

ENDORSED  
FILED  
SAN FRANCISCO COUNTY  
SUPERIOR COURT

2013 SEP 30 AM 11:08

CLERK OF THE COURT

BY: \_\_\_\_\_  
DEPUTY CLERK

**J. STEPPE**

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SAN FRANCISCO

10  
11 CONSUMER ADVOCACY GROUP, INC.,  
12 in the public interest,

13 Plaintiff,

14 v.

15 BIG LOTS STORES, INC., an Ohio  
16 Corporation; and DOES 1-20;

17 Defendants.

CGC-13-534555  
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)

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21 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against  
22 defendants BIG LOTS STORES, INC., and DOES 1-20 as follows:

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**BY FAX**

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COMPLAINT FOR VIOLATION OF PROPOSITION 65, THE SAFE DRINKING WATER AND TOXIC  
ENFORCEMENT ACT OF 1986 (HEALTH AND SAFETY CODE § 25249.5, ET SEQ.)

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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 BIG LOTS STORES, INC. ("BIG LOTS STORES") is an Ohio corporation, doing business in the State of California at all relevant times herein.
3. 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.
4. At all times mentioned herein, the term "Defendants" includes BIG LOTS STORES and DOES 1-20.
5. 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.
6. 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 were ratified and approved by every other Defendant or their officers or managing agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged wrongful conduct of each of the other Defendants.

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

#### 5 JURISDICTION

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

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

19 10. Venue is proper in San Francisco because one or more of the instances of wrongful  
20 conduct occurred, and continues to occur, in San Francisco and/or because Defendants  
21 conducted, and continue to conduct, business in San Francisco with respect to the  
22 consumer product that is the subject of this action.

#### 23 BACKGROUND AND PRELIMINARY FACTS

24 11. In 1986, California voters approved an initiative to address growing concerns about  
25 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to  
26 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,  
27

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

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

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

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

24 15. Plaintiff identified certain practices of manufacturers and distributors of lead-bearing  
25 products of exposing, knowingly and intentionally, persons in California to the  
26 Proposition 65-listed chemicals of such products without first providing clear and  
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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 16. On February 27, 1987, the Governor of California added lead to the list of chemicals  
4 known to the State to cause reproductive toxicity (*Cal. Code Regs. tit. 27, § 27001(c)*).  
5 lead is known to the State to cause developmental, female, and male reproductive  
6 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)  
7 months after addition of lead to the list of chemicals known to the State to cause  
8 reproductive toxicity, lead became fully subject to Proposition 65 warning requirements  
9 and discharge prohibitions.

10 17. On October 1, 1992, the Governor of California added lead and lead compounds to the  
11 list of chemicals known to the State to cause cancer (*Cal. Code Regs. tit. 27, § 27001(b)*).  
12 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months  
13 after addition of lead and lead compounds to the list of chemicals known to the State to  
14 cause cancer, lead and lead compounds became fully subject to Proposition 65 warning  
15 requirements and discharge prohibitions.

16  
17 **SATISFACTION OF PRIOR NOTICE**

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

24 19. Before sending the notices of alleged violation, Plaintiff investigated the consumer  
25 products involved, the likelihood that such products would cause users to suffer  
26 significant exposures to Lead, and the corporate structure of each of the Defendants.

1 20. 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, the subject  
5 Proposition 65-listed chemical of this action. Based on that information, the attorney for  
6 Plaintiff who executed the Certificate of Merit believed there was a reasonable and  
7 meritorious case for this private action. The attorney for Plaintiff attached to the  
8 Certificate of Merit served on the Attorney General the confidential factual information  
9 sufficient to establish the basis of the Certificate of Merit.

10 21. Plaintiff's notices 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 22. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
14 gave notices of the alleged violations to BIG LOTS STORES, and the public prosecutors  
15 referenced in Paragraph 18.

16 23. 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 **FIRST CAUSE OF ACTION**

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

23 **Drain Tools**

24 24. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by  
25 reference paragraphs 1 through 23 of this complaint as though fully set forth herein.

26 25. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,  
27 distributor, promoter, or retailer of Drain Tools, which includes but is not limited to  
28 "Sink Snake Drain Hair Removal Tool, "Slow Drains... Fixed Fast!", "Plumber's

1 Quality", "Length 26 inches", "Anthony Sullivan", "Pitchman Approved!", "Carbon  
2 Steel Cable, Upgraded Carbon Coating, Long Lasting", "Set Includes: Sink Snake,  
3 Shower & Tub Snake, Storage Hook", Made in China, Item No: 91593, barcode: 7 95229  
4 91593 7" ("TOOLS").

5 26. TOOLS contain Lead.

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

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

17 29. Plaintiff is informed, believes, and thereon alleges that between May 20, 2010 and the  
18 present, each of the Defendants knowingly and intentionally exposed California  
19 consumers and users of TOOLS, which Defendants manufactured, distributed, or sold as  
20 mentioned above, to Lead, without first providing any type of clear and reasonable  
21 warning of such to the exposed persons before the time of exposure. Defendants have  
22 distributed and sold TOOLS in California. Defendants know and intend that California  
23 consumers will use and consume TOOLS, thereby exposing them to Lead. Defendants  
24 thereby violated Proposition 65.

25 30. The principal routes of exposure are through dermal contact, ingestion and inhalation.  
26 Persons sustain exposures by handling TOOLS without wearing gloves or any other  
27 personal protective equipment, or by touching bare skin or mucous membranes with  
28

1 gloves after handling TOOLS, as well as through direct and indirect hand to mouth  
2 contact, hand to mucous membrane, or breathing in particulate matter dispersed from  
3 TOOLS.

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

11 32. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65  
12 mentioned herein is ever continuing. Plaintiff further alleges and believes that the  
13 violations alleged herein will continue to occur into the future.

14 33. Based on the allegations herein, Defendants are liable for civil penalties of up to  
15 \$2,500.00 per day per individual exposure to Lead from TOOLS, pursuant to Health and  
16 Safety Code section 25249.7(b).

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

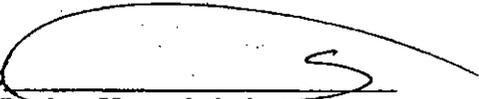
19  
20 **PRAYER FOR RELIEF**

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.

1 Dated: 9/30, 2013

YEROUSHALMI & ASSOCIATES

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