

SETTLEMENT AND RELEASE AGREEMENT

1. INTRODUCTION

1.1. Ecological Alliance, LLC and Five Below, Inc.

This Settlement Agreement is entered into by and between Ecological Alliance, LLC (“Ecological”), on the one hand, and Five Below, Inc. (“Five Below”), on the other hand, with Ecological and Five Below collectively referred to as the “Parties” or individually as a “Party.”

1.2. General Allegations

Ecological alleges that Five Below manufactured and/or distributed and/or offered for sale in the State of California dumbbells and manicure sets containing Di(2-ethylhexyl)phthalate [DEHP] and that such sales have not included warnings pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code sections 25249.6 *et seq.* (“Proposition 65”). California has identified and listed DEHP under Proposition 65 as a chemical known to the State of California to cause cancer, birth defects or other reproductive harm.

1.3. Product Description

The products that are covered by this Settlement Agreement are defined as one-pound to five-pound dumbbells, including one-pound dumbbells identified as SKU No. 2034973:S8, and ten piece manicure sets (SKU No. 400020349736) that Five Below has sold, offered for sale or distributed in California or in the future sells, offers for sale or distributes in California and that contain DEHP. All such items shall be referred to herein as the “Products.”

1.4. Notice of Violation

On March 12, 2018 and May 16, 2018, Ecological served Five Below and the requisite public enforcement agencies eligible to initiate Proposition 65 actions on behalf of the People of

the State of California with documents entitled “60-Day Notice of Violation” (“Notice”) that Five Below had not provided warnings under Proposition 65 with respect to exposure to DEHP in the Products. To the best of each Party’s knowledge, no public enforcer has commenced or is diligently prosecuting the allegations set forth in the Notice.

1.5. No Admission

The Parties enter into this Settlement Agreement to settle disputed claims between them, as set forth herein and with respect to allegations contained in the Notice, concerning alleged violations of Proposition 65 with respect to the Products. Specifically, Five Below denies the material factual and legal allegations contained in the Notice and maintains that all products that it has manufactured for sale and distribution in California, including the Products, have been and are in compliance with Proposition 65 and any other statutory, regulatory, common law or equitable doctrine. 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, given that Five Below specifically denies any violation on its part of Proposition 65 or any other applicable requirement with respect to the Products. However, nothing in this section shall diminish or otherwise affect the obligations, responsibilities, and duties of Five Below under this Settlement Agreement.

1.6. Effective Date

For purposes of this Settlement Agreement, the term “Effective Date” shall mean the date this Settlement Agreement is fully executed.

2. INJUNCTIVE RELIEF: WARNING REQUIREMENTS

2.1. Warning

The Products shall be accompanied by a warning as described in Section 2.2 below, no later than 90 days after the Effective Date if such Products are marketed, sold or shipped by Five Below for sale in the State of California. The warnings required by Section 2.2 shall not apply to: (a) any Products that are already in the stream of commerce as of the Effective Date or that are placed into the stream of commerce during the period within 90 days of the Effective Date; and (b) any Products that either (i) contain or have been or may be reformulated to contain DEHP at concentrations equal to or less than 1,000 parts per million (as determined using United States Environmental Protection Agency test methods 3580A or 8270C) in components or parts of the Products as to which there is a potential for exposure to DEHP or (ii) as to which Five Below has otherwise determined do not require a Proposition 65 warning with respect to exposure to DEHP.

2.2. Warning Language

Where required, Five Below shall provide Proposition 65 warnings as follows:

- (a) Five Below may use any of the following warning statements in full compliance with this Section:
 - (1) **WARNING:** This product can expose you to Di(2-ethylhexyl)phthalate, 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.
 - (2) **WARNING:** This product can expose you to chemicals including Di(2-ethylhexyl)phthalate, 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

(2) **WARNING: Cancer and Reproductive Harm –**
www.P65Warnings.ca.gov.

(b) If Five Below elects to use the warning statements identified in either 2.2(a)(1) to (3), it may also include a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline. Where the sign, label or shelf tag for the product is not printed using the color yellow, the symbol may be printed in black and white. The symbol shall be placed to the left of the text of the warning, in a size no smaller than the height of the word “WARNING”.

(c) The requirements for warnings, set forth in subsection (a) above are imposed pursuant to the terms of this Settlement Agreement. The Parties recognize that these are not the exclusive methods of providing a warning under Proposition 65 and its implementing regulations.

(d) If Proposition 65 warnings for DEHP should no longer be required, Five Below shall have no further obligations pursuant to this Settlement Agreement.

In the event that the Office of Environmental Health Hazard Assessment (“OEHHA”) promulgates one or more regulations requiring or permitted warning text and/or methods of transmission different than those set forth above, Five Below shall be entitled to use, at its discretion, such other warning text and/or method of transmission without being deemed in breach of this Agreement.

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

In settlement of all the claims referred to or addressed by this Settlement Agreement, Five Below shall pay a total of \$1,000 in civil penalties in accordance with this Section, \$500 with respect to each of the Products. The penalty payment will be allocated in accordance with California Health & Safety Code section 25249.12(c)(1) & (d), with 75% of the funds remitted to OEHHA and the remaining 25% of the penalty remitted to Ecological. Ecological's counsel shall be responsible for delivering to OEHHA the portion of any penalty payment made under this Settlement Agreement due OEHHA and for delivering to Ecological the portion of the penalty payment due to Ecological. Ecological agrees to indemnify and hold harmless Five Below in the event that Ecological's counsel fails make any such payments.

4. REIMBURSEMENT OF FEES AND COSTS

The Parties reached an accord on the compensation due to Ecological and its counsel under the private attorney general doctrine and principles of contract law. Under these legal principles, Five Below shall reimburse Ecological's counsel for fees and costs incurred as a result of investigating and bringing this matter to Five Below's attention. Five Below shall pay Ecological's counsel \$24,000 for all attorneys' fees, expert and investigation fees, and related costs associated with alleged violations of Proposition 65 with respect to the Products and the Notice.

5. PAYMENT INFORMATION

By January 15, 2019 Five Below shall make a total payment of Twenty-Five Thousand Dollars (\$25,000) for the civil penalties and attorney's fees and costs due under this Agreement to Custodio & Dubey LLP, as counsel for Ecological. Such payment may be made either by check or wire transfer to:

Bank: Bank of America, N.A.

Routing No.: 026009593

Account No.: 325054144600

Beneficiary: Custodio & Dubey LLP

Other than the payments provided for in this Section, each Party is to bear its own attorneys' fees and costs regarding the Notice and this Agreement.

6. RELEASE OF ALL CLAIMS

6.1. Release of Five Below, Downstream Customers and Upstream Vendors

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4 above, Ecological, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims relating to the Products, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against (a) Five Below and Five Below Merchandising, Inc. ("FBM"), (b) each of Five Below's and FMB's downstream distributors, wholesalers, vendors, licensors, licensees, auctioneers, retailers, franchisees, dealers, shareholders, cooperative members, customers, owners, purchasers, users, and others who have sold or offered for sale the Products or may sell or offer them for sale within 90 days from the Effective Date, (c) each of Five Below's and FMB's upstream suppliers, distributors, and vendors, and (d) the parent companies, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders,

agents, and employees, and sister and parent entities of Five Below, FBM and the other persons and entities referenced above (collectively "Releasees").

Ecological also, in its capacity, on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees and *not* in its representative capacity, provides a general release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of any nature, character or kind, known or unknown, suspected or unsuspected, against Five Below and the Releasees, including without limitation, with respect to all matters arising out of or related to the violations identified in the Notice. Ecological acknowledges that it is familiar with California Civil Code section 1542, which provides 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.

Ecological, in its capacity only, and on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees expressly waives and relinquishes any and all rights and benefits which it may have under, or which may be conferred on it by the provisions of California Civil Code section 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters.

6.2. Five Below's Release of Ecological

Five Below waives any and all claims against Ecological, its attorneys and other representatives, for any and all actions taken or statements made (or those that could have been

taken or made) by Ecological and its attorneys and other representatives, whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the Products.

7. GOVERNING LAW

The terms of this Settlement Agreement shall be governed by the laws 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 by reason of law generally, or as to the Products, then Five Below shall have no further obligations pursuant to this Settlement Agreement.

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 courier on either Party by the other Party at the following addresses:

For Five Below: Sonja A. Inglin, Esq.
 Cermak & Inglin LLP
 12121 Wilshire Blvd., Suite 322
 Los Angeles, CA 90025

For Ecological: Vineet Dubey, Esq.
 Custodio & Dubey LLP
 448 S. Hill St., Suite 615
 Los Angeles, CA 90013

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; FACSIMILE/E-SIGNATURES

This Settlement Agreement may be executed in counterparts and by facsimile or e-signatures, 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 SECTION 25249.7(f)

Ecological agrees to comply with the reporting form requirements referenced in California Health & Safety Code § 25249.7(f). Ecological and its attorneys have not and will not disclose the alleged violation and the terms of this agreement to any person or entity other than an agency as may be required by law.

11. ENTIRE AGREEMENT

This Settlement Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and all related prior discussions, negotiations, commitments and understandings. No other agreements, oral or otherwise, exist to bind either of the Parties.

12. MODIFICATION

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

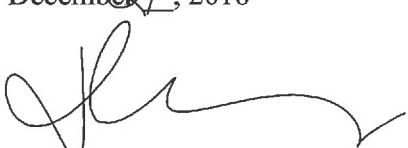
13. AUTHORIZATION

Each person signing this Settlement Agreement on behalf of a Party represents and warrants that he or she is duly authorized to do so and has read, understood and agrees to all of the terms and

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conditions of this Settlement Agreement on behalf of the Party for which he or she has signed.

<p style="text-align: center;">AGREED TO:</p> <p>Date: December <u>21</u>, 2018</p> <p>By:  On Behalf of Ecological Alliance, LLC</p>	<p style="text-align: center;">AGREED TO:</p> <p>Date: December __, 2018</p> <p>FIVE BELOW, INC.</p> <p>By: _____ Name: Title:</p>
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conditions of this Settlement Agreement on behalf of the Party for which he or she has signed.

<p style="text-align: center;">AGREED TO:</p> <p>Date: January __, 2018</p> <p>By: _____ On Behalf of Ecological Alliance, LLC</p>	<p style="text-align: center;">AGREED TO:</p> <p>Date: January 4, 2018</p> <p>FIVE BELOW, INC.</p> <p>By: _____ Name: Ron Masciantonio Title: SVP Legal & General Counsel</p>
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