

Assigned for all purposes to: Stanley Mosk Courthouse, Judicial Officer: Barbara Scheper

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8 Attorneys for Plaintiff,  
9 CONSUMER ADVOCACY GROUP, INC.

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

11 **COUNTY OF LOS ANGELES**

12 **21STCV02336**

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

15 Plaintiff,

16 v.

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

22 Defendants.

CASE NO.

COMPLAINT FOR PENALTY AND  
INJUNCTION

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

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

23 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges one cause of action against  
24 defendants 1616 HOLDINGS, INC., FIVE BELOW, INC., and DOES 1-10 as follows:  
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**THE PARTIES**

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

1 agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated the  
2 alleged wrongful conduct of each of the other Defendants.

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

7 **JURISDICTION**

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

25 **BACKGROUND AND PRELIMINARY FACTS**

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

8 13. Proposition 65 requires the Governor of California to publish a list of chemicals known  
9 to the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety*  
10 *Code* § 25249.8. The list, which the Governor updates at least once a year, contains over  
11 700 chemicals and chemical families. Proposition 65 imposes warning requirements and  
12 other controls that apply to Proposition 65-listed chemicals.

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

19 15. Proposition 65 provides that any person "violating or threatening to violate" the statute  
20 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* §  
21 25249.7. "Threaten to violate" means "to create a condition in which there is a  
22 substantial probability that a violation will occur." *Health & Safety Code* § 25249.11(e).  
23 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,  
24 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

25 16. Plaintiff identified certain practices of manufacturers and distributors of Backpacks of  
26 exposing, knowingly and intentionally, persons in California to Bis (2-ethylhexyl)  
27 phthalate of such products without first providing clear and reasonable warnings of such  
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1 to the exposed persons prior to the time of exposure. Plaintiff later discerned that  
2 Defendants engaged in such practice.

3 17. On January 1, 1988, the Governor of California added Diethyl Hexyl Phthalate and Bis  
4 (2-ethylhexyl) phthalate (“DEHP”) to the list of chemicals known to the State to cause  
5 cancer, (*Cal. Code Regs.* tit. 27, § 27001(b)) and on October 24, 2003, the Governor  
6 added DEHP to the list of chemicals known to the State to cause developmental male  
7 reproductive toxicity (*Cal. Code Regs.* tit. 27, § 27001(c)). Pursuant to Health and  
8 Safety Code sections 25249.9 and 25249.10, twenty (20) months after addition of DEHP  
9 to the list of chemicals known to the State to cause reproductive toxicity, DEHP became  
10 fully subject to Proposition 65 warning requirements and discharge prohibitions.

11 **SATISFACTION OF PRIOR NOTICE**

12 18. Plaintiff served the following notices for alleged violations of Health and Safety Code  
13 Section 25249.6, concerning consumer products exposures:

14 a. On or about June 24, 2020 Plaintiff gave notice of alleged violations of Health  
15 and Safety Code Section 25249.6, concerning consumer products exposures  
16 subject to a private action to 1616 HOLDINGS, FIVE BELOW and to the  
17 California Attorney General, County District Attorneys, and City Attorneys for  
18 each city containing a population of at least 750,000 people in whose  
19 jurisdictions the violations allegedly occurred, concerning the Backpacks with  
20 Plastic Components.

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

24 20. Plaintiff’s notice of alleged violation included a Certificate of Merit executed by the  
25 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for  
26 Plaintiff who executed the certificate had consulted with at least one person with relevant  
27 and appropriate expertise who reviewed data regarding the exposures to DEHP, the

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1 subject Proposition 65-listed chemical of this action. Based on that information, the  
2 attorney for Plaintiff who executed the Certificate of Merit believed there was a  
3 reasonable and meritorious case for this private action. The attorney for Plaintiff  
4 attached to the Certificate of Merit served on the Attorney General the confidential  
5 factual information sufficient to establish the basis of the Certificate of Merit.

6 21. Plaintiff's notice of alleged violations also included a Certificate of Service and a  
7 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986  
8 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

9 22. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
10 gave notice of the alleged violations to 1616 HOLDINGS, FIVE BELOW and the public  
11 prosecutors referenced in Paragraph 18.

12 23. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor  
13 any applicable district attorney or city attorney has commenced and is diligently  
14 prosecuting an action against the Defendants.

15 **FIRST CAUSE OF ACTION**

16 **(By CONSUMER ADVOCACY GROUP, INC. and against 1616 HOLDINGS,**  
17 **FIVE BELOW and DOES 1-10 for Violations of Proposition 65, The Safe Drinking**  
18 **Water and Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, *et***  
***seq.*))**

19 **Fashion Accessories**

20 24. Plaintiff repeats and incorporates by reference paragraphs 1 through 23 of this complaint  
21 as though fully set forth herein.

22 25. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,  
23 distributor, promoter, or retailer of Backpacks with Plastic Components ("Backpacks"),  
24 including but not limited to Metropack™; "Holographic Glitter Backpack";  
25 "124245FV"; "MY080119"; "1 92234 01587 2"; "Made in China".

26 26. Backpacks contains DEHP.  
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1 27. Defendants knew or should have known that DEHP has been identified by the State of  
2 California as a chemical known to cause cancer, and reproductive toxicity and therefore  
3 was subject to Proposition 65 warning requirements. Defendants were also informed of  
4 the presence of DEHP in Backpacks within Plaintiff's notice of alleged violations further  
5 discussed above at Paragraph 18a.

6 28. Plaintiff's allegations regarding Backpacks concerns "[c]onsumer products exposure[s],"  
7 which "is an exposure that results from a person's acquisition, purchase, storage,  
8 consumption, or other reasonably foreseeable use of a consumer good, or any exposure  
9 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*.  
10 Backpacks are consumer products, and, as mentioned herein, exposures to DEHP took  
11 place as a result of such normal and foreseeable consumption and use.

12 29. Plaintiff is informed, believes, and thereon alleges that between June 24, 2017 and the  
13 present, each of the Defendants knowingly and intentionally exposed California  
14 consumers and users of Backpacks, which Defendants manufactured, distributed, or sold  
15 as mentioned above, to DEHP, without first providing any type of clear and reasonable  
16 warning of such to the exposed persons before the time of exposure. Defendants have  
17 distributed and sold Backpacks in California. Defendants know and intend that  
18 California consumers will use and consume Backpacks, thereby exposing them to  
19 DEHP. Further, Plaintiff is informed, believes, and thereon alleges that Defendants are  
20 selling Backpacks under a brand or trademark that is owned or licensed by the  
21 Defendants or an entity affiliated thereto; have knowingly introduced DEHP into  
22 Backpacks or knowingly caused DEHP to be created in Backpacks; have covered,  
23 obscured or altered a warning label that has been affixed to Backpacks by the  
24 manufacturer, producer, packager, importer, supplier or distributor of Backpacks; have  
25 received a notice and warning materials for exposure from Backpacks without  
26 conspicuously posting or displaying the warning materials; and/or have actual

1 knowledge of potential exposure to DEHP from Backpacks. Defendants thereby violated  
2 Proposition 65.

3 30. The principal routes of exposure are through dermal contact, ingestion and inhalation.  
4 Persons sustain exposures by handling Backpacks without wearing gloves or any other  
5 personal protective equipment, or by touching bare skin or mucous membranes with  
6 gloves after handling Backpacks, as well as through direct and indirect hand to mouth  
7 contact, hand to mucous membrane, or breathing in particulate matter dispersed from  
8 Backpacks.

9 31. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of  
10 Proposition 65 as to Backpacks have been ongoing and continuous, as Defendants  
11 engaged and continue to engage in conduct which violates Health and Safety Code  
12 Section 25249.6, including the manufacture, distribution, promotion, and sale of  
13 Backpacks, so that a separate and distinct violation of Proposition 65 occurred each and  
14 every time a person was exposed to DEHP by Backpacks as mentioned herein.

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

18 33. Based on the allegations herein, Defendants are liable for civil penalties of up to  
19 \$2,500.00 per day per individual exposure to DEHP from Backpacks, pursuant to Health  
20 and Safety Code Section 25249.7(b).

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

23  
24 **PRAYER FOR RELIEF**

25 Plaintiff demands against each of the Defendants as follows:

26 35. A permanent injunction mandating Proposition 65-compliant warnings;

27 36. Penalties pursuant to Health and Safety Code Section 25249.7, subdivision (b);

28 37. Costs of suit;



1 38. Reasonable attorney fees and costs; and

2 39. Any further relief that the court may deem just and equitable.

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4 Dated: January 20, 2021

YEROUSHALMI & YEROUSHALMI\*

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7 \_\_\_\_\_  
8 Reuben Yeroushalmi  
9 Attorneys for Plaintiff,  
10 CONSUMER ADVOCACY GROUP, INC.