

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 The Parties. This Settlement Agreement is entered into by and between Precila Balabbo (“Balabbo”) and Five Below, Inc. (“Five Below”). Together, Balabbo and Five Below are collectively referred to as the “Parties.” Balabbo is an individual who resides in the State of California, and seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Balabbo alleges that Five Below is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code § 25249.6, *et seq.* (“Proposition 65”).

1.2 General Allegations. Balabbo alleges that Five Below has imported, distributed and/or sold in the State of California smartphone fitness belts and office accessory bags/pouches that contain Di(2-ethylhexyl) phthalate (DEHP) without providing a requisite Proposition 65 exposure warning. On January 1, 1988, the State of California listed DEHP as a chemical known to the State to cause cancer. On October 24, 2003, the State of California listed DEHP as a chemical known to cause reproductive toxicity.

1.3 Product Description. The products covered by this Settlement Agreement are (a) Series 8 Fitness Smartphone Waist Belts, including those identified with UPC No. 8 4718104356 9, and (b) Pinnacle Office Products accessory pouches/bags, including those identified with UPC No. 7362350117451 (collectively, the “Covered Products”). Balabbo alleges that Covered Products have been imported, distributed, offered for sale and/or sold in California by Five Below and contain DEHP.

1.4 Notice of Violation. On July 6, 2017, and on July 11, 2017, Balabbo served Five Below and various public enforcement agencies with a document entitled “Notice of Violation of California Health & Safety Code § 25249.5, *et seq.*” (the “Notices”). The Notices provided Five Below and such others, including public enforcers, with notice that Balabbo alleged that Five Below was in violation of California Health & Safety Code § 25249.5, for failing to warn consumers and customers that Covered Products exposed users in California to DEHP. No public enforcer has diligently prosecuted the allegations set forth in either of the Notices.

1.5 No Admission. Five Below denies the material factual and legal allegations contained in each of the Notices and maintains that, to the best of its knowledge, all products that are or have been sold and distributed in California, including the Covered Products, have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Five Below of any fact, finding, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Five Below of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Five Below. However, Paragraph 1.5 shall not diminish or otherwise affect Five Below's obligations, responsibilities and duties under this Settlement Agreement. Notwithstanding the allegations in the Notices, Five Below maintains that manufacture, or caused to be manufactured, the Covered Products for sale in California or sell or offer for sale the Covered Products in California in violation of Proposition 65.

1.6 Effective Date. For purposes of this Settlement Agreement, the term "Effective Date" shall mean the date this Agreement is has been executed by both Parties.

2. INJUNCTIVE RELIEF: WARNINGS

2.1 Commencing ninety (90) days after the Effective Date, and continuing thereafter, Five Below shall not manufacture or order from any supplier any Covered Products intended for retail sale in California that contains DEHP on any component to which consumers are exposed in excess of 0.1% (1,000 ppm) (hereinafter "Reformulated Products") unless the Covered Product is accompanied by a warning that complies with Article 6 of Title 27 of the California Code of Regulations. Covered Products sold by Five Below before the Effective Date may be sold without a warning even if such Covered Products are not Reformulated Products. Until August 30, 2018, the warning shall consist of either:

- (a) The statement: "WARNING: This product contains a chemical known to the State of California to cause cancer and birth defects or other reproductive harm."; or
- (b) (1) A symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline to the left of the word "warning" in bold all capital letters, followed

by the statement “This product can expose you to chemicals including Di(2-ethylhexyl) phthalate (DEHP), which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information, go to www.P65Warnings.ca.gov.”; or (2) a warning consisting of a symbol that is a black exclamation point in a yellow equilateral triangle with a bold black outline to the left of the word “warning” in bold all capital letters, followed by the statement “Cancer and Reproductive Harm - www.P65Warnings.ca.gov.”¹

For Covered Products manufactured on and after August 30, 2018, the warning set forth in Paragraph 2.1(b) shall be used.

2.2 The warning provided pursuant to Paragraph 2.1 shall be affixed to or printed on the Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or automatic process, providing that the warning is displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. A warning may be contained in the same section of the packaging, labeling, or instruction booklet that contains other safety warnings, if any, concerning the use of the Covered Product and shall be at least the same size as those other safety warnings.

3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)

In settlement of all the claims referred to in this Settlement Agreement, Five Below shall pay a total of \$2,000.00 as a civil penalty in accordance with this Section. The civil penalty payment shall be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to Balabbo. The civil penalty payment(s) shall be delivered to the addresses identified in Paragraph 3.2, below.

3.1 Civil Penalty. Within ten (10) business days of the Effective Date, Five Below shall issue two separate checks for the civil penalty payment to (a) “OEHHA” in the amount of \$1,500.00;

¹ The triangular symbol need only be in yellow where the sign, label, shelf tag or other transmission format is being printed in color for purposes of other language, symbols or designs.

and (b) "Brodsky & Smith, LLC in Trust for Balabbo" in the amount of \$500.00. The civil penalty payments shall be delivered to the addresses identified in Paragraph 3.2, below.

3.2 Payment Procedures.

(a) Issuance of Payments. Payments shall be delivered as follows:

(i) All payments owed to Balabbo, pursuant to Paragraph 3.1 shall be delivered to the following payment address:

Evan J. Smith, Esquire
Brodsky & Smith, LLC
Two Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

(ii) All payments owed to OEHHA (EIN: 68-0284486), pursuant to Paragraph 3.1 shall be delivered directly to OEHHA (Memo Line "Prop 65 Penalties") at one of the following addresses:

For United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

For Non-United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

(b) Copy of Payments to OEHHA. Five Below agrees to provide Balabbo's counsel with a copy of the check(s) payable to OEHHA, simultaneous with its penalty payment(s) to Balabbo, to be delivered to the address provided in Paragraph 3.2(a)(i), as proof of payment to OEHHA.

(c) **Tax Documentation.** Five Below agrees to provide a completed IRS 1099 for its payments to, and Balaboo agrees to provide IRS W-9 forms for, each of the following payees under this Settlement Agreement:

(i) “Precila Balabbo” whose address and tax identification number shall be provided within five (5) days after this Settlement Agreement is fully executed by the Parties;

(ii) “Brodsky & Smith, LLC” (EIN: 23-2971061) at the address provided in Paragraph 3.2(a)(i); and

(iii) “Office of Environmental Health Hazard Assessment,” 1001 I Street, Sacramento, CA 95814.

4. REIMBURSEMENT OF FEES AND COSTS

The Parties acknowledge that Balabbo and her counsel offered to reach preliminary agreement on the material terms of this dispute before reaching terms on the amount of fees and costs to be reimbursed to them. The Parties thereafter reached an accord on the compensation due to Balabbo and her counsel under general contract principles and the private attorney general doctrine and principles codified at California Code of Civil Procedure § 1021.5, for all work performed through the Effective Date. Under these legal principles, Five Below has agreed to reimburse Balabbo’s counsel for fees and costs claimed to have been incurred as a result of investigating and bringing this matter to Five Below’s attention, and negotiating a settlement in the public interest. Within ten (10) business days of the Effective Date, Five Below shall issue a check payable to “Brodsky & Smith, LLC” in the amount of \$22,000.00 for delivery to the address identified in Paragraph 3.2(a)(i), above.

5. RELEASE OF ALL CLAIMS

5.1 Release of Five Below and Downstream Customers and Entities. This Settlement Agreement is a full, final and binding resolution between Balabbo, acting on her own behalf, and Five Below, of any violation of Proposition 65 that was or could have been asserted by Balabbo or on behalf of her past and current agents, representatives, attorneys, successors, and/or assigns

(“Releasors”) for failure to provide warnings for alleged exposures to DEHP contained in the Covered Products, and Releasors hereby release any and all such claims against Five Below and Five Below Merchandising, Inc., Pinnacle Office Products, Regency Office Solutions and Regency Office Products, LLC, and their respective subsidiaries, affiliates and parents, members and licensees, and each of their parents, subsidiaries, affiliated entities, shareholders, marketplaces, directors, officers, agents, employees, attorneys, successors and assignees, and each entity to whom the Covered Products were directly or indirectly distributed or sold (collectively, the “Releasees”), from all claims for violations of Proposition 65 through the Effective Date based on any failure to warn about alleged exposures to the chemical DEHP or any other chemical listed under Proposition 65 that is contained in the Covered Products or otherwise alleged in the Notices.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4 above, Balabbo, on behalf of herself, her past and current agents, representatives, attorneys, successors and/or assignees, hereby covenants not to sue and waives any right to institute, participate in, directly or indirectly, any form of legal action and releases all claims that she may have, including without limitation, all actions and causes of action in law and in equity, all obligations, expenses (including without limitation all attorneys’ fees, expert fees, and investigation fees, and costs), damages, losses, liabilities and demands against any of the Releasees of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of the alleged or actual exposure to the chemical DEHP or any other chemical listed under Proposition 65 in the Covered Products or relating to or arising out of each of the Notices.

5.2 Five Below’s Release of Balabbo. Five Below, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Balabbo, her attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Balabbo and/or her attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter or with respect to the Covered Products.

5.3 California Civil Code § 1542. It is possible that other claims not known to the Balaboo arising out of the facts alleged in the Notices and relating to the Products will develop or be discovered. Balaboo, on behalf of the Released Parties, acknowledges that this Agreement is expressly intended to cover and include all such claims up through the Effective Date, including all rights of action therefor. Balaboo acknowledges that the claims released in Paragraph 5.1, above, may include unknown claims, and nevertheless waive California Civil Code § 1542 as to any such unknown claims. California Civil Code § 1542 reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Balaboo acknowledges and understands the significance and consequences of this specific waiver of California Civil Code § 1542.

5.4 Deemed Compliance with Proposition 65. Compliance by Five Below with this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposures to DEHP in the Covered Products.

5.5 Public Benefit. It is Five Below's understanding that the commitments it has agreed to herein, and actions to be taken by Five Below under this Settlement Agreement, would confer a significant benefit to the general public, as set forth in Code of Civil Procedure § 1021.5 and Cal. Admin. Code tit. 11, § 3201. As such, it is the intent of Five Below that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to the failure to provide a warning concerning exposure to DEHP with respect to the Covered Products, such private party action would not confer a significant benefit on the general public as to those Products addressed in this Settlement Agreement, provided that Five Below is in material compliance with this Settlement Agreement.

6. SEVERABILITY

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected but only to the extent the deletion of the provision deemed unenforceable does not materially affect, or otherwise result in the effect of the Settlement Agreement being contrary to the intent of the Parties in entering into this Settlement Agreement.

7. GOVERNING LAW

The terms of this Settlement Agreement shall be governed by the law of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable or limited by reason of law generally, or as to the Covered Products, Five Below shall provide written notice to Balabbo of any asserted change in the law, and shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, a Covered Product is so affected.

8. NOTICES

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any party by the other party to the following addresses:

For Five Below:

Sonja Inglin
Baker & Hostetler LLP
11601 Wilshire Boulevard, Suite 1400
Los Angeles, CA 90025-0509

For Balabbo:

Evan J. Smith
Brodsky & Smith, LLC
Two Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

Either Party, from time to time, may specify in writing to the other Party a change of address to which all notices and other communications shall be sent.

9. COUNTERPARTS: SIGNATURES

This Settlement Agreement may be executed in counterparts and by facsimile or .pdf signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

Balabbo agrees to comply with the reporting requirements referenced in Health & Safety Code § 25249.7(f).

11. MODIFICATION

This Settlement Agreement may be modified only by a written agreement of the Parties.

12. ENTIRE AGREEMENT

This Settlement Agreement contains the sole and entire agreement of the Parties and any and all prior negotiations and understandings related hereto shall be deemed to have been merged within it. No representations or terms of agreement other than those contained herein exist or have been made by any Party with respect to the other Party or the subject matter hereof.

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13. AUTHORIZATION

Each of the Parties acknowledges that she or it has read, understood and agree to all of the terms and conditions contained of this Settlement Agreement, and Five Below further acknowledges that the person signing below is authorized to sign this Agreement on its behalf.


AGREED TO:

Date: 4/17/2018

By: 
Precila Balabbo

AGREED TO:

Date: 4/17/2018

FIVE BELOW, INC.
By: 
Name: Karen Ward-Procell
Title: SVP, Legal and Corporate Secretary