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5 MIDWESTERN HOME PRODUCTS, INC.

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9 ATTORNEYS FOR PLAINTIFF MICHAEL DiPIRRO

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12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **FOR THE COUNTY OF SAN FRANCISCO**
14

15 MICHAEL DiPIRRO,

16 PLAINTIFF,

17 V.

18 BIG LOTS STORES, INC.; MIDWESTERN
19 HOME PRODUCES, INC. AND DOES 1
THROUGH 150,

20 DEFENDANTS.
21
22

) CASE NO. 407082

) **CONSENT JUDGMENT**

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CONSENT JUDGMENT
CASE NO. 407082.

1 This Consent Judgment ("Agreement" or "Consent Judgment") is entered into by and
2 between Plaintiff Michael DiPirro (hereinafter "DiPirro") and Defendants BIG LOTS STORES
3 INC. (hereinafter "Big Lots Stores") (DiPirro and Big Lots Stores ay hereinafter collectively be
4 referred to as "the Parties"), as of April 11, 2003 (the "Effective Date"). The Parties agree to the
5 following terms and conditions:

6 WHEREAS:

7 A. Michael DiPirro is an individual residing in San Francisco, California, who seeks
8 to promote awareness of exposures to toxic chemicals and improve human health by reducing or
9 eliminating hazardous substances contained in consumer and industrial products;

10 B. DiPirro alleges that Big Lots Stores is a company that apparently sells and/or
11 distributes for sale certain products that contain lead or lead compounds, a substance known to
12 the State of California to cause cancer and birth defects (or other reproductive harm);

13 C. A list of such products that DiPirro alleges contain lead (or lead compounds) (the
14 "Listed Chemical"), which are sold or offered for sale in California and which are covered by
15 this Agreement, is provided in Exhibit A (all such products to be collectively referred to
16 hereinafter as the "Products"). No other Products except the three specific items listed in Exhibit
17 A are covered by this Agreement.

18 D. On November 8, 2001, DiPirro first served Big Lots, Inc. and Midwestern Home
19 Products, Inc. and other public enforcement agencies with a document entitled "60-Day Notice
20 of Violation" that provided notice that said entities were allegedly in violation of Health &
21 Safety Code §25249.6 for allegedly failing to warn purchasers that two (2) of the Products (photo
22 frames and stained glass lamps) sold in California expose users to the Listed Chemical; and

23 E. On December 7, 2001, DiPirro served Big Lots, Inc. and Midwestern Home
24 Products, Inc. and other public enforcement agencies with a document entitled "60-Day Notice
25 of Violation" that provided notice that said entities were allegedly in violation of Health &
26 Safety Code §25249.6 for allegedly failing to warn purchasers that one (1) of the Products
27 (candle/votive holder) sold in California expose users to the Listed Chemical. The November 8,
28 2001 and December 7, 2001 60-Day Notices shall hereinafter be referred to as the "Notices."

1 F. On April 24, 2002, DiPirro filed a complaint entitled Michael DiPirro v. Big Lots
2 Stores Inc.; Midwestern Home Products, Inc., Inc.; et al. in the San Francisco County Superior
3 Court, naming Big Lots Stores, Inc. and Midwestern Home Products, Inc. as defendants and
4 alleging violations of Business & Professions Code §17200 and §17500 as well as Health &
5 Safety Code §25249.6 on behalf of individuals in California who have been allegedly exposed to
6 the Listed Chemical contained in the Products that defendants allegedly distribute and/or sell.
7 Big Lots Stores moved for summary judgment alleging the Court's lack of subject matter
8 jurisdiction over Big Lots Stores because the Notices did not name Big Lots Stores but instead
9 named a purportedly separate and distinct entity, Big Lots, Inc. The Parties resolved the subject
10 matter jurisdiction issue by agreeing that, although DiPirro would not maintain a Proposition 65
11 cause of action against Big Lots Stores, DiPirro could maintain causes of action pursuant to
12 Business and Professions Code sections 17200 *et seq.* and 17500 *et seq.* for alleged violations of
13 Proposition 65.

14 G. This Consent Judgment is entered into between Big Lots Stores and DiPirro
15 pursuant to Business and Professions Code sections 17200 *et seq.* and 17500 *et seq.* and As part
16 of the resolution of these matters against the alleged retailer of the Products, Big Lots Stores,
17 DiPirro agrees to dismiss an alleged distributor of the Products, Midwestern Home Products, Inc.
18 the manner set forth below in Section Four.

19 H. Nothing in this Agreement shall be construed as an admission by Big Lots Stores,
20 Big Lots, Inc. or Midwestern Home Products, Inc. of any fact, finding, issue of law or violation
21 of law, nor shall compliance with this Agreement constitute or be construed as an admission by
22 any defendant of any fact, finding, conclusion, issue of law or violation of law. However, this
23 paragraph shall not diminish or otherwise affect the obligations, responsibilities, and duties of
24 Big Lots Stores under this Agreement.

25 NOW THEREFORE, PLAINTIFF MICHAEL DIPIRRO AND DEFENDANTS BIG LOTS
26 STORES AGREE AS FOLLOWS:

27 **1.0 Product Warnings.**

28 Beginning immediately after the Effective Date of this Agreement but in no event

1 later than December 1, 2003, Big Lots Stores will ensure that all of the Products in retail stores
2 operating under the "Big ! Lots" name in California, including all stores formerly operating
3 under the "MacFrugal's Bargains Close-Outs" name, bear the following warning statement:

4 **WARNING:**

5 **This product contains LEAD, a substance known to the State**
6 **of California to cause cancer, and birth defects (or other**
reproductive harm). Wash Hands After Handling.

7 The warning stated above may be placed on: (1) a product label; (2) on the accompanying
8 packaging as a sticker; or (3) on a store sign sufficiently near the Products' point of sale so that it
9 is likely to be read by an ordinary individual under customary conditions of purchase for the
10 Products. For purposes of this Consent Judgment, a warning sticker placed on product
11 packaging that is not available to the consumer before purchase, or on product packaging that
12 does not accompany the Products when purchased, is not reasonably calculated to transmit the
13 requisite warning and, thus, may not be used to comply with this paragraph.

14 **1.1 Interim Health Safety Efforts**

15 In an attempt to ensure that all Products in the stream of commerce contain the requisite
16 health hazard warnings at the point of sale, Big Lots Stores agrees to communicate in writing
17 within 30 days of the Effective Date, via certified or electronic mail, to the Plaintiff that it is no
18 longer selling the Products in any of its California "Big ! Lots" retail locations, or, in the
19 alternative, confirming that each "Big ! Lots" store with remaining inventory has received
20 instructions to remove the Products until appropriate warnings are affixed to such Products in a
21 manner consistent with paragraph 1.0 above.

22 **2. Payment Pursuant To Business and Professions Code §17202**

23 Pursuant to Business and Professions Code section 17202, and the authority
24 vested in the Court to grant relief to remedy the effects of unfair competition, Big Lots Stores
25 will pay a total sum of \$2,000 to Health Risk Consultants Inc. ("HRC"), which is an organization
26 that provides risk assessment, risk management and risk communication services on behalf of
27 private and public entities, including the U.S. Navy, state and local health departments and the
28 Agency for Toxic Substances and Disease Registry (an arm of the federal public health service).

1 The Parties agree that such funds may only be spent to perform research on the nature, extent or
2 causation of health hazards posed by exposures to lead (or lead compounds) on behalf of
3 governmental or non-profit entities acting in the public interest. Funds are to be transferred to
4 HRC for the sole purpose of said research. DiPirro agrees to obtain a written statement and
5 relevant supporting documents from HRC that confirms that such funds will be spent for the
6 purposes stated above and that the funds will be accounted for in an appropriate manner.

7 The payment is to be made by April 24, 2003 and payable to "Sheffer & Chanler LLP In
8 Trust For Michael DiPirro." If the Court does not approve the Consent Judgment, DiPirro will
9 return all funds, with interest thereon at the prevailing federal funds rate (currently set at 1.25%
10 per annum), within five (5) calendar days of notice of the Court's decision. All remedial monies
11 shall be delivered to HRC within 10 days of court approval of this Consent Judgment. DiPirro
12 will provide proof of payment to HRC and a copy of said written statement to counsel for Big
13 Lots Stores within ten (10) days of payment.

14 **3.0 Reimbursement Of Fees And Costs.**

15 The Parties acknowledge that DiPirro and his counsel offered to resolve this dispute
16 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
17 leaving this fee issue to be resolved after the material terms of the agreement had been settled.
18 Big Lots Stores then expressed a desire to resolve the fee and cost issue shortly after the other
19 settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on
20 the compensation due to DiPirro and his counsel under the private attorney general doctrine
21 codified at C.C.P. §1021.5 for all work performed through the Effective Date of the Agreement.

22 Under the private attorney general doctrine codified at C.C.P. §1021.5, Big Lots Stores
23 shall reimburse DiPirro and his counsel for his fees and costs, incurred as a result of
24 investigating, bringing this matter to the attention of Big Lots Stores, litigating and negotiating a
25 settlement in the public interest. Big Lots Stores shall pay DiPirro and his counsel \$28,000, for
26 all attorneys' fees, expert and investigation fees, and litigation costs, by April 24, 2003. Payment
27 should be made payable to "Sheffer & Chanler LLP." If the Consent Judgment is not approved
28 by the Court, DiPirro and Sheffer & Chanler LLP will return all funds, with interest thereon at

1 the prevailing federal funds rate (currently set at 1.25% per annum), within five (5) calendar days
2 of notice of the Court's decision.

3 **3.1 Procedures for Judicial Approval.**

4 The Parties acknowledge that a noticed motion may be required to obtain judicial
5 approval of this Agreement. Accordingly, the Parties agree to use their best efforts to file a *Joint*
6 *Motion to Approve the Agreement* within a reasonable period of time after execution of this
7 Agreement. As part of its best efforts commitment, DiPirro agrees to provide counsel for Big
8 Lots Stores with a template of the moving papers for the approval within seven calendar days of
9 the Effective Date and to the Parties will use their best efforts to get the joint motion on file
10 within 14 days of the Effective Date. Big Lots Stores agrees to support this Agreement as well as
11 undertake those activities reasonably necessary to obtain necessary approval of this Consent
12 Judgment.

13 **4. Michael DiPirro's Release of the Big Lots Stores and Midwestern Home** 14 **Products, Inc.**

15 DiPirro, by this Agreement, on behalf of himself, his agents, representatives, attorneys,
16 assigns, and in the interest of the general public, waives all rights to institute or participate in,
17 directly or indirectly, any form of legal action, and releases all claims, liabilities, obligations,
18 losses, costs, expenses, fines, penalties, fees, and damages, restitution, injunction, and any other
19 form of relief, whether legal or equitable, against BIG LOTS STORES and MIDWESTERN
20 HOME PRODUCTS, INC., and their directors, officers, employees, agents, parents, subsidiaries,
21 affiliates, retailers, successors and assigns, whether under Proposition 65 or the Business &
22 Profession Code §17200 or §17500, based on their alleged failure to warn about exposure to the
23 Listed Chemical contained in any of the Products. DiPirro agrees to dismiss the complaint, with
24 prejudice, against Midwestern Home Products, Inc. in its entirety and serve a copy of the file-
25 endorsed Request for Dismissal with Prejudice regarding Midwestern Home Products, Inc.
26 within two (2) business days of the approval of this Consent Judgment.

27 This Agreement is a full, final, and binding resolution between DiPirro, on behalf of
28 himself and in the interest of the general public, and Big Lots Stores (and the above named

1 parties), of any violation of Proposition 65, Business & Professions Code §§17200 or 17500, or
2 any other claim that could have been asserted based on alleged failure to warn for exposure to
3 lead in the Products as alleged in the Complaint. The Parties intend that compliance with this
4 Agreement to resolve any issue now, in the past, or in the future concerning the Products past
5 and present, and future (up to the date of compliance established in Paragraph 1, above, and in
6 the future so long as Big Lots Stores complies with this Agreement) compliance with Proposition
7 65 as such compliance pertains to the Products at issue. In addition, DiPirro, on behalf of
8 himself, his attorneys, and his agents, waives all rights to institute any form of legal action
9 against Big Lots Stores and its attorneys or representatives, for all actions or statements made by
10 Big Lots Stores or its attorneys or representatives, in the course of responding to alleged
11 violations of Proposition 65 or Business & Profession Code § 17200 and § 17500 by Big Lots
12 Stores and Midwestern Home Products, Inc. Provided, however, that DiPirro shall remain free to
13 institute any form of legal action to enforce the provisions of this Consent Judgment.

14 **5. Defendants' Release Of Michael DiPirro.**

15 Big Lots Stores and each defendant named in this litigation and their directors, officers,
16 employees, agents, parents, subsidiaries, affiliates, retailers, successors and assigns by this
17 Agreement, waive all rights to institute any form of legal action against DiPirro and his attorneys
18 or representatives, for all actions or statements made by DiPirro or his attorneys or
19 representatives, in the course of seeking enforcement of Proposition 65 or Business & Profession
20 Code §17200 and §17500 against the defendants in this litigation. Provided, however, that Big
21 Lots Stores shall remain free to institute any form of legal action to enforce the provisions of this
22 Consent Judgment.

23 **6. Court Approval Required.**

24 If, for any reason, the Court does not ultimately approve this Consent Judgment, this
25 Agreement shall be deemed null and void.

26 **7. Severability.**

27 In the event that any of the provisions of this Agreement is held by a court to be
28 unenforceable, the validity of the enforceable provisions shall not be adversely affected.

1 **8. Attorney's Fees.**

2 In the event that a dispute arises with respect to any provision(s) of this Agreement
3 (including, but not limited to, disputes arising from payments to be made under this Agreement),
4 reasonable attorneys' fees incurred from the resolution of such dispute shall be available to the
5 prevailing party.

6 **9. Governing Law.**

7 The laws of the State of California shall govern the terms of this Agreement.

8 **10. Notices.** All correspondence to Michael DiPirro shall be mailed to:

9 Gregory M. Sheffer, Esq.
10 Sheffer & Chanler LLP
11 160 Sansome Street, 2nd Floor
12 San Francisco, CA
 Tel: 415.434.9111

13 All correspondence to Defendants shall be mailed to:

14 Michael E. Delehunt, Esq.
15 Foley & Lardner
16 Attorneys at Law
17 One Maritime Plaza, Sixth Floor
 San Francisco, CA 94111
 Tel. 415.434.4484

18 **11. Compliance With Reporting Requirements (Health & Safety Code**
19 **§25249.7(f)).**

20 The Parties acknowledge that the reporting provisions of Health & Safety Code
21 § 25249.7(f) may apply to this Consent Judgment. To the extent that it may be required, counsel
22 for DiPirro shall comply with any required reporting procedures.

23 **12. Counterparts and Facsimile.**

24 This Agreement may be executed in counterparts and facsimile, each of which shall be
25 deemed an original, and all of which, when taken together, shall constitute one and the same
26 document.

27 **13. Authorization.**

28 The undersigned are authorized to execute this Agreement on behalf of their respective

1 Parties and have read, understood and agree to all of the terms and conditions of this Agreement.

2
3 DATE: APRIL __, 2003
4

5 BY: _____
6 MICHAEL A. SCHLONSKY, ESQ.
7 VICE PRESIDENT, RISK MANAGEMENT &
8 ADMINISTRATIVE SERVICES, BIG LOTS, INC.
9 ON BEHALF OF BIG LOTS STORES, INC.

10 **APPROVED AS TO FORM:**

11 DATE: APRIL __, 2003
12


13 BY: _____
14 MICHAEL E. DELEHUNT
15 ATTORNEY FOR
16 BIG LOTS STORES, INC.

17 DATE: APRIL __, 2003
18

19 BY: _____
20 MICHAEL DiPIRRO, PLAINTIFF

21 **APPROVED AS TO FORM:**

22 DATE: APRIL 30, 2003
23

24 BY:  _____
25 SHEFFER & CHANLER LLP
26 DEREK R. LONGSTAFF
27 ATTORNEYS FOR PLAINTIFF,
28 MICHAEL DiPIRRO

1 Parties and have read, understood and agree to all of the terms and conditions of this Agreement.

2

3 DATE: APRIL __, 2003

4

5

BY: _____

MICHAEL A. SCHLONSKY, ESQ.
VICE PRESIDENT, RISK MANAGEMENT &
ADMINISTRATIVE SERVICES, BIG LOTS, INC.
ON BEHALF OF BIG LOTS STORES, INC.

6

7

8

APPROVED AS TO FORM:

9

DATE: APRIL __, 2003

10

11

BY: _____

MICHAEL E. DELEHUNT
ATTORNEY FOR
BIG LOTS STORES, INC.

12

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14

DATE: APRIL 22, 2003

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BY: 

MICHAEL DIPIRRO, PLAINTIFF

18

APPROVED AS TO FORM:

19

DATE: APRIL __, 2003

20

21

BY: _____

SHEFFER & CHANLER LLP
DEREK R. LONGSTAFF
ATTORNEYS FOR PLAINTIFF,
MICHAEL DIPIRRO

22

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1 Parties and have read, understood and agree to all of the terms and conditions of this Agreement.

2
3 DATE: APRIL 30, 2003

4
5 BY: Michael A. Schlonsky

6 MICHAEL A. SCHLONSKY, ESQ.
7 VICE PRESIDENT, RISK MANAGEMENT &
8 ADMINISTRATIVE SERVICES, BIG LOTS, INC. ON
9 BEHALF OF BIG LOTS STORES, INC.

10 APPROVED AS TO FORM:

11 DATE: APRIL __, 2003

12 BY: _____

13 MICHAEL E. DELEHUNT
14 ATTORNEY FOR
15 BIG LOTS STORES, INC.

16 DATE: APRIL __, 2003

17 BY: _____

18 MICHAEL DIPIRRO, PLAINTIFF

19 APPROVED AS TO FORM:

20 DATE: APRIL __, 2003

21 BY: _____

22 SHEFFER & CHANLER LLP
23 DEREK R. LONGSTAFF
24 ATTORNEYS FOR PLAINTIFF,
25 MICHAEL DIPIRRO
26
27
28

1 Parties and have read, understood and agree to all of the terms and conditions of this Agreement.

2

3 DATE: APRIL __, 2003

4

5

BY: _____

MICHAEL A. SCHLONSKY, ESQ.
VICE PRESIDENT, RISK MANAGEMENT &
ADMINISTRATIVE SERVICES, BIG LOTS, INC.
ON BEHALF OF BIG LOTS STORES, INC.

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7

8

APPROVED AS TO FORM:

9

DATE: APRIL 30, 2003

10

11

BY: _____

MICHAEL E. DELEHUNT
ATTORNEY FOR
BIG LOTS STORES, INC.

Michael E.

Delehunt

12

13

14

15

DATE: APRIL __, 2003

16

17

BY: _____

MICHAEL DIPIRRO, PLAINTIFF

18

APPROVED AS TO FORM:

19

DATE: APRIL __, 2003

20

21

BY: _____

SHEFFER & CHANLER LLP
DEREK R. LONGSTAFF
ATTORNEYS FOR PLAINTIFF,
MICHAEL DIPIRRO

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EXHIBIT A: PRODUCT LIST

CONSENT JUDGMENT IN SAN FRANCISCO SUPERIOR COURT CASE NUMBER

407082

The following Products are the exclusive Products that are covered by this Consent

Judgment:

1. **Arrington Stained Glass Light House Lamp**, V#164230, Item #W14D2274,
SKU: 610002006;..
2. **Santa Claus Candle Holder**, V#7726040, Item # H02031, SKU 360010388.
3. **Photo Frame**, V#730730, Item #010/217, SKU 345003524. .