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ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco

08/12/2022
Clerk of the Court
BY: LAURA SIMMONS
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

CGC-22-601237

11 PRECILA BALABBO,

12 Plaintiff,

13 vs.

14 FIVE BELOW, INC.,

15 Defendant.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

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

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 reproductive toxicity without first giving clear
23 and reasonable 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 Di-isodecyl phthalate (DIDP), a toxic chemical found in Verge
27 Children’s Sport Velcro Baseball Glove and Ball Sets sold and/or distributed by defendant Five
28 Below, Inc. (“Five Below” or “Defendant”) in California.

1 3. DIDP is a harmful chemical known to the State of California to cause reproductive
2 toxicity. On April 20, 2007, the State of California listed DIDP as a chemical known to the State
3 to cause reproductive toxicity and it has come under the purview of Proposition 65 regulations
4 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
5 25249.10(b).

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

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

17 6. Plaintiff alleges that Defendant distributes and/or offers for sale in California,
18 without a requisite exposure warning, Verge Children’s Sport Velcro Baseball Glove and Ball Sets
19 (the “Products”) that expose persons to DIDP when used for their intended purpose.

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

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

26 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
27 Defendant to provide purchasers or users of the Products with required warnings related to the
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1 dangers and health hazards associated with exposure to DIDP 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 Five Below, through its business, effectively imports, distributes, sells,
10 and/or offers the Products for sale or use in the State of California, or it implies by its conduct that
11 it imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
12 Plaintiff alleges that defendant Five Below is a "person" in the course of doing business within the
13 meaning of Health & Safety Code sections 25249.6 and 25249.11.

14 **VENUE AND JURISDICTION**

15 13. Venue is proper in the County of San Francisco because one or more of the
16 instances of wrongful conduct occurred and continue to occur in this county and/or because
17 Defendant conducted, and continues to conduct, business in the County of San Francisco with
18 respect to the Products.

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

24 15. This Court has jurisdiction over Defendant because defendant is either a citizen of
25 the State of California, has sufficient minimum contacts with the State of California, is registered
26 with the California Secretary of State as foreign corporations authorized to do business in the State
27 of California, and/or has otherwise purposefully availed itself of the California market. Such
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1 purposeful availment has rendered the exercise of jurisdiction by California courts consistent and
2 permissible with traditional notions of fair play and substantial justice.

3 **STATUTORY BACKGROUND**

4 16. The people of the State of California declared in Proposition 65 their right “[t]o be
5 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
6 harm.” (Section 1(b) of Initiative Measure, Proposition 65.)

7 17. To effect this goal, Proposition 65 requires that individuals be provided with a
8 “clear and reasonable warning” before being exposed to substances listed by the State of California
9 as causing cancer or reproductive toxicity. H&S Code § 25249.6 states, in pertinent part:

10 No person in the course of doing business shall knowingly and intentionally expose any
11 individual to a chemical known to the state to cause cancer or reproductive toxicity without
12 first giving clear and reasonable warning to such individual...

13 18. An exposure to a chemical in a consumer product is one “which results from a
14 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
15 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
16 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
17 shall provide a warning to any person to whom the product is sold or transferred unless the product
18 is packaged or labeled with a clear and reasonable warning.”

19 19. Pursuant to H&S Code § 25603.1, the warning may be provided by using one or
20 more of the following methods individually or in combination:¹

- 21 a. A warning that appears on a product’s label or other labeling.
- 22 b. Identification of the product at the retail outlet in a manner which provides
23 a warning. Identification may be through shelf labeling, signs, menus, or a combination
24 thereof.

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27 ¹ Alternatively, a person in the course of doing business may elect to comply with the warning
28 requirements set out in the amended version of 27 CCR 25601, *et.seq.*, as amended on August 30,
2016, and operative on August 30, 2018.

1 c. The warnings provided pursuant to subparagraphs (a) and (b) shall be
2 prominently placed upon a product's labels or other labeling or displayed at the retail outlet
3 with such conspicuousness, as compared with other words, statements, designs, or devices
4 in the label, labeling or display as to render it likely to be read and understood by an
5 ordinary individual under customary conditions of purchase or use.

6 d. A system of signs, public advertising identifying the system and toll-free
7 information services, or any other system that provides clear and reasonable warnings.

8 20. Proposition 65 provides that any "person who violates or threatens to violate" the
9 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
10 "threaten to violate" is defined to mean creating "a condition in which there is a substantial
11 probability that a violation will occur." (H&S Code § 25249.11(e).) Violators are liable for civil
12 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
13 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

14 **FACTUAL BACKGROUND**

15 21. On April 20, 2007, the State of California listed DIDP as a chemical known to the
16 State to cause reproductive toxicity and it has come under the purview of Proposition 65
17 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8
18 & 25249.10(b).

19 22. The exposures that are the subject of the Notice result from the purchase,
20 acquisition, handling and recommended use of the Product. The primary route of exposure is
21 through dermal absorption directly through the skin when consumers use, touch, or handle the
22 Products. Exposure through ingestion will occur by touching the Product with subsequent touching
23 of the user's hand to mouth. No clear and reasonable warning is provided with the Products
24 regarding the health hazards of exposure to DIDP.

25 23. Defendant has manufactured, processed, marketed, distributed, offered to sell
26 and/or sold the Products in California since at least August 13, 2021. The Products continue to be
27 distributed and sold in California without the requisite warning information.

1 DIDP from use of the Products without proper warning, subject to a private action to Defendant
2 and to the California Attorney General's office and the offices of the County District attorneys and
3 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
4 violations allegedly occurred.

5 32. The Notice complied with all procedural requirements of Proposition 65 including
6 the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at
7 least one person with relevant and appropriate expertise who reviewed relevant data regarding
8 DIDP exposure, and that counsel believed there was meritorious and reasonable cause for a private
9 action.

10 33. After receiving the Notice, and to Plaintiff's best information and belief, none of
11 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
12 cause of action against Defendant under Proposition 65 to enforce the alleged violations which are
13 the subject of the Notice.

14 34. Plaintiff is commencing this action more than sixty (60) days from the date of the
15 Notice to Defendant, as required by law.

16 **FIRST CAUSE OF ACTION**

17 **(By Plaintiff against Defendant for the Violation of Proposition 65)**

18 35. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 34 of
19 this Complaint as though fully set forth herein.

20 36. Defendant has, at all times mentioned herein, acted as distributor, and/or retailer of
21 the Products.

22 37. Use of the Products will expose users and consumers thereof to DIDP, a hazardous
23 chemical found on the Proposition 65 list of chemicals known to be hazardous to human health.

24 38. The Products do not comply with the Proposition 65 warning requirements.

25 39. Plaintiff, based on her best information and belief, avers that at all relevant times
26 herein, and at least since August 13, 2021, continuing until the present, that Defendant have
27 continued to knowingly and intentionally expose California users and consumers of the Products
28 to DIDP without providing required warnings under Proposition 65.

1 40. The exposures that are the subject of the Notice result from the purchase,
2 acquisition, handling and recommended use of the Product. The primary route of exposure to the
3 is through dermal absorption directly through the skin when consumers use, touch, or handle the
4 Products. Exposure through ingestion will occur by touching the Product with subsequent touching
5 of the user's hand to mouth. No clear and reasonable warning is provided with the Products
6 regarding the health hazards of exposure.

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

10 42. Defendant has knowledge that the normal and reasonably foreseeable use of the
11 Products exposes individuals to DIDP, and Defendant intends that exposures to DIDP will occur
12 by their deliberate, non-accidental participation in the importation, distribution, sale and offering
13 of the Products to consumers in California

14 43. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
15 Complaint.

16 44. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
17 described acts, Defendant is liable for a maximum civil penalty of \$2,500 per day per violation.

18 45. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
19 authorized to grant injunctive relief in favor of Plaintiff and against Defendant.

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1 **PRAYER FOR RELIEF**

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

4 A. That the court assess civil penalties against defendant in the amount of \$2,500 per
5 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 Defendant 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: August 12, 2022

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