

Assigned for all purposes to: Stanley Mosk Courthouse, Judicial Officer: Stuart Rice

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9 CONSUMER ADVOCACY GROUP, INC.

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **COUNTY OF LOS ANGELES**

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

14 Plaintiff,

15 v.

16 FIVE BELOW INC., a Pennsylvania
17 Corporation;
18 1616 HOLDINGS INC., FKA FIVE
19 BELOW MERCHANDISING INC., a
20 Pennsylvania Corporation;
21 and DOES 1-10,
22 Defendants.

23 CASE NO. 20STCV22881

24 COMPLAINT FOR PENALTY AND
25 INJUNCTION

26 Violation of Proposition 65, the Safe
27 Drinking Water and Toxic Enforcement
28 Act of 1986 (*Health & Safety Code*, §
25249.5, *et seq.*)

ACTION IS AN UNLIMITED CIVIL
CASE (exceeds \$25,000)

1 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges one cause of action
2 against defendants FIVE BELOW INC., 1616 HOLDINGS INC., FKA FIVE BELOW
3 MERCHANDISING, INC. and DOES 1-10 as follows:

4 **THE PARTIES**

- 5 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. (“Plaintiff” or “CAG”) is an
6 organization qualified to do business in the State of California. CAG is a person within
7 the meaning of Health and Safety Code Section 25249.11, subdivision (a). CAG, acting
8 as a private attorney general, brings this action in the public interest as defined under
9 Health and Safety Code Section 25249.7, subdivision (d).
- 10 2. Defendant FIVE BELOW INC. (“FIVE BELOW”) is a Pennsylvania Corporation doing
11 business in the State of California at all relevant times herein.
- 12 3. Defendant 1616 HOLDINGS INC., FKA FIVE BELOW MERCHANDISING, INC.
13 (“FIVE BELOW MERCHANDISING”) is a Pennsylvania Corporation doing business
14 in the State of California at all relevant times herein.
- 15 4. Plaintiff is presently unaware of the true names and capacities of defendants DOES
16 1-10, and therefore sues these defendants by such fictitious names. Plaintiff will amend
17 this Complaint to allege their true names and capacities when ascertained. Plaintiff is
18 informed, believes, and thereon alleges that each fictitiously named defendant is
19 responsible in some manner for the occurrences herein alleged and the damages caused
20 thereby.
- 21 5. At all times mentioned herein, the term “Defendants” includes FIVE BELOW, FIVE
22 BELOW MERCHANDISING, and DOES 1-10.
- 23 6. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
24 times mentioned herein have conducted business within the State of California.
- 25 7. Upon information and belief, at all times relevant to this action, the Defendants,
26 including DOES 1-10, was an agent, servant, or employee of each of the other
27 Defendant. In conducting the activities alleged in this Complaint, each of the
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1 Defendants was acting within the course and scope of this agency, service, or
2 employment, and was acting with the consent, permission, and authorization of each of
3 the other Defendants. All actions of each of the Defendants alleged in this Complaint
4 were ratified and approved by every other Defendant or their officers or managing
5 agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated
6 the alleged wrongful conduct of each of the other Defendants.

- 7 8. Plaintiff is informed, believes, and thereon alleges that at all relevant times, the
8 Defendant was a person doing business within the meaning of Health and Safety Code
9 Section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
10 employees at all relevant times.

11 **JURISDICTION**

- 12 9. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
13 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
14 those given by statute to other trial courts. This Court has jurisdiction over this action
15 pursuant to Health and Safety Code Section 25249.7, which allows enforcement of
16 violations of Proposition 65 in any Court of competent jurisdiction.
- 17 10. This Court has jurisdiction over Defendants named herein because Defendants either
18 reside or are located in this State or are foreign corporations authorized to do business
19 in California, are registered with the California Secretary of State, or who do sufficient
20 business in California, have sufficient minimum contacts with California, or otherwise
21 intentionally avail themselves of the markets within California through their
22 manufacture, distribution, promotion, marketing, or sale of their products within
23 California to render the exercise of jurisdiction by the California courts permissible
24 under traditional notions of fair play and substantial justice.
- 25 11. Venue is proper in the County of Los Angeles because one or more of the instances of
26 wrongful conduct occurred, and continues to occur, in the County of Los Angeles
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1 and/or because Defendants conducted, and continue to conduct, business in the County
2 of Los Angeles with respect to the consumer product that is the subject of this action.

3 **BACKGROUND AND PRELIMINARY FACTS**

4 12. In 1986, California voters approved an initiative to address growing concerns about
5 exposure to toxic chemicals and declared their right “[t]o be informed about exposures
6 to chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp.,
7 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
8 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code Sections
9 25249.5, *et seq.* (“Proposition 65”), helps to protect California’s drinking water sources
10 from contamination, to allow consumers to make informed choices about the products
11 they buy, and to enable persons to protect themselves from toxic chemicals as they see
12 fit.

13 13. Proposition 65 requires the Governor of California to publish a list of chemicals known
14 to the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety*
15 *Code* § 25249.8. The list, which the Governor updates at least once a year, contains
16 over 700 chemicals and chemical families. Proposition 65 imposes warning
17 requirements and other controls that apply to Proposition 65-listed chemicals.

18 14. All businesses with ten (10) or more employees that operate or sell products in
19 California must comply with Proposition 65. Under Proposition 65, businesses are: (1)
20 prohibited from knowingly discharging Proposition 65-listed chemicals into sources of
21 drinking water (*Health & Safety Code* § 25249.5), and (2) required to provide “clear
22 and reasonable” warnings before exposing a person, knowingly and intentionally, to a
23 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

24 15. Proposition 65 provides that any person "violating or threatening to violate" the statute
25 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* §
26 25249.7. "Threaten to violate" means "to create a condition in which there is a
27 substantial probability that a violation will occur." *Health & Safety Code* §

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1 25249.11(e). Defendants are also liable for civil penalties of up to \$2,500.00 per day
2 per violation, recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

3 16. Plaintiff identified certain practices of manufacturers and distributors of Sandals of
4 exposing, knowingly and intentionally, persons in California to Di-n-butyl Phthalate
5 (“DBP”) in such products without first providing clear and reasonable warnings of such
6 to the exposed persons prior to the time of exposure. Plaintiff later discerned that
7 Defendants engaged in such practice.

8 17. On December 2, 2005, the Governor of California added DBP to the list of chemicals
9 known to the State to cause developmental, and reproductive toxicity (*Cal. Code Regs.*
10 tit. 27, § 27001(c)). DBP is known to the State to cause developmental, female, and
11 male reproductive toxicity. Pursuant to Health and Safety Code Sections 25249.9 and
12 25249.10, twenty (20) months after addition of DBP to the list of chemicals known to
13 the State to cause reproductive toxicity, DBP became fully subject to Proposition 65
14 warning requirements and discharge prohibitions.

15 **SATISFACTION OF PRIOR NOTICE**

16 18. On or about November 12, 2019 Plaintiff gave notice of alleged violations of Health
17 and Safety Code Section 25249.6, concerning consumer products exposures, subject to
18 a private action to FIVE BELOW, FIVE BELOW MERCHANDISING, and to the
19 California Attorney General, County District Attorneys, and City Attorneys for each
20 city containing a population of at least 750,000 people in whose jurisdictions the
21 violations allegedly occurred, concerning the Sandals with Plastic Components.

22 19. Before sending the notice of alleged violations, Plaintiff investigated the consumer
23 products involved, the likelihood that such products would cause users to suffer
24 significant exposures to DBP, and the corporate structure of each of the Defendants.

25 20. Plaintiff’s notice of alleged violation included a Certificate of Merit executed by the
26 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney
27 for Plaintiff who executed the certificate had consulted with at least one person with
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1 relevant and appropriate expertise who reviewed data regarding the exposures to DBP,
2 the subject Proposition 65-listed chemical of this action. Based on that information, the
3 attorney for Plaintiff who executed the Certificate of Merit believed there was a
4 reasonable and meritorious case for this private action. The attorney for Plaintiff
5 attached to the Certificate of Merit served on the Attorney General the confidential
6 factual information sufficient to establish the basis of the Certificate of Merit.

- 7 21. Plaintiff's notice of alleged violations also included a Certificate of Service and a
8 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
9 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).
- 10 22. Plaintiff is commencing this action more than sixty (60) days from the dates that
11 Plaintiff gave notice of the alleged violations to FIVE BELOW, FIVE BELOW
12 MERCHANDISING, and the public prosecutors referenced in Paragraph 18.
- 13 23. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General,
14 nor any applicable district attorney or city attorney has commenced and is diligently
15 prosecuting an action against the Defendants.

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17 **FIRST CAUSE OF ACTION**

18 **(By CONSUMER ADVOCACY GROUP, INC. and against FIVE BELOW, FIVE**
19 **BELOW MERCHANDISING, and DOES 1-10 for Violations of Proposition 65,**
20 **The Safe Drinking Water and Toxic Enforcement Act of 1986 (*Health & Safety***
21 ***Code, §§ 25249.5, et seq.*))**

22
23 **Sandals**

- 24 24. Plaintiff repeats and incorporates by reference paragraphs 1 through 24 of this
25 complaint as though fully set forth herein.
- 26 25. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
27 distributor, promoter, or retailer of Sandals with Plastic Components ("Sandals"),
28 including but not limited to: "SOLE MATES;" "STYLE: DAWN76;" "COLOR:
WHITE;" "SIZE: M(7/8);" "Distributed by Five Below Merchandising, Inc. 1818

1 Market Street, Suite 2000 Philadelphia, PA 19103 “Made In China;” “Visit us At:
2 www.Fivebelow.com;” “1 92234 01826 2”

3 26. Sandals contain DBP.

4 27. Defendants knew or should have known that DBP has been identified by the State of
5 California as a chemical known to cause c developmental, male and female
6 reproductive toxicity and therefore was subject to Proposition 65 warning requirements.
7 Defendants were also informed of the presence of DBP in Sandals within Plaintiff’s
8 notice of alleged violations further discussed above at Paragraph 18.

9 28. Plaintiff’s allegations regarding Product concerns “[c]onsumer products exposure[s],”
10 which “is an exposure that results from a person’s acquisition, purchase, storage,
11 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
12 that results from receiving a consumer service.” *Cal. Code Regs. tit. 27, § 25602(b)*.
13 Sandals is a consumer product, and, as mentioned herein, exposures to DBP took place
14 as a result of such normal and foreseeable use.

15 29. Plaintiff is informed, believes, and thereon alleges that between November 12, 2016 and
16 the present, each of the Defendants knowingly and intentionally exposed California
17 consumers and users of Sandals, which Defendants manufactured, distributed, or sold as
18 mentioned above, to DBP, without first providing any type of clear and reasonable
19 warning of such to the exposed persons before the time of exposure. Defendants have
20 distributed and sold Sandals in California. Defendants know and intend that California
21 consumers will use Sandals, thereby exposing them to DBP. Defendants thereby
22 violated Proposition 65.

23 30. The principal routes of exposure were through dermal contact, inhalation, and ingestion.
24 Persons sustain exposures by using, wearing, or handling the Sandals without wearing
25 gloves or by touching bare skin or mucous membranes with or without gloves after
26 handling Sandals, as well as direct and indirect hand to mouth contact, hand to mucous
27 membrane, trans-dermal absorption, or breathing in particulate matter emanating from
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1 the Sandals during use, as well as through environmental mediums that carry the DBP
2 once contained within the Sandals.

3 31. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations
4 of Proposition 65 as to Sandals have been ongoing and continuous, as Defendants
5 engaged and continue to engage in conduct which violates Health and Safety Code
6 Section 25249.6, including the manufacture, distribution, promotion, and sale of
7 Sandals, so that a separate and distinct violation of Proposition 65 occurred each and
8 every time a person was exposed to DBP by Sandals as mentioned herein.

9 32. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
10 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
11 violations alleged herein will continue to occur into the future.

12 33. Based on the allegations herein, Defendants are liable for civil penalties of up to
13 \$2,500.00 per day per individual exposure to DBP from Sandals, pursuant to Health and
14 Safety Code Section 25249.7(b).

15 34. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
16 filing this Complaint.

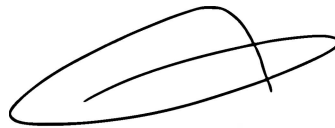
17 **PRAYER FOR RELIEF**

18 Plaintiff demands against each of the Defendants as follows:

- 19 1. A permanent injunction mandating Proposition 65-compliant warnings;
20 2. Penalties pursuant to Health and Safety Code Section 25249.7, subdivision (b);
21 3. Costs of suit;
22 4. Reasonable attorney fees and costs; and
23 5. Any further relief that the court may deem just and equitable.

24 Dated: June 17, 2020

YEROUSHALMI & YEROUSHALMI*

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Reuben Yeroushalmi
Attorneys for Plaintiff,

CONSUMER ADVOCACY GROUP, INC.

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