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16 Attorneys for Representative Plaintiff  
17 and the Plaintiff class

18 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
19 **IN AND FOR THE COUNTY OF ALAMEDA**

20 MARK WITRIOL, individually, and on  
21 behalf of all others similarly situated,

22 Plaintiffs,

23 vs.

24 HOME DEPOT U.S.A., INC., a  
25 corporation; HOME DEPOT  
26 INSTALLATION SERVICES, INC., a  
27 corporation; THE HOME DEPOT  
28 BATH REMODELING, INC., a  
corporation; HOME DEPOT  
SERVICES, LLC; and DOES 1 through  
25, inclusive,

Defendants.

Case No. *RG* 09 - 433195

**CLASS ACTION**

**COMPLAINT FOR DAMAGES,  
INJUNCTIVE RELIEF AND RESTITUTION**

Representative Plaintiff alleges as follows:

**PRELIMINARY STATEMENT**

1. This is a class action, under Code of Civil Procedure § 382, seeking damages, interest thereon, injunctive and other equitable relief and reasonable attorneys' fees and costs on behalf of

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1 Representative Plaintiff and all other persons who have purchased goods and/or services, (hereinafter  
2 referred to as the "Class Members," and/or the "Plaintiff Class") from defendants Home Depot  
3 U.S.A., Inc.; Home Depot Installation Services, Inc.; the Home Depot Bath Remodeling, Inc.; and/or,  
4 Home Depot Services, LLC (hereinafter collectively referred to as "Home Depot" and/or  
5 "Defendants") within the State of California at any time since January 28, 2005. The Representative  
6 Plaintiff, on behalf of himself and the Class Members, also seeks injunctive relief and restitution of  
7 all benefits Home Depot has enjoyed from its unlawful and/or deceptive business practices, as  
8 detailed herein.

## 10 INTRODUCTION

### 11 Home Improvement Industry.

12 2. The Home Improvement Industry was born in the post World War II housing boom,  
13 as returning soldiers and their families needed more space. The do-it-yourself movement was born,  
14 partially for economic reasons and partially for entertainment. Home Depot was founded in 1978,  
15 as a one-stop shopping, do-it-yourself store. It has subsequently become the fastest growing retailer  
16 in U.S. history.

### 18 Defendant's Marketing Activity And Products.

19 3. Home Depot is a major provider and marketer of home improvement goods and/or  
20 services in the State of California. In marketing home improvement goods and/or services, including  
21 home improvement products and related services, defendant Home Depot has disseminated or caused  
22 to be disseminated to consumers, through its internet presence, via point-of-sale materials and/or  
23 print advertisements, prices of certain goods and/or services.

24 4. Plaintiff is informed and believes, and on that basis alleges, that Home Depot  
25 unlawfully assesses sales tax on many of its items not subject to sales tax.

26 5. Defendant's assessment of sales tax associated with its goods and/or services, is of  
27 material fact and constitutes misrepresentation and unfair, unlawful, fraudulent and/or deceptive  
28 business practices in violation of California law. For example, Defendant's false and/or misleading

1 representations, expressly or by implication, that the advertised costs of its goods and/or services is  
2 all inclusive constitutes a deceptive act or practice in violation of California's consumer protection  
3 laws, including, but not limited to California Business and Profession Code §§ 17200, *et sequitur*.

4 6. Indeed, Defendant is obligated by law to accurately and honestly disclose all  
5 applicable charges at the point of sale and time of purchase.

6 7. As a result of Defendant's concealment and non-disclosure, customers are misled into  
7 purchasing Home Depot's goods and/or services, unjustly enriching Defendant at the expense of  
8 these consumers. Defendant, at all times, knew that Representative Plaintiff and the Class Members  
9 relied (or should be presumed to have relied) upon the misrepresentations of Defendant. Defendant's  
10 concealment, misbranding and non-disclosure were intended to influence consumers' purchasing  
11 decisions and were done with reckless disregard for the rights of consumers. Representative  
12 Plaintiff's and Class Members' reliance and resultant substantial monetary loss were reasonably  
13 foreseeable by Defendant.

14 8. Absent injunctive relief by this Court, Defendant is likely to continue to injure  
15 consumers and harm the public interest. This action is brought to redress and end this pattern of  
16 unlawful conduct.

### 17 18 JURISDICTION AND VENUE

19 9. This Court has jurisdiction over Representative Plaintiff's and Class Members' claims  
20 for unlawfully assessing sales tax on certain goods and/or services under Code of Civil Procedure  
21 § 382; the Unfair Competition Law ("UCL"), Business & Professions Code § 17200 *et seq.*, the  
22 False Advertising Law, Business & Professions Code § 17500 *et seq.* ("Section 17500"); and the  
23 Consumers Legal Remedies Act ("CLRA"), Civil Code § 1750 *et seq.*

24 10. This Court has jurisdiction over Representative Plaintiff's and Class Members' claims  
25 for injunctive relief and restitution of ill-gotten benefits arising from defendant Home Depot's  
26 unlawful business practices under Business & Professions Code §§ 17203 and 17204.

27 11. Venue as to Defendant is proper in this judicial district, pursuant to Code of Civil  
28 Procedure § 395(a). Defendant Home Depot transacts business, has agents, and is otherwise within

1 this Court's jurisdiction for purposes of service of process. The unlawful acts alleged herein have  
2 a direct effect on Representative Plaintiff and those similarly situated within the State of California  
3 and within Alameda County. Defendant Home Depot distributes and markets the sale of goods  
4 and/or services to class members in Alameda County.

5 12. Venue is also proper in this Court pursuant to Code of Civil Procedure §§ 395 and  
6 395.5, Business and Professions Code §§ 16750(a), 17203, 17204 and 17535, and Civil Code §§  
7 1780(d) and 1781(a) because Defendant either transacts business, has an agent, or is doing business  
8 in the County of Alameda and the Defendant is within the jurisdiction of this Court for purposes of  
9 service of process. The acts hereinafter described were carried on, in part, within the State of  
10 California and, more particularly, within Alameda County.

11 13. Federal court subject matter jurisdiction over this class action and representative  
12 action does not exist. The amount in controversy alleged in this Complaint as to the Representative  
13 Plaintiff and each member of the Class does not exceed \$75,000, including interest and any award  
14 of attorneys' fees and costs. Representative Plaintiff and each member of the Class disclaim any  
15 recovery greater than \$75,000 (including compensatory damages, statutory damages, punitive or  
16 exemplary damages, and awardable attorneys' fees and costs on a per-plaintiff basis), and  
17 specifically limit their total claims to \$75,000 or less for any particular plaintiff/class member.  
18 Damages (whether compensatory, statutory, punitive, or exemplary), attorneys' fees and costs may  
19 not be aggregated to meet the minimum jurisdictional amount of the federal district courts.

20  
21 **PLAINTIFFS**

22 14. The Representative Plaintiff identified herein was and is a natural person and, during  
23 the relevant time period identified herein, purchased product(s) or service(s) not subject to sales tax  
24 ("goods and/or services") on whom Home Depot improperly assessed sales tax.

25 15. As used throughout this Complaint, the terms "Plaintiff" and/or "Class" refer to the  
26 named plaintiff herein as well as each and every person eligible for membership in the Plaintiff  
27 Class, as further described and defined below.

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1 of the remaining defendants and, in doing the acts herein alleged, was acting within the course and  
2 scope of such agency and/or employment.

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**CLASS ACTION ALLEGATIONS**

23. Representative Plaintiff Mark Witriol brings this action on behalf of himself and as  
a class action on behalf of all persons or entities similarly situated and proximately damaged by  
Home Depot's conduct as set forth herein, including, but not necessarily limited to, the following  
Class:

All persons who purchased, within the State of California, any product or service not  
subject to sales tax ("goods and/or services") from Home Depot at any time during  
the period of January 28, 2005 to the present (the "Class Period") and to whom Home  
Depot improperly assessed sales tax.

24. Excluded from the Class are defendant Home Depot, its officers, directors, parents,  
predecessors, successors, subsidiaries, units, divisions, and co-conspirators, government entities, and  
any and all judges and justices assigned to hear any aspect of this case.

25. This action has been brought and may properly be maintained as a class action under  
Code of Civil Procedure § 382 because there is a well-defined community of interest in the litigation  
and the proposed Class are easily ascertainable.

- a. **Numerosity:** A class action is the only available method for the fair and  
efficient adjudication of this controversy. The members of the Class are so  
numerous that joinder of all members is impractical, if not impossible, insofar  
as Representative Plaintiff is informed and believes and, on that basis, alleges  
that the total membership of the Class is in the tens of thousands, if not much  
greater. Membership in the Class will be determined upon analysis of sales,  
among other, records maintained by Home Depot.
- b. **Commonality:** The Representative Plaintiff and the Class Members share a  
community of interests in that there are numerous common questions and  
issues of fact and law which predominate over any questions and issues solely  
affecting individual members, including, but not necessarily limited to:
  - (1) whether Home Depot had a duty to Representative Plaintiff and the  
Class to disclose the amount of sales tax improperly added to the  
advertised price of goods and/or services;
  - (2) whether the facts concealed by Defendant from Representative  
Plaintiff and the Class are material facts;
  - (3) whether Defendant misled consumers by failing to disclose the

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amount of sales tax improperly added to the advertised price of goods and/or services purchased by Representative Plaintiff and the class;

(4) whether Defendant engaged in unfair competition or unfair and/or deceptive acts or practices when it represented, through advertising, warranties and other express and implied representations that Defendant's goods and/or services had characteristics that they do not actually have;

(5) whether Defendant violated California law, including Business & Professions Code § 17200, *et seq.*, Business & Professions Code § 17500, *et seq.*, and the Consumers Legal Remedies Act, California Civil Code §§ 1750, *et seq.*

(6) Whether Home Depot committed fraud in concealing from Representative Plaintiff and the Class the true nature of the actual value of the goods and/or services being purchased thereby;

c. Typicality: The Representative Plaintiff's claims are typical of the claims of the Plaintiff Class. The Representative Plaintiff and all members of the Plaintiff Class sustained injuries and damages arising out of and caused by Defendants' common course of conduct in violation of state law, as alleged herein.

d. Adequacy of Representation: The Representative Plaintiff in this class action is an adequate representative of the Class, in that the Representative Plaintiff's claims are typical of those of the Class and the Representative Plaintiff has the same interests in the litigation of this case as the Class Members. The Representative Plaintiff is committed to vigorous prosecution of this case, and has retained competent counsel, experienced in litigation of this nature. The Representative Plaintiff is not subject to any individual defenses unique from those conceivably applicable to the Class as a whole. The Representative Plaintiff anticipates no management difficulties in this litigation.

e. Superiority of Class Action: Since the damages suffered by individual Class Members, while not inconsequential, may be relatively small, the expense and burden of individual litigation by each member makes or may make it impractical for Class Members to seek redress individually for the wrongful conduct alleged herein. Should separate actions be brought or be required to be brought by each individual Class Member, the resulting multiplicity of lawsuits would cause undue hardship and expense for the Court and the litigants. The prosecution of separate actions would also create a risk of inconsistent rulings, which might be dispositive of the interests of other Class Members who are not parties to the adjudications and/or may substantially impede their ability to adequately protect their interests.

**FIRST CAUSE OF ACTION**  
**BREACH OF CONTRACT**

26. Representative Plaintiff incorporates in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.





1 35. Moreover, at all times herein mentioned, Defendant intended to cause or acted with  
2 reckless disregard of the probability of causing damage to Representative Plaintiff and members of  
3 the Plaintiff Class, and because Defendant was guilty of Oppressive, Fraudulent and/or Malicious  
4 conduct, Representative Plaintiff and members of the Plaintiff Class are entitled to an award of  
5 exemplary or punitive damages against Defendant in an amount adequate to deter such conduct in  
6 the future.

7  
8 **THIRD CAUSE OF ACTION**  
9 **NEGLIGENT MISREPRESENTATION**

10 36. Representative Plaintiff incorporates in this cause of action each and every allegation  
11 of the preceding paragraphs, with the same force and effect as though fully set forth herein.

12 37. Defendant owed a duty to Representative Plaintiff and members of the Class to  
13 exercise reasonable care in making representations about all charges associated with consumer  
14 purchases of the goods and/or services Home Depot offered for sale thereto.

15 38. Defendant should have known of the nature and amount of all surcharges and, thus,  
16 should have known that its representations, as detailed in this Complaint, were false or would  
17 become false prior to purchase of Home Depot's goods and/or services by Representative Plaintiff  
18 and members of the Class.

19 39. Defendant's representations were negligently and recklessly made to potential  
20 consumers and the general public through uniform statements prepared and/or disseminated by  
21 Defendant. As a direct and proximate result of these misrepresentations, Representative Plaintiff and  
22 Class members have been damaged in an amount to be proven at trial.

23  
24 **FOURTH CAUSE OF ACTION**  
25 **DECEPTIVE ADVERTISING PRACTICES**  
**(California Business & Professions Code §§ 17500, et seq.)**

26 40. Representative Plaintiff incorporates in this cause of action each and every allegation  
27 of the preceding paragraphs, with the same force and effect as though fully set forth herein.

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1 41. California Business & Professions Code § 17500 prohibits “unfair, deceptive, untrue  
2 or misleading advertising.”

3 42. Defendant violated California Business & Professions Code § 17500 when it  
4 represented, through its advertising, warranties, and other express representations that Home Depot’s  
5 goods and/or services possessed characteristics and value that they did not actually have.

6 43. Defendant’s deceptive practices were specifically designed to induce Representative  
7 Plaintiff and members of the Class to purchase these goods and/or services. Defendant engaged in  
8 broad-based marketing efforts in order to reach Representative Plaintiff and Class members and  
9 induce them to purchase Home Depot’s goods and/or services.

10 44. To this day, Defendant continues to engage in unlawful, unfair and deceptive  
11 practices in violation of California Business & Professions Code § 17500. Specifically, Defendant  
12 continues to conceal the true value of the goods and/or services described in this Complaint and has  
13 failed to provide a remedy for its violations.

14 45. As a proximate result of its violations of California Business & Professions Code §  
15 17500, Defendant should be required to provide all proper remedies to Representative Plaintiff and  
16 members of the Class.

17  
18 **FIFTH CAUSE OF ACTION**  
19 **CONSUMERS LEGAL REMEDIES ACT**  
(California Civil Code §1750, et seq.)

20 46. Representative Plaintiff incorporates in this cause of action each and every allegation  
21 of the preceding paragraphs, with the same force and effect as though fully set forth herein.

22 47. Representative Plaintiff and the members of the Class are consumers who purchased  
23 goods and/or services from Defendant for personal and/or commercial use.

24 48. Representing that these goods and/or services had/have characteristics, uses and/or  
25 benefits which they did/do not have, constitute[d/s] an unfair or deceptive trade practice under the  
26 provisions of California Civil Code § 1770(a)(13) (Consumers Legal Remedies Act).

27 49. Representative Plaintiff and the members of the Class have all been directly and  
28 proximately injured by Defendant’s conduct, and such injury includes the purchase of goods and/or

1 services that they would not have purchased if they had truthfully and fully been informed of  
2 material facts concerning unlawful sales tax assessments associated with Home Depot's goods  
3 and/or services.

4 50. Insofar as Defendant's conduct violated California Civil Code § 1770(a)(13),  
5 Representative Plaintiff and members of the Class are entitled (pursuant to California Civil Code §  
6 1780, *et seq.*) and do seek injunctive and equitable relief to end Defendant's violations of the  
7 Consumers Legal Remedies Act. Representative Plaintiff, on his own behalf and on behalf of  
8 members of the Class, further requests that this Court enter such orders or judgments as may be  
9 necessary to restore to any person in interest any money which may have been acquired by means  
10 of such unfair business practices, and for such other relief as provided in Civil Code § 1780 and the  
11 Prayer for Relief.

12  
13 **SIXTH CAUSE OF ACTION**  
14 **UNFAIR BUSINESS PRACTICES UNDER THE UNFAIR COMPETITION ACT**  
15 **(California Business & Professions Code §§ 17200, *et seq.*)**

16 51. Representative Plaintiff incorporates in this cause of action each and every allegation  
17 of the preceding paragraphs, with the same force and effect as though fully set forth herein.

18 52. Representative Plaintiff further brings this cause of action, seeking equitable and  
19 statutory relief to stop the misconduct of Defendant, as complained of herein, and seeking restitution  
20 from Defendant for the unfair, unlawful and fraudulent business practices described herein.

21 53. The knowing conduct of Defendant, as alleged herein, constitutes an unlawful and/or  
22 fraudulent business practice, as set forth in California Business & Professions Code §§ 17200-17208.  
23 Specifically, Defendant conducted business activities while failing to comply with the legal mandates  
24 cited herein. In engaging in these unlawful business practices, Home Depot has enjoyed an advantage  
25 over its competition and a resultant disadvantage to the public.

26 54. Defendant's knowing failure to adopt policies in accordance with and/or adhere to  
27 these laws, all of which are binding upon and burdensome to Defendant's competitors, engenders  
28 an unfair competitive advantage for Defendant, thereby constituting an unfair business practice, as  
set forth in California Business & Professions Code §§ 17200-17208.



