gloves or any other  
17 personal protective equipment, or by touching bare skin or mucous membranes with  
18 gloves after handling Barstools, as well as through direct and indirect hand to mouth  
19 contact, hand to mucous membrane, or breathing in particulate matter dispersed from  
20 Barstools.

21 40. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of  
22 Proposition 65 as to Barstools have been ongoing and continuous to the date of the  
23 signing of this complaint, as Defendants engaged and continue to engage in conduct  
24 which violates Health and Safety Code section 25249.6, including the manufacture,  
25 distribution, promotion, and sale of Barstools, so that a separate and distinct violation of  
26 Proposition 65 occurred each and every time a person was exposed to DEHP by Barstools  
27 as mentioned herein.  
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1 41. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65  
2 mentioned herein is ever continuing. Plaintiff further alleges and believes that the  
3 violations alleged herein will continue to occur into the future.

4 42. Based on the allegations herein, Defendants are liable for civil penalties of up to  
5 \$2,500.00 per day per individual exposure to DEHP from Bar Stools and Barstools,  
6 pursuant to Health and Safety Code section 25249.7(b).

7 43. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to  
8 filing this Complaint.

9 **PRAYER FOR RELIEF**

10 Plaintiff demands against each of the Defendants as follows:

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

16  
17 Dated: MARCH 13, 2013

YEROUSHALMI & ASSOCIATES

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19  
20 BY: 

Reuben Yeroushalmi  
Attorneys for Plaintiff,  
Consumer Advocacy Group, Inc.