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Superior Court of California
County of Los Angeles

MAR 18 2014

Sherri R. Carter, Executive Officer/Clerk
By Geoffrey Charles, Deputy

1 Reuben Yeroushalmi (SBN 193981)
2 Daniel D. Cho (SBN 105409)
3 Ben Yeroushalmi (SBN 232540)
4 **YEROUSHALMI & ASSOCIATES**
5 9100 Wilshire Boulevard, Suite 240W
6 Beverly Hills, California 90212
7 Telephone: 310.623.1926
8 Facsimile: 310.623.1930

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

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

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

Plaintiff,

v.

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

Defendants.

CASE NO. BC482586

CONSENT JUDGMENT [PROPOSED]

Dept: 24

Judge: Honorable Robert L. Hess

Complaint filed: April 9, 2012

1. INTRODUCTION

1.1 This Consent Judgment is entered into by and between plaintiff Consumer Advocacy Group, Inc. ("CAG") acting on behalf of itself and in the interest of the public and defendants Earhugger, Inc., Empire Brands, Inc. (recently renamed to Wicked Audio, Inc.), M-Squared, Inc., Big Lots Stores, Inc. and Does 1-50 ("Defendants"), with each a "Party" and collectively referred to as "Parties."

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CONSENT JUDGMENT [PROPOSED]

1 1.2 It is alleged that Defendants employ ten or more persons, are persons in the
2 course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of
3 1986, California Health & Safety Code §§ 25249.6 et seq. ("Proposition 65"), and manufacture,
4 distribute, and/or sell Headsets, including but not limited to EarHugger® All-in-One Cellular
5 Headset, Model # C-8110 and Headphones, including but not limited to EarHugger® Stereo
6 Headphones, Model # A-1000 and all other Headsets and Headphones of Defendants sold into
7 California before the effective date of this Consent Judgment ("Alleged Products").

8 **1.3 Notice of Violation.**

9 1.3.1 On or about July 6, 2011, CAG served Defendants and various public
10 enforcement agencies with a document entitled "60-Day Notice of Violation" (the "July
11 6, 2011 Notice") that provided the recipients with notice of alleged violations of Health
12 & Safety Code § 25249.6 for failing to warn individuals in California of exposures to
13 Lead contained in Alleged Products.

14 1.3.2 No public enforcer has commenced or diligently prosecuted the
15 allegations set forth in the July 6, 2011 Notice.

16 **1.4 Complaint.**

17 On April 9, 2012, CAG filed a Complaint for civil penalties and injunctive relief
18 ("Complaint") in Los Angeles Superior Court, Case No. BC482586. The Complaint alleges,
19 among other things, that Defendants violated Proposition 65 by failing to give clear and
20 reasonable warnings of exposure to Lead from Alleged Products.

21 **1.5 Consent to Jurisdiction**

22 While otherwise disputed, for purposes of this Consent Judgment, the parties consent that
23 this Court has jurisdiction over the allegations of violations contained in the Complaint and
24 personal jurisdiction over Defendants as to the acts alleged in the Complaint, that venue is proper
25 in the City and County of Los Angeles and that this Court has jurisdiction to enter this Consent
26 Judgment as a full settlement and resolution of the allegations contained in the Complaint and of
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1 all claims which were or could have been raised by any person or entity based in whole or in
2 part, directly or indirectly, on the prior conduct of the parties or on the facts alleged in the
3 Complaint or arising therefrom or related to.

4 **1.6 No Admission**

5 This Consent Judgment resolves claims that are denied and disputed. The parties enter
6 into this Consent Judgment pursuant to a full and final settlement of any and all claims between
7 the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall not
8 constitute an admission with respect to any material allegation of the Complaint, each and every
9 allegation of which Defendants denies including jurisdiction, nor may this Consent Judgment or
10 compliance with it be used as evidence of any wrongdoing, misconduct, culpability or liability
11 on the part of Defendants.

12 **2. DEFINITIONS**

13 2.1 "Covered Products" means Headsets and Headphones manufactured, sold, and/or
14 distributed by only Earhugger, Inc., Empire Brands, Inc., and M-Squared, Inc.; and such
15 Headsets and Headphones sold by Big Lots Stores, Inc. ("Defendants") prior to Effective Date of
16 this Consent Judgment.

17 2.2 "Effective Date" means the date that this Consent Judgment is approved by the
18 Court.

19 **3. INJUNCTIVE RELIEF/REFORMULATION**

20 3.1 Within 60 days of the Effective Date Defendants shall not sell or offer for sale in
21 California Covered Products that contain Lead with more than 100 ppm.

22 **4. SETTLEMENT PAYMENT**

23 **Total Payment:** Defendant Empire Brands shall mail by certified mail, payments
24 totaling fifty-eight thousand dollars (\$58,000.00) as follows:

25 4.1 **Reimbursement of Attorneys' Fees and Costs:** Defendant Empire Brands shall
26 pay \$55,000.00 to "Yeroushalmi & Associates" as reimbursement for the investigation fees and
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1 costs, testing costs, expert fees, attorney fees, and other litigation costs and expenses for all work
2 performed through the approval of this Consent Judgment.

3 **4.2 Civil Penalties.** Defendant Empire Brands shall issue two separate checks for a
4 total amount of two thousand dollars (\$2,000.00) as penalties pursuant to Health & Safety Code
5 § 25249.12: (a) one check made payable to the State of California's Office of Environmental
6 Health Hazard Assessment (OEHHA) in the amount of \$1,500 representing 75% of the total
7 penalty; and (b) one check to Consumer Advocacy Group, Inc. in the amount of \$500,
8 representing 25% of the total penalty. Two separate 1099s shall be issued for the above
9 payments: The first 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95184
10 (EIN: 68-0284486) in the amount of \$1,500. The second 1099 shall be issued in the amount of
11 \$500 to CAG and delivered to: Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite
12 240W, Beverly Hills, California 90212.

13 **4.3 Payment In Lieu of Civil Penalties:** Defendant Empire Brands shall pay \$1,000
14 in lieu of civil penalties to "Consumer Advocacy Group, Inc." CAG will use this payment for
15 investigation of the public's exposure to Proposition 65 listed chemicals through various means,
16 laboratory fees for testing for Proposition 65 listed chemicals, expert fees for evaluating
17 exposures through various mediums, including but not limited to consumer product,
18 occupational, and environmental exposures to Proposition 65 listed chemicals, and the cost of
19 hiring consulting and retained experts who assist with the extensive scientific analysis necessary
20 for those files in litigation, as well as administrative costs incurred during the litigation, in order
21 to reduce the public's exposure to Proposition 65 listed chemicals by notifying those persons
22 and/or entities believed to be responsible for such exposures and attempting to persuade those
23 persons and/or entities to reformulate their products or the source of exposure to completely
24 eliminate or lower the level of Proposition 65 listed chemicals, thereby addressing the same
25 public harm as allegedly in the instant Action. Further, should the court require it, CAG will
26 submit under seal, an accounting of these funds as described above as to how the funds were
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1 used. The check shall be made payable to "Consumer Advocacy Group, Inc." and delivered to
2 Reuben Yeroushalmi, Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 240W,
3 Beverly Hills, California 90212.

4 4.4 Payments pursuant to 4.1, 4.2 and 4.3 shall be delivered to: Reuben Yeroushalmi,
5 Yeroushalmi & Associates, 9100 Wilshire Blvd., Suite 610W, Beverly Hills, CA 90212 within
6 the time agreed upon by the Parties.

7 5. MATTERS COVERED BY THIS CONSENT JUDGMENT

8 5.1 This Consent Judgment is a full, final, and binding resolution between CAG on
9 behalf of itself and in the public interest and Defendants and its officers, directors, insurers,
10 employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, sister
11 companies, agents, contractors, vendors, and their successors and assigns ("Defendant
12 Releasees"), including but not limited to each of their suppliers, customers, distributors,
13 wholesalers, retailers, or any other person in the course of doing business, and the successors and
14 assigns of any of them, who may use, maintain, distribute or sell Covered Products
15 ("Downstream Defendant Releasees"), for all conduct of Defendants prior to the Effective Date
16 based on alleged exposure to Lead from Covered Products as set forth in the Notice. Defendants
17 and Defendant Releasees' compliance with this Consent Judgment shall constitute compliance
18 with Proposition 65 with respect to Lead from Covered Products.

19 5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys,
20 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or
21 indirectly, any form of legal action and releases all claims, including, without limitation, all
22 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations,
23 damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation
24 fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or unknown,
25 fixed or contingent (collectively "Claims"), against Defendants, Defendant Releasees, and
26 Downstream Defendant Releasees arising from any allegations of violation of Proposition 65 or
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1 any other statutory or common law regarding the failure to warn about exposure to Lead from
2 Covered Products manufactured, distributed, or sold by Defendants and Defendant Releasees. In
3 furtherance of the foregoing, as to alleged exposures to Lead from Covered Products, CAG
4 hereby waives any and all rights and benefits which it now has, or in the future may have,
5 conferred upon it with respect to the Claims arising from any violation of Proposition 65 or any
6 other statutory or common law regarding the failure to warn about exposure to Lead from
7 Covered Products by virtue of the provisions of section 1542 of the California Civil Code, which
8 provides as follows:

9
10 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
11 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT
12 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM,
13 MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
14 DEBTOR.

15 CAG understands and acknowledges that the significance and consequence of this waiver of
16 California Civil Code section 1542 is that even if CAG suffers future damages arising out of or
17 resulting from, or related directly or indirectly to, in whole or in part, the Claims arising from
18 any alleged violation of Proposition 65 or any other statutory or common law regarding the
19 failure to warn about exposure to Lead from Covered Products, including but not limited to any
20 exposure to, or failure to warn with respect to exposure to Lead from the Covered Products,
21 CAG will not be able to make any claim for those damages against Defendants or the Defendant
22 Releasees or Downstream Defendant Releasees. Furthermore, CAG acknowledges that it intends
23 these consequences for any such Claims arising from any alleged violation of Proposition 65 or
24 any other statutory or common law regarding the failure to warn about exposure to Lead from
25 Covered Products as may exist as of the date of this release but which CAG does not know exist,
26 and which, if known, would materially affect their decision to enter into this Consent Judgment,
27 regardless of whether their lack of knowledge is the result of ignorance, oversight, error,
28 negligence, or any other cause.

1 **6. ENFORCEMENT OF JUDGMENT**

2 6.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
3 hereto. Except as otherwise agreed by the Parties, the Parties may, by noticed motion or order to
4 show cause before the Superior Court of California, City and County of Los Angeles, giving the
5 notice required by law, enforce the terms and conditions contained herein. A Party may enforce
6 any of the terms and conditions of this Consent Judgment only after that Party first provides
7 notice to the Party allegedly failing to comply with the terms and conditions of this Consent
8 Judgment and provide 60 days in which the Parties shall attempt to resolve such Party's failure to
9 comply in an open and good faith manner.

10 6.2 **Notice of Violation.** Prior to bringing any motion, order to show cause, or other
11 proceeding to enforce any alleged violation of Section 3.1 of this Consent Judgment, CAG shall
12 provide a Notice of Violation ("NOV") to Defendants. The NOV shall include for each of the
13 Newly Alleged Products: the date(s) the alleged violation(s) was observed and the location at
14 which the Newly Alleged Products were offered for sale, and shall be accompanied by all test
15 data obtained by CAG regarding the Newly Alleged Products, including an identification of the
16 component(s) of the Newly Alleged Products that were tested. Before any destructive testing of
17 any Newly Alleged Products is conducted by or on behalf of CAG, CAG shall give Defendant(s)
18 an opportunity to inspect and verify at reasonable times and places the authenticity of any Newly
19 Alleged Product in violation of this Consent Judgment.
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21 6.2.1 **Non-Contested NOV.** CAG shall take no further action regarding the
22 alleged violation if, within 60 days of receiving such NOV, Defendants serves a Notice of
23 Election ("NOE") that meets one of the following conditions:

24 (a) The Newly Alleged Products were shipped by Defendants for sale
25 in California before the Effective Date, or

26 (b) Since receiving the NOV Defendants have taken corrective action
27 by either (i) requesting that its customers in California remove the Newly Alleged
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1 Products identified in the NOV from sale in California and destroy or return the Newly
2 Alleged Products to Defendants, or (ii) providing a clear and reasonable warning for the
3 Newly Alleged Products identified in the NOV pursuant to 27 Cal. Code Regs. § 25603.

4 6.2.2 **Contested NOV.** Defendants may serve an NOE informing CAG of its
5 election to contest the NOV within 60 days of receiving the NOV.

6 (a) In its election, Defendants may request that the sample(s) Covered
7 Products tested by CAG be subject to additional confirmatory testing at an EPA-
8 accredited laboratory.

9 (b) If the confirmatory testing establishes that the Newly Alleged
10 Products do not contain Lead in excess of the level allowed in Section 3.1, CAG shall
11 take no further action regarding the alleged violation. If the testing does not establish
12 compliance with Section 3.1, Defendants may withdraw its NOE to contest the violation
13 and may serve a new NOE pursuant to Section 6.2.1.

14 (c) If Defendants do not withdraw an NOE to contest the NOV, the
15 Parties shall meet and confer for a period of no less than 30 days before CAG may seek
16 an order enforcing the terms of this Consent Judgment.

17 6.3 In any proceeding brought by either Party to enforce this Consent Judgment, such
18 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
19 violation of Proposition 65 or this Consent Judgment.

21 7. ENTRY OF CONSENT JUDGMENT

22 7.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to
23 California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CAG and
24 Defendants waive their respective rights to a hearing or trial on the allegations of the Complaint.

25 7.2 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
26 and any and all prior agreements between the parties merged herein shall terminate and become
27 null and void, and the actions shall revert to the status that existed prior to the execution date of
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1 this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the
2 negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall
3 have any effect, nor shall any such matter be admissible in evidence for any purpose in this
4 Action, or in any other proceeding; and (c) the Parties agree to meet and confer to determine
5 whether to modify the terms of the Consent Judgment and to resubmit it for approval.

6 **8. MODIFICATION OF JUDGMENT AND RIGHTS THEREUNDER**

7 8.1 This Consent Judgment may be modified only upon written agreement of the
8 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
9 any Party as provided by law and upon entry of a modified Consent Judgment by the Court. Any
10 Party may waive in writing any right it may have under this Consent Judgment.

11 8.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to
12 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

13 **9. RETENTION OF JURISDICTION**

14 9.1 This Court shall retain jurisdiction of this matter to implement and enforce the
15 terms of this Consent Judgment.

16 **10. DUTIES LIMITED TO CALIFORNIA**

17 This Consent Judgment shall have no effect on Covered Products sold outside the State of
18 California.

19 **11. SERVICE ON THE ATTORNEY GENERAL**

20 11.1 CAG shall serve a copy of this Consent Judgment, signed by both parties, on the
21 California Attorney General so that the Attorney General may review this Consent Judgment
22 prior to its submittal to the Court for approval. No sooner than forty five (45) days after the
23 Attorney General has received the aforementioned copy of this Consent Judgment, and in the
24 absence of any written objection by the Attorney General to the terms of this Consent Judgment,
25 the Parties may then submit it to the Court for approval.

26 **12. ATTORNEY FEES**

1 12.1 Except as specifically provided in Section 4.1 and 6.3, each Party shall bear its
2 own costs and attorney fees in connection with this action.

3 **13. GOVERNING LAW**

4 13.1 The validity, construction and performance of this Consent Judgment shall be
5 governed by the laws of the State of California, without reference to any conflicts of law
6 provisions of California law.

7 13.2 The Parties, including their counsel, have participated in the preparation of this
8 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
9 Consent Judgment was subject to revision and modification by the Parties and has been accepted
10 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty
11 or ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a
12 result of the manner of the preparation of this Consent Judgment. Each Party to this Consent
13 Judgment agrees that any statute or rule of construction providing that ambiguities are to be
14 resolved against the drafting Party should not be employed in the interpretation of this Consent
15 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

16 **14. EXECUTION AND COUNTERPARTS**

17 14.1 This Consent Judgment may be executed in counterparts and by means of
18 facsimile or portable document format (PDF), which taken together shall be deemed to constitute
19 one document.
20

21 **15. NOTICES**

22 15.1 Any notices under this Consent Judgment shall be by personal delivery or First
23 Class Mail.

24 If to CAG:

25 Reuben Yeroushalmi
26 9100 Wilshire Boulevard, Suite 240W
27 Beverly Hills, CA 90212
28 (310) 623-1926

1 If to Earhugger, Inc., Empire Brands, Inc., and M-Squared, Inc.:

2 Earhugger, Inc.
3 874 West 325 North
4 Lindon, UT 84042

5 Empire Brands, Inc. (now Wicked Audio, Inc.)
6 874 West 325 North
7 Lindon, UT 84042

8 M-Squared, Inc.
9 874 West 325 North
10 Lindon, UT 84042

11 With a copy to:

12 Todd Zenger, Esq.
13 Kirton McConkie
14 60 East South Temple, Suite 1800
15 Salt Lake City, UT 84111
16 (For Earhugger, Empire and M-Squared)

17 If to Big Lots Stores, Inc.

18 Big Lots Stores, Inc.
19 300 Philippi Road
20 Columbus, OH 43228

21 With a copy to

22 Michael E. Delehunt
23 **FOLEY & LARDNER LLP**
24 555 California Street
25 Suite 1700
26 San Francisco, CA 94104

27 **16. AUTHORITY TO STIPULATE**

28 16.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
by the party he or she represents to enter into this Consent Judgment and to execute it on behalf
of the party represented and legally to bind that party.

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AGREED TO:

Date: _____, 2013

By: _____

Plaintiff, CONSUMER ADVOCACY GROUP, INC.

AGREED TO:

Date: _____, 2013

By: _____

Defendant, EMPIRE BRANDS, INC.

(now Wicked Audio, Inc.)

AGREED TO:

Date: January 23, 2014

By: Chadwick P. Reynolds

Chadwick P. Reynolds, Vice President, Deputy

General Counsel and Assistant Corporate

Secretary

Defendant, BIG LOTS STORES, INC.



AGREED TO:

Date: _____, 2013

By: _____

Defendant, EARHUGGER, INC.

AGREED TO:

Date: _____, 2013

By: _____

Defendant, M-SQUARED, INC.

IT IS SO ORDERED.

Date: 3-18-14

Robert L. Hess

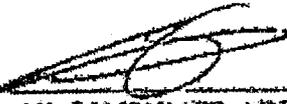
Robert L. Hess

JUDGE OF THE SUPERIOR COURT

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AGREED TO:

Date: 1-21, 2014

By: 

Plaintiff, CONSUMER ADVOCACY GROUP, INC.

AGREED TO:

Date: _____, 2013

By: _____

Defendant, EARHUGGER, INC.

AGREED TO:

Date: _____, 2013

By: _____

Defendant, EMPIRE BRANDS, INC.

(now Wicked Audio, Inc.)

AGREED TO:

Date: _____, 2013

By: _____

Defendant, M-SQUARED, INC.

By: _____

Defendant, BIG LOTS STORES, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

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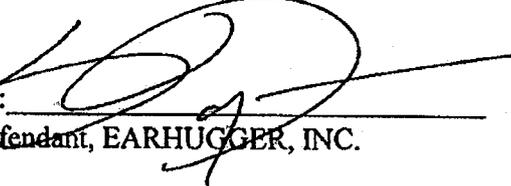
AGREED TO:

Date: _____, 2013

By: _____
Plaintiff, CONSUMER ADVOCACY
GROUP, INC.

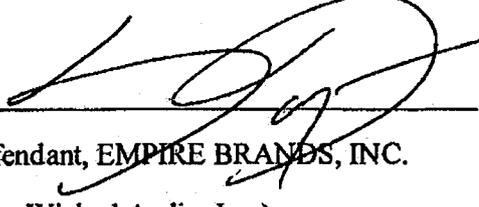
AGREED TO:

Date: 12/27, 2013

By: 
Defendant, EARHUGGER, INC.

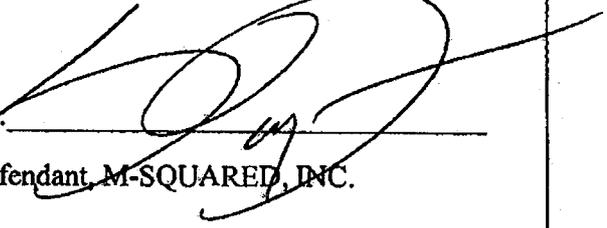
AGREED TO:

Date: 12/27, 2013

By: 
Defendant, EMPIRE BRANDS, INC.
(now Wicked Audio, Inc.)

AGREED TO:

Date: 12/27, 2013

By: 
Defendant, M-SQUARED, INC.

By: _____
Defendant, BIG LOTS STORES, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT