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ELECTRONICALLY  
**FILED**  
Superior Court of California,  
County of San Francisco

10/28/2022  
Clerk of the Court  
BY: JEFFREY FLORES  
Deputy Clerk

6 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
7  
8 COUNTY OF SAN FRANCISCO

9 PRECILA BALABBO,

10 Plaintiff,

11 vs.

12 FRUIT OF THE EARTH, INC., FIVE  
13 BELOW, INC.,

14 Defendants.

Case No.:

**CGC-22-602637**

**COMPLAINT FOR CIVIL PENALTIES AND  
INJUNCTIVE RELIEF**

**(Violation of Health & Safety Code § 25249.5 et  
seq.)**

15 Plaintiff Precila Balabbo (“Plaintiff”), by and through her attorneys, alleges the following  
16 cause of action in the public interest of the citizens of the State of California.

17 **BACKGROUND OF THE CASE**

18 1. Plaintiff brings this representative action on behalf of all California citizens to  
19 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at  
20 the Health and Safety Code § 25249.5 et seq (“Proposition 65”), which reads, in relevant part,  
21 “[n]o person in the course of doing business shall knowingly and intentionally expose any  
22 individual to a chemical known to the state to cause cancer without first giving clear and reasonable  
23 warning to such individual ...”. Health & Safety Code § 25249.6.

24 2. This complaint is a representative action brought by Plaintiff in the public interest  
25 of the citizens of the State of California to enforce the People’s right to be informed of the health  
26 hazards caused by exposure to Diethanolamine (DEA), a toxic chemical found in Fruit of The  
27 Earth Aloe Vera After Sun Lotion sold and/or distributed by defendants Fruit Of The Earth, Inc.

1 (“FOTE”) and/or defendant Five Below, Inc. (“Five Below”) (collectively, “Defendants”) in  
2 California.

3 3. DEA is a harmful chemical known to the State of California to cause cancer. On  
4 June 22, 2012, the State of California listed DEA as a chemical known to the State to cause cancer  
5 and it has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs.  
6 Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

7 4. Proposition 65 requires all businesses with ten (10) or more employees that operate  
8 within California or sell products therein to comply with Proposition 65 regulations. Included in  
9 such regulations is the requirement that businesses must label any product containing a Proposition  
10 65-listed chemical that will create an exposure above safe harbor levels with a “clear and  
11 reasonable” warning before “knowingly and intentionally” exposing any person to any such listed  
12 chemical.

13 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation  
14 for up to 365 days to be imposed upon defendants in a civil action for violations of Proposition 65.  
15 Health & Safety Code § 25249.7(b). Proposition 65 also allows for any court of competent  
16 jurisdiction to enjoin the actions of a defendant which “violate or threaten to violate” the statute.  
17 Health & Safety Code § 25249.7.

18 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,  
19 without a requisite exposure warning, Fruit of The Earth Aloe Vera After Sun Lotion (the  
20 “Products”) that expose persons to DEA when used for their intended purpose.

21 7. Defendants’ failure to warn consumers and other individuals in California of the  
22 health hazards associated with exposure to DEA in conjunction with the sale and/or distribution  
23 of the Products is a violation of Proposition 65 and subjects Defendants to the enjoinder and civil  
24 penalties described herein.

25 8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition  
26 65 in accordance with Health and Safety Code § 25249.7(b).

27 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring  
28 Defendants to provide purchasers or users of the Products with required warnings related to the

1 dangers and health hazards associated with exposure to DEA pursuant to Health and Safety Code  
2 § 25249.7(a).

3 10. Plaintiff further seeks a reasonable award of attorney's fees and costs.

4 **PARTIES**

5 11. Plaintiff is a citizen of the State of California acting in the interest of the general  
6 public to promote awareness of exposures to toxic chemicals in products sold in California and to  
7 improve human health by reducing hazardous substances contained in such items. She brings this  
8 action in the public interest pursuant to Health and Safety Code § 25249.7(d).

9 12. Defendant FOTE, through its business, effectively imports, distributes, sells, and/or  
10 offers the Products for sale or use in the State of California, or it implies by its conduct that it  
11 imports, distributes, sells, and/or offers the Products for sale or use in the State of California.  
12 Plaintiff alleges that defendant FOTE is a "person" in the course of doing business within the  
13 meaning of Health & Safety Code sections 25249.6 and 25249.11.

14 13. Defendant Five Below, through its business, effectively imports, distributes, sells,  
15 and/or offers the Products for sale or use in the State of California, or it implies by its conduct that  
16 it imports, distributes, sells, and/or offers the Products for sale or use in the State of California.  
17 Plaintiff alleges that defendant Five Below is a "person" in the course of doing business within the  
18 meaning of Health & Safety Code sections 25249.6 and 25249.11.

19 **VENUE AND JURISDICTION**

20 14. Venue is proper in the County of San Francisco because one or more of the  
21 instances of wrongful conduct occurred, and continue to occur in this county and/or because  
22 Defendants conducted, and continue to conduct, business in the County of San Francisco with  
23 respect to the Products.

24 15. This Court has jurisdiction over this action pursuant to California Constitution  
25 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those  
26 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the enforcement  
27 of violations of Proposition 65 in any Court of competent jurisdiction; therefore, this Court has  
28 jurisdiction over this lawsuit.









1           39.     The Products do not comply with the Proposition 65 warning requirements.

2           40.     Plaintiff, based on her best information and belief, avers that at all relevant times  
3 herein, and at least since June 2, 2021, continuing until the present, that Defendants have continued  
4 to knowingly and intentionally expose California users and consumers of the Products to DEA  
5 without providing required warnings under Proposition 65.

6           41.     The exposures that are the subject of the Notice result from the purchase,  
7 acquisition, handling and recommended use of the Product. The primary route of exposure to DEA  
8 is through dermal exposure. Some amount of exposure through ingestion can occur by touching  
9 the Product with subsequent touching of the user's hand to mouth. No clear and reasonable warning  
10 is provided with the Products regarding the health hazards of exposure to DEA.

11          42.     Plaintiff, based on her best information and belief, avers that such exposures will  
12 continue every day until clear and reasonable warnings are provided to purchasers and users or  
13 until this known toxic chemical is removed from the Products.

14          43.     Defendants have knowledge that the normal and reasonably foreseeable use of the  
15 Products exposes individuals to DEA, and Defendants intend that exposures to DEA will occur by  
16 its deliberate, non-accidental participation in the importation, distribution, sale and offering of the  
17 Products to consumers in California

18          44.     Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this  
19 Complaint.

20          45.     Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above  
21 described acts, Defendants are liable for a maximum civil penalty of \$2,500 per day per violation.

22          46.     Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically  
23 authorized to grant injunctive relief in favor of Plaintiff and against Defendants.



1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff demands judgment against Defendants and requests the following  
3 relief:

4 A. That the court assess civil penalties against each defendant in the amount of \$2,500  
5 per day for each violation for up to 365 days in accordance with Health and Safety Code §  
6 25249.7(b);

7 B. That the court preliminarily and permanently enjoin Defendants mandating  
8 Proposition 65 compliant warnings on the Products;

9 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit, in the  
10 amount of \$50,000.00.

11 D. That the court grant any further relief as may be just and proper.

12 Dated: October 28, 2022

BRODSKY & SMITH

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