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16 Attorneys for Plaintiff Kim Embry

17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

18 **IN AND FOR THE COUNTY OF ALAMEDA**

19 KIM EMBRY, an individual,

20 Plaintiff,

21 v.

22 DGL GROUP, LTD., a New Jersey
23 corporation, FIVE BELOW, INC., a
24 Pennsylvania corporation; and DOES 1 through
25 100, inclusive,

26 Defendants.

Case No.: HG19023416

[PROPOSED] CONSENT JUDGMENT AS
TO DGL GROUP, LTD.

(Health & Safety Code § 25249.6 *et. seq.* and
Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Kim Embry (“Embry”) on one hand,
4 and DGL Group, Ltd. (“Defendant” or “DGL”) on the other hand, with Embry and DGL individually
5 referred to as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Embry is a citizen of the State of California and acting in the interest of the general public. She
8 seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing
9 or eliminating hazardous substances contained in consumer products.

10 **1.3 Defendant**

11 DGL employs ten or more individuals and is a “person in the course of doing business” for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code
13 section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Embry alleges that DGL manufactures, imports, sells, and distributes for sale in California,
16 hands-free phone neck mounts that contain Diisononyl phthalate (“DINP”). Embry further alleges
17 that DGL does so without providing a sufficient health hazard warning as required by Proposition 65.
18 Pursuant to Proposition 65, DINP is listed as a chemical known to cause cancer. DGL denies that
19 warnings are required under Proposition 65 for any exposures to DINP in the Products, and DGL
20 maintains that it has complied with all applicable federal and state laws, including but not limited to
21 Proposition 65.

22 **1.5 Product Description**

23 For purposes of this Consent Judgment, “Product” or “Products” are defined as phone
24 accessories, including but not limited to Hands-free Phone Neck Mount manufactured, imported, sold,
25 or distributed for sale in California by DGL.

26 **1.6 Notice of Violation**

27 On March 1, 2019, Embry served DGL, Five Below, Inc., the California Attorney General, and
28 all other required public enforcement agencies with a 60-Day Notice of Violation of California Health

1 and Safety Code section 25249.6 *et seq.* (“Notice”). The Notice alleged that DGL violated Proposition
2 65 by failing to sufficiently warn consumers in California of the health hazards associated with
3 exposures to DINP contained in the Products.

4 No public enforcer has commenced or is otherwise prosecuting an action to enforce the
5 violations alleged in the Notice.

6 **1.7 Complaint**

7 On June 18, 2019, Embry filed a complaint against DGL for the alleged violations of Health
8 and Safety Code section 25249.6 that are the subject of the Notice. On July 29, 2019, Embry filed a
9 First Amended Complaint (“Complaint”).

10 **1.8 No Admission**

11 DGL denies the material, factual and legal allegations contained in the Notice and Complaint
12 and maintains that all products that it has sold and distributed in California, including the Products,
13 have been and are in compliance with all laws.

14 Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,
15 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment
16 be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law.
17 This Section shall not, however, diminish or otherwise affect the Parties’ obligations, responsibilities,
18 and duties under this Consent Judgment.

19 **1.9 Jurisdiction**

20 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
21 Court has jurisdiction over DGL as to the allegations in the Complaint, that venue is proper in the
22 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
23 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

24 **1.10 Effective Date and Compliance Date**

25 For purposes of this Consent Judgment, the term (1) “Effective Date” means the date on which
26 the Court grants the motion for approval of this Consent Judgment; (2) “Compliance Date” means July
27 1, 2020 and is the date that DGL must be in compliance with the Injunctive Relief terms (*infra*) of this
28 Consent Judgment.

1 **2. INJUNCTIVE RELIEF**

2 **2.1 Definitions**

3 (a) “Accessible Component” means any accessible part of the Product that can be
4 mouthed, handled, or touches the body during the ordinary and customary conditions of purchase or
5 use of the Product.

6 (b) “Listed Chemicals” means the following listed chemicals: Di[2-Ethylhexyl]
7 Phthalate (DEHP), Diisononyl Phthalate (DINP), Di-n-butyl Phthalate (DBP), Di-isodecyl Phthalate
8 (DIDP), Benzyl Butyl Phthalate (BBP), and Di-n-hexyl Phthalate (DnHP) each of which are listed
9 pursuant to Proposition 65 as a chemical known to the State of California to cause cancer, birth
10 defects, and/or other reproductive harm.

11 (c) “Phthalate Free” means that each Accessible Component of the Products
12 contains less than or equal to 1,000 parts per million (ppm) of DEHP, DINP, DBP, DIDP, BBP, and
13 DnHP when analyzed pursuant to U.S. EPA testing methodology 3580A and 8270C or similar
14 methodologies utilized by federal or state agencies for the purpose of determining phthalate content
15 in a solid substance. DGL may rely on its suppliers’ test results in order to determine whether the
16 Products are Phthalate Free,

17 **2.2 Reformulation Commitment**

18 No later than July 1, 2020 (the Compliance Date), DGL shall not manufacture, import,
19 distribute, sell or offer for sale in the State of California the Product unless it is either Phthalate Free
20 or carries an appropriate Proposition 65 warning per Section 2.3, below.

21 **2.3 Clear and Reasonable Warnings**

22 Commencing on July 1, 2020 (the Compliance Date), DGL shall provide a clear and reasonable
23 warning that complies with Proposition 65’s warning regulations, including 27 California Code of
24 Regulations Section 25600 *et. seq.* on the label of any Product that is not Phthalate Free and is
25 distributed for sale in the State of California.

26 **2.2 Grace Period for Existing Inventory of Product**

27 The requirements of this Consent Judgment shall not apply to Products manufactured as of
28 July 1, 2020, which Products are expressly subject to the releases provided in Section 4.

1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Settlement Amount**

3 DGL shall pay fifty thousand dollars (\$50,000.00) in settlement and total satisfaction of all the
4 claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes civil
5 penalties in the amount of five thousand dollars (\$5,000.00) pursuant to Health and Safety Code
6 section 25249.7(b) and attorney’s fees and costs in the amount of forty-five thousand dollars
7 (\$45,000.00) pursuant to Code of Civil Procedure section 1021.5 and Health and Safety Code section
8 25249 *et seq.*

9 **3.2 Civil Penalty**

10 The portion of the settlement attributable to civil penalties shall be allocated according to
11 Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty
12 paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”), and the
13 remaining twenty-five percent (25%) of the penalty paid to Embry. The Civil Penalty shall be due
14 within thirty (30) days after the Effective Date.

15 All payments owed to Embry, shall be delivered to the following payment address:

16 Noam Glick
17 Glick Law Group
225 Broadway, Suite 2100
18 San Diego, CA 92101

19 All payments owed to OEHHA (EIN: 68-0284486) shall be delivered directly to OEHHA
20 (Memo line “Prop 65 Penalties) at the following addresses:

21 For United States Postal Delivery:

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

25 For Non-United States Postal Service Delivery:

26 Mike Gyuries
27 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
28 1001 I Street
Sacramento, CA 95814

1 DGL agrees to provide Embry’s counsel with a copy of the check payable to OEHHA
2 simultaneous with its penalty payment to Embry.

3 The Parties will exchange completed IRS 1099, W-9, or other forms as required by law.
4 Relevant information for Embry, Glick Law Group and Nicholas & Tomasevic are set out below:

- 5 • “Kim Embry” whose address and tax identification number shall be provided within
6 five (5) days after this Consent Judgment is fully executed by the Parties;
- 7 • “Glick Law Group” (EIN: 47-1838518) at address provided in Section 3.2; and
- 8 • “Nicholas & Tomasevic” (EIN: 46-3474065) at address provided in Section 3.3.

9 **3.3 Attorney’s Fees and Costs**

10 The portion of the settlement attributable to attorney’s fees and costs shall be paid to Embry’s
11 counsel, who are entitled to attorney’s fees and costs incurred by her in this action, including but not
12 limited to investigating potential violations, bringing this matter to DGL’s attention, as well as
13 litigating and negotiating a settlement in the public interest.

14 DGL shall provide its payment to Embry’s counsel in eight monthly payments of five thousand
15 six hundred and twenty-five dollars (\$5,625), commencing thirty (30) days after the Effective Date,
16 and continuing thereafter for seven months. For example, if the Effective Date is June 1st, DGL’s first
17 payment would be due July 1st, and their next payment would be due August 1st, etc. Each monthly
18 payment shall be divided equally, payable to Glick Law Group, PC (\$2,812.50) and Nicholas &
19 Tomasevic, LLP (\$2,812.50) respectively each month. The addresses for these two entities are:

20 Noam Glick
21 Glick Law Group
22 225 Broadway, Suite 2100
23 San Diego, CA 92101

24 Craig Nicholas
25 Nicholas & Tomasevic, LLP
26 225 Broadway, Suite 2100
27 San Diego, CA 92101

28 **4. CLAIMS COVERED AND RELEASED**

4.1 Embry’s Public Release of Proposition 65 Claims

Embry, acting on her own behalf and in the public interest, releases DGL of any and all liability

1 arising from or related to the Notice and Complaint. This release includes DGL's owners, parents,
2 subsidiaries, affiliated entities under common ownership, its directors, officers, agents, employees,
3 attorneys, and each entity to whom DGL directly or indirectly distributes or sells or has distributed or
4 sold the Products, including but not limited to, Five Below, Inc., distributors, wholesalers, customers,
5 retailers, franchisees, cooperative members and licensees, (collectively, the "Releasees") and the
6 Releasees' parents, subsidiaries and affiliates and their respective employees, agents, and assigns.
7 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with
8 respect to the alleged or actual failure to warn about exposures to Listed Chemicals from Products
9 manufactured, imported, sold, or distributed by DGL after the Effective Date. This Consent Judgment
10 is a full, final and binding resolution of all claims that were or could have been asserted against DGL
11 and/or Releasees for failure to provide warnings for alleged exposures to Listed Chemicals contained
12 in the Products.

13 **4.2 Embry's Individual Release of Claims**

14 Embry, in her individual capacity, also provides a release to DGL and/or Releasees, which
15 shall be a full and final accord and satisfaction of as well as a bar to all actions, causes of action,
16 obligations, costs, expenses, attorney's fees, damages, losses, claims, liabilities, and demands by
17 Embry of any nature, character, or kind, whether known or unknown, suspected or unsuspected, arising
18 out of alleged or actual exposures to Listed Chemicals in Products manufactured, imported, sold, or
19 distributed by DGL or Releasees before the Effective Date. With respect to the foregoing waivers and
20 releases in this Section, Embry hereby specifically waives any and all rights and benefits which she
21 now has, or in the future may have, conferred by virtue of the provisions of Section 1542 of the
22 California Civil Code, which provides as follows:

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

26 In addition, Embry expressly waives and relinquishes any all rights and benefits she may have or
27 which may be conferred by any other state or federal statute or common law principle of similar effect
28

1 to the fullest extent that she may lawfully waive such rights or benefits pertaining to the released
2 matters.

3 **4.3 DGL's Release of Embry**

4 DGL, on its own behalf, as well as its past and current agents, representatives, attorneys,
5 successors, and assignees, hereby waives any and all claims against Embry and its attorneys and other
6 representatives, for any and all actions taken or statements made by Embry and its attorneys and other
7 representatives, whether in the course of investigating claims, otherwise seeking to enforce
8 Proposition 65 against it, in this matter or with respect to the Products.

9 **4.4 Dismissal of Five Below, Inc.**

10 Within ten (10) days of the Effective Date, Embry shall file a request for dismissal without
11 prejudice of Five Below, Inc. in this action.

12 **5. COURT APPROVAL**

13 This Consent Judgment is not effective until it is approved and entered by the Court and shall
14 be null and void if it is not approved and entered by the Court within one year after it has been fully
15 executed by the Parties, or by such additional time as the Parties may agree to in writing.

16 **6. SEVERABILITY**

17 Subsequent to the Court's approval and entry of this Consent Judgment, if any provision is
18 held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely
19 affected.

20 **7. GOVERNING LAW**

21 The terms of this Consent Judgment shall be governed by the laws of the state of California
22 and apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise
23 rendered inapplicable to the Products, then DGL may provide written notice to Embry of any asserted
24 change, and shall have no further injunctive obligations pursuant to this Consent Judgment with
25 respect to, and to the extent that, the Products are so affected.

26 **8. NOTICE**

27 Unless specified herein, all correspondence and notice required by this Consent Judgment shall
28 be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail, return

1 receipt requested; or (iii) a recognized overnight courier to the following addresses:

2 For DGL:

For Embry:

3 Peg Carew Toledo
4 Arnold & Porter Kaye Scholer LLP
5 Three Embarcadero Center, 10th floor
6 San Francisco, CA 94111-4024

Noam Glick
Glick Law Group, PC
225 Broadway, 21st Floor
San Diego, CA 92101

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

8 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

9 This Consent Judgment may be executed in counterparts and by facsimile signature, each of
10 which shall be deemed an original, and all of which, when taken together, shall constitute one and the
11 same document.

12 **10. POST EXECUTION ACTIVITIES**

13 Embry agrees to comply with the reporting form requirements referenced in Health and Safety
14 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
15 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which
16 motion Embry shall draft and file. In furtherance of obtaining such approval, the Parties agree to
17 mutually employ their best efforts, including those of their counsel, to support the entry of this
18 agreement as a judgment, and to obtain judicial approval of their settlement in a timely manner. For
19 purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion for
20 approval, responding to any objection that any third-party may make, and appearing at the hearing
21 before the Court if so requested.

22 **11. MODIFICATION**

23 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
24 entry of a modified consent judgment thereon by the Court; or (ii) a successful motion or application
25 of any Party, and the entry of a modified consent judgment thereon by the Court.

26 **12. AUTHORIZATION**

27 The undersigned are authorized to execute this Consent Judgment and acknowledge that they
28 have read, understand, and agree to all of the terms and conditions contained herein.

1 **13. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

2 If a dispute arises with respect to either Party's compliance with the terms of this Consent
3 Judgment, the Parties shall meet and confer in person, by telephone, and/or in writing and endeavor to
4 resolve the dispute in an amicable manner. No action or motion may be filed in the absence of such a
5 good faith attempt to resolve the dispute beforehand.

6 **14. ENTIRE AGREEMENT**


7 This Consent Judgment contains the sole and entire agreement and understanding of the Parties
8 with respect to the entire subject matter herein, and any and all prior discussions, negotiations,
9 commitments, and understandings related hereto. No representations, oral or otherwise, express or
10 implied, other than those contained herein have been made by any Party. No other agreements, oral
11 or otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.


12 **AGREED TO:**

AGREED TO BY (DEFENDANT)

13
14 Date: March 26, 2020

Date: April 3, 2020

15
16 By: 
17 Kim Embry

By: 
Ezra Zaafarani
[print name/title]