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SAN FRANCISCO COUNTY
SUPERIOR COURT

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CLERK OF THE COURT

BY: _____
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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN FRANCISCO**

11 **CONSUMER ADVOCACY GROUP, INC.,**
12 **in the public interest,**

13 **Plaintiff,**

14 **v.**

15 **HARBOR FREIGHT TOOLS USA, INC., a**
16 **Delaware Corporation; and DOES 1-20;**

17 **Defendants.**

CASE NO.

**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)**

BY FAX

20 **Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against**
21 **defendant, and DOES 1-20 as follows:**

22 **//**

23 **//**

24 **//**

25 **//**

26 **//**

1 THE PARTIES

- 2 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an
3 organization 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 HARBOR FREIGHT TOOLS USA, INC. ("HARBOR FREIGHT TOOLS
8 USA") is a Delaware corporation, doing business in the State of California at all relevant
9 times herein.
- 10 3. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,
11 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
12 complaint to allege their true names and capacities when ascertained. Plaintiff is
13 informed, believes, and thereon alleges that each fictitiously named defendant is
14 responsible in some manner for the occurrences herein alleged and the damages caused
15 thereby.
- 16 4. At all times mentioned herein, the term "Defendants" includes HARBOR FREIGHT
17 TOOLS USA and DOES 1-20.
- 18 5. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
19 times mentioned herein have conducted business within the State of California.
- 20 6. Upon information and belief, at all times relevant to this action, each of the Defendants,
21 including DOES 1-20, was an agent, servant, or employee of each of the other
22 Defendants. In conducting the activities alleged in this Complaint, each of the
23 Defendants was acting within the course and scope of this agency, service, or
24 employment, and was acting with the consent, permission, and authorization of each of
25 the other Defendants. All actions of each of the Defendants alleged in this Complaint
26 were ratified and approved by every other Defendant or their officers or managing agents.
- 27
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1 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged
2 wrongful conduct of each of the other Defendants.

- 3 7. 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 8. 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 9. 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 10. Venue is proper in the County of San Francisco because one or more of the instances of
22 wrongful conduct occurred, and continues to occur, in the County of San Francisco
23 and/or because Defendants conducted, and continue to conduct, business in the County of
24 San Francisco with respect to the consumer product that is the subject of this action.

25 **BACKGROUND AND PRELIMINARY FACTS**

- 26 11. 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
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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 12. 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 13. 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 14. 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 15. Plaintiff identified certain practices of manufacturers and distributors of Diethyl Hexyl
26 Phthalate ("DEHP")-bearing products of exposing, knowingly and intentionally, persons
27 in California to the Proposition 65-listed chemicals of such products without first
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1 providing clear and reasonable warnings of such to the exposed persons prior to the time
2 of exposure. Plaintiff later discerned that Defendants engaged in such practice.

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

10 SATISFACTION OF PRIOR NOTICE

11 17. On or about May 10, 2013, Plaintiff gave notice of alleged violations of Health and
12 Safety Code section 25249.6, concerning consumer products exposures, subject to a
13 private action to HARBOR FREIGHT TOOLS USA and to the California Attorney
14 General, County District Attorneys, and City Attorneys for each city containing a
15 population of at least 750,000 people in whose jurisdictions the violations allegedly
16 occurred, concerning the product Hand Tools containing DEHP.

17 18. On or about May 20, 2013, Plaintiff gave notice of alleged violations of Health and
18 Safety Code section 25249.6, concerning consumer products exposures, subject to a
19 private action to HARBOR FREIGHT TOOLS USA and to the California Attorney
20 General, County District Attorneys, and City Attorneys for each city containing a
21 population of at least 750,000 people in whose jurisdictions the violations allegedly
22 occurred, concerning the product Binoculars containing DEHP.

23 19. Before sending the notices of alleged violation, 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 20. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
27 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
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1 Plaintiff who executed the certificate had consulted with at least one person with relevant
2 and appropriate expertise who reviewed data regarding the exposures to DEHP, the
3 subject Proposition 65-listed chemicals of this action. Based on that information, the
4 attorney for Plaintiff who executed the Certificate of Merit believed there was a
5 reasonable and meritorious case for this private action. The attorney for Plaintiff attached
6 to the Certificate of Merit served on the Attorney General the confidential factual
7 information sufficient to establish the basis of the Certificate of Merit.

- 8 21. Plaintiff's notices of alleged violations also included a Certificate 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 22. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
12 gave notices of the alleged violation to HARBOR FREIGHT TOOLS USA and the
13 public prosecutors referenced in Paragraph 17-18.
- 14 23. 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 an action against the Defendants.

17 **FIRST CAUSE OF ACTION**

18 **(By CONSUMER ADVOCACY GROUP, INC. and against DAS DISTRIBUTORS**
19 **and DOES 1-20 for Violations of Proposition 65, The Safe Drinking Water and**
20 **Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, *et seq.*))**

21 **Hand Tools**

- 22 24. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
23 reference paragraphs 1 through 23 of this complaint as though fully set forth herein. Each
24 of the Defendants is, and at all times mentioned herein was, a manufacturer, distributor,
25 promoter, or retailer of Hand Tools, which includes but is not limited to,
26 "PITTSBURGH® Automotive 5/16" Side-Terminal Battery Ratchet Wrench, "For use on
27 5/16" battery terminal bolts found on GM and most other domestic vehicles",
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1 "Reversible, ratcheting box wrench; Insulated vinyl grip handle to prevent electrical
2 shock", "Satin chrome-plated finish to resist corrosion", "Overall dimensions: 5-5/8"L x
3 3/4"W", "Distributed by Harbor Freight Tools, Camarillo, CA, www.HarborFreight.com,
4 Item 97261, Made in China, circular sticker placed to package with numbers: 36972
5 492011, barcode: 7 92363 97261 1; Mosaic Tile Cutter/Nipper with plastic coated grips,
6 "Precision cutting of glass & porcelain mosaic tile", "Cuts seashells & high-fired
7 ceramics up to 1/4" thick", "Includes long lasting carbide cutting wheels & allen wrench",
8 8" long, "Distributed Exclusively by Harbor Freight Tools, www.HarborFreight.com,
9 Item 97377, Made in China, circular sticker placed to package with numbers 36513
10 282012, barcode: 7 92363 97377 9; PITTSBURGH® Automotive 3 3/4" Swivel Handle
11 Oil Filter Wrench, "Fits filters 3 1/4" to 3 3/4", "Nonslip rubber gripper even works on
12 dented or oily filters", "Distributed by Harbor Freight Tools, Camarillo, CA,
13 www.HarborFreight.com, Item 68963, Made in China, circular sticker placed to package
14 with numbers 36239 422012, barcode: 7 92363 68963 2" ("HAND TOOLS").

15 25. HAND TOOLS contain DEHP.

16 26. Defendants knew or should have known that DEHP has been identified by the State of
17 California as a chemical known to cause cancer and reproductive toxicity and therefore
18 was subject to Proposition 65 warning requirements. Defendants were also informed of
19 the presence of lead in HAND TOOLS within Plaintiff's notice of alleged violations
20 further discussed above at Paragraph 17.

21 27. Plaintiff's allegations regarding HAND TOOLS concerns "[c]onsumer products
22 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
23 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
24 exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, §*
25 *25602(b)*. HAND TOOLS are consumer products, and, as mentioned herein, exposures
26 to lead took place as a result of such normal and foreseeable consumption and use.

1 28. Plaintiff is informed, believes, and thereon alleges that between May 10, 2010 and the
2 present, each of the Defendants knowingly and intentionally exposed their California
3 consumers and users of HAND TOOLS, which Defendants manufactured, distributed, or
4 sold as mentioned above, to DEHP, without first providing any type of clear and
5 reasonable warning of such to the exposed persons before the time of exposure.

6 Defendants have distributed and sold HAND TOOLS in California. Defendants know
7 and intend that California consumers will use and consume HAND TOOLS, thereby
8 exposing them to lead. Defendants thereby violated Proposition 65.

9 29. The principal routes of exposure are through dermal contact, ingestion and inhalation.

10 Persons sustain exposures by handling HAND TOOLS without wearing gloves or any
11 other personal protective equipment, or by touching bare skin or mucous membranes with
12 gloves after handling HAND TOOLS, as well as through direct and indirect hand to
13 mouth contact, hand to mucous membrane, or breathing in particulate matter dispersed
14 from HAND TOOLS.

15 30. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
16 Proposition 65 as to HAND TOOLS have been ongoing and continuous to the date of the
17 signing of this complaint, as Defendants engaged and continue to engage in conduct
18 which violates Health and Safety Code section 25249.6, including the manufacture,
19 distribution, promotion, and sale of HAND TOOLS, so that a separate and distinct
20 violation of Proposition 65 occurred each and every time a person was exposed to DEHP
21 by HAND TOOLS as mentioned herein.

22 31. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
23 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
24 violations alleged herein will continue to occur into the future.

25 32. 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 HAND TOOLS, pursuant to
27 Health and Safety Code section 25249.7(b).

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1 33. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
2 filing this Complaint.

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4 **SECOND CAUSE OF ACTION**

5 **(By CONSUMER ADVOCACY GROUP, INC. and against DAS DISTRIBUTORS**
6 **and DOES 1-20 for Violations of Proposition 65, The Safe Drinking Water and**
7 **Toxic Enforcement Act of 1986 (*Health & Safety Code, §§ 25249.5, et seq.*))**

8 **Binoculars**

9 34. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
10 reference paragraphs 1 through 33 of this complaint as though fully set forth herein. Each
11 of the Defendants is, and at all times mentioned herein was, a manufacturer, distributor,
12 promoter, or retailer of Binoculars, which includes but is not limited to "GORDON® 10
13 x 25mm Objective Lens, Compact Binoculars, Field of View: 288 FT. @ 1000 YD., Item
14 92442, Overall dimensions: 4- 3/4" W x 4- 5/8" L x 1- 1/2" H (unfolded), Made in China,
15 Distributed by Harbor Freight Tools, Camarillo CA, barcode: 7 92363 92442 9."
16 ("BINOCULARS").

17 35. BINOCULARS contain DEHP.

18 36. Defendants knew or should have known that DEHP has been identified by the State of
19 California as chemicals known to cause cancer and reproductive toxicity and therefore
20 was subject to Proposition 65 warning requirements. Defendants were also informed of
21 the presence of DEHP in BINOCULARS within Plaintiff's notice of alleged violations
22 further discussed above at Paragraph 18.

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

1 38. Plaintiff is informed, believes, and thereon alleges that between May 20, 2010 and the
2 present, each of the Defendants knowingly and intentionally exposed their employees and
3 California consumers and users of BINOCULARS, which Defendants manufactured,
4 distributed, or sold as mentioned above, to DEHP, without first providing any type of
5 clear and reasonable warning of such to the exposed persons before the time of exposure.
6 Defendants have distributed and sold BINOCULARS in California. Defendants know
7 and intend that California consumers will use and consume BINOCULARS, thereby
8 exposing them to DEHP. Defendants thereby violated Proposition 65.

9 39. The principal routes of exposure are through dermal contact, ingestion and inhalation.
10 Persons sustain exposures by handling BINOCULARS without wearing gloves or any
11 other personal protective equipment, or by touching bare skin or mucous membranes with
12 gloves after handling BINOCULARS, as well as through direct and indirect hand to
13 mouth contact, hand to mucous membrane, or breathing in particulate matter dispersed
14 from BINOCULARS.

15 40. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
16 Proposition 65 as to BINOCULARS have been ongoing and continuous to the date of the
17 signing of this complaint, as Defendants engaged and continue to engage in conduct
18 which violates Health and Safety Code section 25249.6, including the manufacture,
19 distribution, promotion, and sale of BINOCULARS, so that a separate and distinct
20 violation of Proposition 65 occurred each and every time a person was exposed to DEHP
21 by BINOCULARS as mentioned herein.

22 41. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
23 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
24 violations alleged herein will continue to occur into the future.

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

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

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4 **PRAYER FOR RELIEF**

5 Plaintiff demands against each of the Defendants as follows:

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

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13 Dated: October 23, 2013

YEROUSHALMI & ASSOCIATES

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15 BY: 

16 Reuben Yeroushalmi
17 Attorneys for Plaintiff,
18 Consumer Advocacy Group, Inc.
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