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**FILED BY FAX**  
ALAMEDA COUNTY  
July 29, 2019  
CLERK OF  
THE SUPERIOR COURT  
By Cheryl Clark, Deputy  
CASE NUMBER:  
**HG19023416**

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

KIM EMBRY, an individual,  
  
Plaintiff,  
  
v.

DGL GROUP, LTD., a New Jersey  
corporation; FIVE BELOW, INC., a  
Pennsylvania corporation; and DOES 1  
through 100, inclusive  
  
Defendants.

Case No.: HG19023416

**FIRST AMENDED COMPLAINT FOR  
CIVIL PENALTIES AND INJUNCTIVE  
RELIEF**

(Cal. Health & Safety Code § 25249.6 et seq.)

1 **I. INTRODUCTION**

2 1. This Complaint is a representative action brought by Plaintiff in the public interest  
3 of the citizens of the State of California. Plaintiff seeks to enforce the People’s right to be  
4 informed of the presence of diisononyl phthalate (“DINP” or “Listed Chemical”), found in DGL  
5 Group, Ltd.’s (“DGL Group” or “Defendant”) hands-free phone neck mount (“Product” or  
6 “Products”) manufactured, imported, sold, or distributed for sale in California.

7 2. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986,  
8 California Health & Safety Code Section 25249.6 et seq. (“Proposition 65”), “[n]o person in the  
9 course of doing business shall knowingly and intentionally expose any individual to a chemical  
10 known to the state to cause cancer or reproductive toxicity without first giving clear and  
11 reasonable warning to such individual. . . .” (Cal. Health & Safety Code, § 25249.6.)

12 3. California identified and listed DINP as a chemical known to cause cancer as early  
13 as December 20, 2013.

14 4. Defendant’s hands-free phone neck mount manufactured, imported, sold, or  
15 distributed in California contain prohibited levels of DINP.

16 5. Defendant failed to sufficiently warn consumers and individuals in California  
17 about potential exposure to DINP in connection with Defendant’s manufacture, import, sale, or  
18 distribution of Products. This is a violation of Proposition 65.

19 6. Plaintiff seeks injunctive relief compelling Defendant to cease exposing consumers  
20 in California to DINP through its Products and/or sufficiently warn consumers in California  
21 before exposing them to DINP in Products pursuant to Proposition 65 and related Regulations.  
22 (Cal. Health & Safety Code, § 25249.7(a).) Plaintiff also seeks civil penalties against Defendant  
23 for its violations of Proposition 65, attorney’s fees and costs. (Cal. Health & Safety Code, §  
24 25249.7.)

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1 **II. PARTIES**

2 7. Plaintiff is a citizen of the State of California dedicated to protecting the health of  
3 California citizens through the elimination or reduction of toxic exposure from consumer  
4 products. She brings this action in the public interest pursuant to California Health and Safety  
5 Code section 25249.7.

6 8. Defendant DGL GROUP, LTD., (“DGL Group”), is a corporation organized and  
7 existing under the laws of New Jersey. Defendant is registered to do and does business in  
8 California, County of Alameda, within the meaning of California Health and Safety Code section  
9 25249.11. Defendant manufactures, imports, sells, or distributes Products in California and  
10 Alameda County.

11 9. Defendant FIVE BELOW, INC., (“Five Below”) is a corporation organized and  
12 existing under the laws of the State of Pennsylvania. Five Below does business in California, and does  
13 business in the County of Alameda, within the meaning of Cal. Health & Safety Code section  
14 25249.11. Five Below manufactures, imports, sells, or distributes Products in California and Alameda  
15 County. (DGL Group and Five Below are collectively referred to as “Defendants.”)

16 10. Plaintiff does not know the true names and/or capacities, whether individual,  
17 partners, or corporate, of the defendants sued herein as DOES 1 through 100, inclusive, and for  
18 that reason sues said defendants under fictitious names. Plaintiff will seek leave to amend this  
19 Complaint when the true names and capacities of these defendants have been ascertained. Plaintiff  
20 is informed and believes and thereon alleges that these defendants are responsible in whole or in  
21 part for Plaintiffs’ alleged damages.

22 **III. VENUE AND JURISDICTION**

23 11. California Constitution Article VI, Section 10, grants the Superior Court original  
24 jurisdiction in all cases except those given by statute to other trial courts. The Health & Safety  
25 Code statute upon which this action is based does not give jurisdiction to any other court. As such,  
26 this Court has jurisdiction.

1 12. Venue is proper in Alameda County Superior Court pursuant to Code of Civil  
2 Procedure sections 394, 395, and 395.5. Wrongful conduct occurred and continues to occur in this  
3 County. Defendant conducted and continue to conduct business in this County as it relates to  
4 Products.

5 13. Defendant has sufficient minimum contacts in the State of California or otherwise  
6 purposefully avails itself of the California market. Exercising jurisdiction over Defendant would  
7 be consistent with traditional notions of fair play and substantial justice.

8 **IV. CAUSES OF ACTION**

9 **FIRST CAUSE OF ACTION**  
10 **(Violation of Proposition 65 – Against all Defendants)**

11 14. Plaintiff incorporates by reference each and every allegation contained above.

12 15. Proposition 65 mandates that citizens be informed about exposures to chemicals  
13 that cause cancer, birth defects, and other reproductive harm.

14 16. Defendants manufactured, imported, sold, and/or distributed Products containing  
15 DINP in violation of California Health and Safety Code section 25249.6 et seq. Plaintiff is  
16 informed and believes such violations have continued after receipt of the Notice (defined *infra*)  
17 and will continue to occur into the future.

18 17. In manufacturing, importing, selling, and/or distributing Products, Defendants  
19 failed to provide a clear and reasonable warning to consumers and individuals in California who  
20 may be exposed to DINP through reasonably foreseeable use of the Products.

21 18. The presence of the DINP in Products exposes individuals to the DINP.

22 19. Defendants knew or should have known that the Products contained the DINP and  
23 exposed individuals to DINP in the ways provided above. The Notice informed Defendants of the  
24 presence of DINP in the Products. Likewise, media coverage concerning the DINP and related  
25 chemicals in consumer products, provided constructive notice to Defendants.

26 20. Defendants' actions in this regard were deliberate and not accidental.

27 21. More than sixty days prior to naming each Defendant in this lawsuit, Plaintiff  
28 issued a 60-Day Notice of Violation (“Notice(s)”) as required by and in compliance with

1 Proposition 65. Plaintiff provided the Notices to the various required public enforcement  
2 agencies along with a certificate of merit. The Notices alleged that Defendants violated  
3 Proposition 65 by failing to sufficiently warn consumers in California of the health hazards  
4 associated with exposures to DINP contained in the Products.

5 22. The appropriate public enforcement agencies provided with the Notices failed to  
6 commence and diligently prosecute a cause of action against Defendants.

7 23. Individuals exposed to DINP contained in the Products resulting from reasonably  
8 foreseeable use of the Products have suffered and continue to suffer irreparable harm. There is no  
9 other plain, speedy, or adequate remedy at law.

10 24. Defendants are liable for a maximum civil penalty of \$2,500 per day for each  
11 violation of Proposition 65 pursuant to California Health and Safety Code section 252497(b).  
12 Injunctive relief is also appropriate pursuant to California Health and Safety Code section  
13 25249.7(a).

14 **V. PRAYER FOR RELIEF**

15 Wherefore, Plaintiff prays for judgment against Defendants as follows:

- 16 1. Civil penalties in the amount of \$2,500 per day for each violation;
- 17 2. A preliminary and permanent injunction against Defendants from manufacturing,  
18 importing, selling, and/or distributing Products in California without providing a  
19 clear and reasonable warning as required by Proposition 65 and related  
20 Regulations;
- 21 3. Reasonable attorney's fees and costs of suit; and
- 22 4. Such other and further relief as may be just and proper.

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26 *[Signature of counsel appears on the following page.]*  
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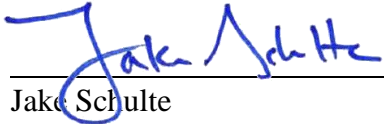
1 Respectfully submitted:

2 Dated: July 29, 2019

**NICHOLAS & TOMASEVIC, LLP**

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5 By:   
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Jake Schulte

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Attorney for Plaintiff  
Kim Embry

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