

1  
2  
3  
4  
5  
6  
7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT SEATTLE

10                   PROGRESSIVE INTERNATIONAL  
11                   CORPORATION,

12                   Plaintiff,

13                   v.  
14                   BIG LOTS STORES, INC.,

15                   Defendant.

16                   CASE NO. 2:17-CV-1046-TSZ

17                   **STIPULATED  
18                   PROTECTIVE ORDER**

19                   1. **PURPOSES AND LIMITATIONS**

20                   Discovery in this action is likely to involve production of confidential, proprietary, or  
21                   private information for which special protection may be warranted. Accordingly, the parties  
22                   hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The  
23                   parties acknowledge that this agreement is consistent with LCR 26(c). It does not confer blanket  
24                   protection on all disclosures or responses to discovery, the protection it affords from public  
25                   disclosure and use extends only to the limited information or items that are entitled to  
26                   confidential treatment under the applicable legal principles, and it does not presumptively entitle  
                       parties to file confidential information under seal.

1    2.    “CONFIDENTIAL” MATERIAL

2       “Confidential” material shall include the following documents and tangible things  
3 produced or otherwise exchanged: financial documents (including sales, shipping, profits,  
4 inventories, costs, taxes, and similar documents), product development, technical schematics,  
5 customers and customer lists, vendors, suppliers, pricing, and marketing plans and techniques.

6    3.    SCOPE

7       The protections conferred by this agreement cover not only confidential material (as  
8 defined above), but also (1) any information copied or extracted from confidential material; (2)  
9 all copies, excerpts, summaries, or compilations of confidential material; and (3) any testimony,  
10 conversations, or presentations by parties or their counsel that might reveal confidential material.

11      However, the protections conferred by this agreement do not cover information that is in  
12 the public domain or becomes part of the public domain through trial or otherwise.

13    4.    ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

14      4.1    Basic Principles. A receiving party may use confidential material that is disclosed  
15 or produced by another party or by a non-party in connection with this case only for prosecuting,  
16 defending, or attempting to settle this litigation. Confidential material may be disclosed only to  
17 the categories of persons and under the conditions described in this agreement. Confidential  
18 material must be stored and maintained by a receiving party at a location and in a secure manner  
19 that ensures that access is limited to the persons authorized under this agreement.

20      4.2    Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise  
21 ordered by the court or permitted in writing by the designating party, a receiving party may  
22 disclose any confidential material only to:

23                 (a)    the receiving party’s counsel of record in this action, as well as employees  
24 of counsel to whom it is reasonably necessary to disclose the information for this litigation;

25                 (b)    the officers, directors, and employees (including in house counsel) of the  
26 receiving party to whom disclosure is reasonably necessary for this litigation, unless the

1 designating party designates that a particular document or material produced is for Attorney's  
2 Eyes Only (meaning that it contains confidential information that the designating party believes  
3 in good faith cannot be disclosed without threat of competitive injury) and is so designated under  
4 the label "CONFIDENTIAL—ATTORNEYS' EYES ONLY" or "ATTORNEYS EYES  
5 ONLY," in which case the designated material may not be disclosed to such persons in this  
6 paragraph;

7                         (c) experts and consultants to whom disclosure is reasonably necessary for  
8 this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit  
9 A), provided that at least ten days before access is given, the consultant or expert is disclosed to  
10 the designating party by serving a curriculum vitae of the consultant or expert upon counsel for  
11 the designating party to allow the designating party the opportunity to object in writing to the  
12 proposed access. The parties agree to promptly confer in good faith to resolve any such  
13 objection. If the parties are unable to resolve any objection, the objecting party may file a motion  
14 with the court within fifteen days of the objection, or within such other time as the parties may  
15 agree, seeking a protective order against disclosure. No disclosure shall be provided to the  
16 proposed expert or consultant until all such objections are resolved by agreement or court order;

17                         (d) the court, court personnel, and court reporters and their staff;

18                         (e) independent litigation support services including court reporters, jury or  
19 trial consultants, document database services, and copy or imaging services retained by counsel  
20 to assist in the duplication of confidential material, provided that counsel for the party retaining  
21 the support service instructs the service not to disclose any confidential material to third parties  
22 and to immediately return all originals and copies of any confidential material;

23                         (f) during their depositions, witnesses in the action to whom disclosure is  
24 reasonably necessary and who have signed the "Acknowledgment and Agreement to Be Bound"  
25 (Exhibit A), unless otherwise agreed by the designating party or ordered by the court. Pages of  
26 transcribed deposition testimony or exhibits to depositions that reveal confidential material must

1 be separately bound by the court reporter and may not be disclosed to anyone except as permitted  
2 under this agreement;

3                         (g) the author or recipient of a document containing the information or a  
4 custodian or other person who otherwise possessed or knew the information.

5                  4.3 Filing Confidential Material. Before filing confidential material or discussing or  
6 referencing such material in court filings, the filing party shall confer with the designating party  
7 to determine whether the designating party will remove the confidential designation, whether the  
8 document can be redacted, or whether a motion to seal or stipulation and proposed order is  
9 warranted. Local Civil Rule 5(g) sets forth the procedures that must be followed and the  
10 standards that will be applied when a party seeks permission from the court to file material under  
11 seal.

12 5. DESIGNATING PROTECTED MATERIAL

13                  5.1 Exercise of Restraint and Care in Designating Material for Protection. Each party  
14 or non-party that designates information or items for protection under this agreement must take  
15 care to limit any such designation to specific material that qualifies under the appropriate  
16 standards. The designating party must designate for protection only those parts of material,  
17 documents, items, or oral or written communications that qualify, so that other portions of the  
18 material, documents, items, or communications for which protection is not warranted are not  
19 swept unjustifiably within the ambit of this agreement.

20                  Mass, indiscriminate, or routinized designations are prohibited. Designations that are  
21 shown to be clearly unjustified or that have been made for an improper purpose (*e.g.*, to  
22 unnecessarily encumber or delay the case development process or to impose unnecessary  
23 expenses and burdens on other parties) expose the designating party to sanctions.

24                  If it comes to a designating party's attention that information or items that it designated  
25 for protection do not qualify for protection, the designating party must promptly notify all other  
26 parties that it is withdrawing the mistaken designation.

1       5.2     Manner and Timing of Designations. Except as otherwise provided in this  
2 agreement (see, *e.g.*, second paragraph of section 5.2(a) below), or as otherwise stipulated or  
3 ordered, disclosure or discovery material that qualifies for protection under this agreement must  
4 be clearly so designated before or when the material is disclosed or produced.

5              (a)     Information in documentary form: (*e.g.*, paper or electronic documents  
6 and deposition exhibits, but excluding transcripts of depositions or other pretrial or trial  
7 proceedings), the designating party must affix the word “CONFIDENTIAL” or  
8 “CONFIDENTIAL—ATTORNEYS’ EYES ONLY” or “ATTORNEYS EYES ONLY” to each  
9 page that contains confidential material. If only a portion or portions of the material on a page  
10 qualifies for protection, the producing party also must clearly identify the protected portion(s)  
11 (*e.g.*, by making appropriate markings in the margins).

12              (b)     Testimony given in deposition or in other pretrial proceedings: the parties  
13 and any participating non-parties must identify on the record, during the deposition or other  
14 pretrial proceeding, all protected testimony, without prejudice to their right to so designate other  
15 testimony after reviewing the transcript. Any party or non-party may, within fifteen days after  
16 receiving the transcript of the deposition or other pretrial proceeding, designate portions of the  
17 transcript, or exhibits thereto, as confidential or for attorneys eyes only. If a party or non-party  
18 desires to protect confidential information at trial, the issue should be addressed during the pre-  
19 trial conference.

20              (c)     Other tangible items: the producing party must affix in a prominent place  
21 on the exterior of the container or containers in which the information or item is stored the word  
22 “CONFIDENTIAL” or “CONFIDENTIAL—ATTORNEYS’ EYES ONLY” or “ATTORNEYS  
23 EYES ONLY.” If only a portion or portions of the information or item warrant protection, the  
24 producing party, to the extent practicable, shall identify the protected portion(s).

25       5.3     Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to  
26 designate qualified information or items does not, standing alone, waive the designating party’s

1 right to secure protection under this agreement for such material. Upon timely correction of a  
2 designation, the receiving party must make reasonable efforts to ensure that the material is  
3 treated in accordance with the provisions of this agreement.

4 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

5       6.1     Timing of Challenges. Any party or non-party may challenge a designation of  
6 confidentiality at any time. Unless a prompt challenge to a designating party's confidentiality  
7 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic  
8 burdens, or a significant disruption or delay of the litigation, a party does not waive its right to  
9 challenge a confidentiality designation by electing not to mount a challenge promptly after the  
10 original designation is disclosed.

11       6.2     Meet and Confer. The parties must make every attempt to resolve any dispute  
12 regarding confidential designations without court involvement. Any motion regarding  
13 confidential designations or for a protective order must include a certification, in the motion or in  
14 a declaration or affidavit, that the movant has engaged in a good faith meet and confer  
15 conference with other affected parties in an effort to resolve the dispute without court action. The  
16 certification must list the date, manner, and participants to the conference. A good faith effort to  
17 confer requires a face-to-face meeting or a telephone conference.

18       6.3     Judicial Intervention. If the parties cannot resolve a challenge without court  
19 intervention, the designating party may file and serve a motion to retain confidentiality under  
20 Local Civil Rule 7 (and in compliance with Local Civil Rule 5(g), if applicable). The burden of  
21 persuasion in any such motion shall be on the designating party. Frivolous challenges, and those  
22 made for an improper purpose (*e.g.*, to harass or impose unnecessary expenses and burdens on  
23 other parties) may expose the challenging party to sanctions. All parties shall continue to  
24 maintain the material in question as confidential until the court rules on the challenge.

25

26

1   7.    PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER  
2   LITIGATION

3           If a party is served with a subpoena or a court order issued in other litigation that compels  
4 disclosure of any information or items designated in this action as “CONFIDENTIAL,” or  
5 “CONFIDENTIAL—ATTORNEYS’ EYES ONLY” or “ATTORNEYS EYES ONLY,” that  
6 party must:

7               (a)     promptly notify the designating party in writing and include a copy of the  
8 subpoena or court order;

9               (b)     promptly notify in writing the party who caused the subpoena or order to  
10 issue in the other litigation that some or all of the material covered by the subpoena or order is  
11 subject to this agreement. Such notification shall include a copy of this agreement; and

12              (c)     cooperate with respect to all reasonable procedures sought to be pursued  
13 by the designating party whose confidential material may be affected.

14   8.    UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

15           If a receiving party learns that, by inadvertence or otherwise, it has disclosed confidential  
16 material to any person or in any circumstance not authorized under this agreement, the receiving  
17 party must immediately (a) notify in writing the designating party of the unauthorized  
18 disclosures, (b) use its best efforts to retrieve all unauthorized copies of the protected material,  
19 (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of  
20 this agreement, and (d) request that such person or persons execute the “Acknowledgment and  
21 Agreement to Be Bound” that is attached hereto as Exhibit A.

22   9.    INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED  
23   MATERIAL

24           When a producing party gives notice to receiving parties that certain inadvertently  
25 produced material is subject to a claim of privilege or other protection, the obligations of the  
26 receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This

1 provision is not intended to modify whatever procedure may be established in an e-discovery  
2 order or agreement that provides for production without prior privilege review. The parties  
3 agree to the entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.

4 **10. NON TERMINATION AND RETURN OF DOCUMENTS**

5 Within 60 days after the termination of this action, including all appeals, each receiving  
6 party must return all confidential material to the producing party, including all copies, extracts  
7 and summaries thereof. Alternatively, the parties may agree upon appropriate methods of  
8 destruction.

9 Notwithstanding this provision, counsel are entitled to retain one archival copy of all  
10 documents filed with the court, trial, deposition, and hearing transcripts, correspondence,  
11 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert  
12 work product, even if such materials contain confidential material.

13 The confidentiality obligations imposed by this agreement shall remain in effect until a  
14 designating party agrees otherwise in writing or a court orders otherwise.

15 **11. THIRD PARTIES**

16 To the extent any discovery is taken of persons who are not parties to this action ("Third  
17 Parties"), and in the event that such Third Parties reasonably believe that the discovery sought  
18 involves Confidential material, the Third Parties may produce and designate the Confidential  
19 material in accordance with this order, and in such case all applicable provisions of this order  
20 shall apply to the Third Party designated material to the same extent as if it had been designated  
21 and produced by a party.

22

23

24

25

26

1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2 **LOWE GRAHAM JONES<sup>PLLC</sup>**

3 By: /s/ Lawrence D. Graham

4 Lawrence D. Graham, WSBA No. 25402  
5 701 Fifth Avenue, Suite 4800  
6 Seattle, Washington 98104  
T: 206.381.3300  
F: 206.381.3301  
[Graham@LoweGrahamJones.com](mailto:Graham@LoweGrahamJones.com)

7  
8 *Attorneys for Plaintiff Progressive International Corp.*

9 **SAVITT BRUCE & WILLEY LLP**

10 By: /s/ Duncan E. Manville

11 Duncan E. Manville, WSBA #30304  
12 1425 Fourth Avenue, Suite 800  
Seattle, Washington 98101-2272  
Tel.: (206) 749-0500  
Fax: (206) 749-0600  
Email: [dmanville@sbwllp.com](mailto:dmanville@sbwllp.com)

13  
14 **WOOD, HERRON & EVANS LLP**

15 By: /s/ Paul J. Linden

16 Paul J. Linden (*pro hac vice*)  
2700 Carew Tower  
17 441 Vine Street  
Cincinnati, Ohio 45202-2917  
Tel.: (513) 241-2324  
Fax: (513) 241-6234  
Email: [plinden@whe-law.com](mailto:plinden@whe-law.com)  
[jsiderits@whe-law.com](mailto:jsiderits@whe-law.com)

18  
19  
20  
21 *Attorneys for Defendant Big Lots Stores, Inc.*

22

23

24

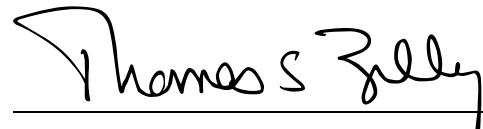
25

26

1 PURSUANT TO STIPULATION, IT IS SO ORDERED  
2  
3

4 IT IS FURTHER ORDERED that pursuant to Fed. R. Evid. 502(d), the production of any  
5 documents in this proceeding shall not, for the purposes of this proceeding or any other  
6 proceeding in any other court, constitute a waiver by the producing party of any privilege  
7 applicable to those documents, including the attorney-client privilege, attorney work-product  
protection, or any other privilege or protection recognized by law.

8  
9 DATED: February 8, 2018.

10  
11   
12

13 Thomas S. Zilly  
United States District Judge  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

EXHIBIT A

## ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, \_\_\_\_\_ [print or type full name], of \_\_\_\_\_ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the United States District Court for the Western District of Washington on [date] in the case of Progressive International Corporation v. Big Lots Stores, Inc., Case No. 2:17-cv-1046TSZ. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the Western District of Washington for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

16 || Date: \_\_\_\_\_

17 | City and State where sworn and signed:

18 Printed name:

19 || Signature: