

ANNE MILGRAM  
ATTORNEY GENERAL OF NEW JERSEY  
Division of Law  
124 Halsey Street - 5<sup>th</sup> Floor  
P.O. Box 45029  
Newark, New Jersey 07101

**FILED**

AUG 18 2009

**Division of Consumer Affairs**

Attorney for New Jersey Division of Consumer Affairs

By: Jah-Juin Ho  
Deputy Attorney General  
(973) 877-1280

STATE OF NEW JERSEY  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF CONSUMER AFFAIRS

_____	:	
In the Matter of	:	Administrative Action
	:	
FIVE BELOW, INC.,	:	
	:	
Respondent.	:	<b><u>CONSENT ORDER</u></b>
_____	:	

**WHEREAS** this matter having been opened by the New Jersey Division of Consumer Affairs, Office of Consumer Protection (“Division”), as an investigation to ascertain whether violations of the of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. (“CFA”), and the Act Prohibiting Sale of Yo- Yo Waterballs, N.J.S.A. 2A:65B-1 et seq. (“Yo-Yo Waterball Act”), have been or are being committed by Five Below, Inc. (“Five Below” or “Respondent”) “(hereinafter referred to as the “Investigation”);

**WHEREAS** the Respondent denies that it has committed any violation of the CFA and the Yo-Yo Waterball Act; and

**WHEREAS** the Division and Respondent (collectively, the “Parties”) have reached an amicable agreement resolving the issues in controversy and concluding this matter without the need for further action, and the Respondent having voluntarily cooperated with the Investigation and

consented to the entry of the within order (“Consent Order”) without having admitted any violation of law or finding of fact, and for good cause shown:

IT IS on this 1<sup>st</sup> day of August, 2009 **ORDERED** and **AGREED** as follows:

**1. EFFECTIVE DATE**

1.1 This Consent Order shall be effective on the date that it is filed with the Division (“Effective Date”).

**2. DEFINITIONS**

As used in this Consent Order, the following words or terms shall have the following meanings, which meanings shall apply wherever the words appear in this Consent Order:

2.1 “Advertisement” shall mean any written, oral or electronic statement, illustration or depiction that is designed to create interest in the purchase of, impart information about the attributes of, publicize the availability of, or effect the sale or use of, goods or services, whether the statement appears in a brochure, newspaper, magazine, free-standing inset, bill board, circular, mailer, package insert, package label, product instructions, electronic mail, website, homepage, television, cable television, radio, commercial or any other medium. This definition applies to other forms of the word “Advertisement” including, without limitation, “Advertise.”

2.2 “Attorney General” shall refer to the Attorney General of the State of New Jersey and the Office of the Attorney General of the State of New Jersey.

2.3 “Clearly and Conspicuously” shall mean a statement that, regardless of the medium in which it is made, is presented in such size, color, contrast, duration, location and audibility, as reasonably compared to the other information with which it is presented, that it is reasonably

apparent and understandable and in language and terms used in accordance with their common or ordinary usage and meaning. If such statement modifies, explains or clarifies other information with which it is presented, it must reasonably be presented in proximity to the information it modifies, explains or clarifies and in a reasonable manner that is readily apparent and understandable.

2.4 “Consumer” shall refer to any Person who is offered Merchandise for Sale.

2.5 “Director” shall refer to the Director of the Division.

2.6 “Merchandise” shall be defined in accordance with N.J.S.A. 56:8-1(c) and includes, but is not limited to, Yo-Yo Waterballs and other toys.

2.7 “Person(s)” shall be defined in accordance with N.J.S.A. 56:8-1(d).

2.8 “Policies” shall refer to any procedures, practices and/or established courses of action, whether written or oral.

2.9 “Sale” shall be defined in N.J.S.A. 56:8-1(e).

2.10 “State” shall refer to the State of New Jersey.

2.11 “Yo-Yo Waterball” shall be defined in accordance with N.J.S.A. 2A:65B-2.

### **3. INJUNCTIVE RELIEF AND FUTURE BUSINESS PRACTICES**

3.1 Respondent shall not engage in any unfair and/or deceptive acts or practices in the conduct of its business in the State and shall comply with such State and/or Federal laws, rules and regulations as now constituted or as may hereinafter be amended, which are applicable to the conduct of its business including, but not limited to, the CFA and the Yo-Yo Waterball Act.

3.2 In accordance with N.J.S.A. 2A:65B-2, Respondent shall not sell and/or offer for Sale Yo-Yo Waterballs in the State.

3.3 To the extent not already prohibited in Section 3.2, Respondent shall not ship or otherwise cause to be shipped Yo-Yo Waterballs into the State.

3.4 Respondent shall develop, implement and periodically update Policies to monitor and comply with any State or Federal recall or other notices, relating to any sale or offer for sale of Merchandise, and describe the steps to be taken by Respondent and its employees in the event Respondent does receive notice or otherwise becomes aware of a recall or other problem with Merchandise it is selling, including how to dispose of any recalled or banned Merchandise.

#### **4. SETTLEMENT PAYMENT**

4.1 Contemporaneously with the execution of this Consent Order, Respondent shall make a payment totaling Six Thousand Four Hundred Sixty-Three and 93/100 Dollars (\$6,463.93) (“Settlement Payment”).

4.2 The Settlement Payment consists of a civil penalty of Five Thousand Two Hundred Fifty and 00/100 Dollars (\$5,250.00), pursuant to N.J.S.A. 56:8-13 and N.J.S.A. 2A:65B-3, and One Thousand Two Hundred Thirteen and 93/100 Dollars (\$1,213.93), as reimbursement of the Division’s attorneys’ fees and investigative costs, pursuant to N.J.S.A. 56:8-11 and N.J.S.A. 56:8-19.

4.3 The Settlement Payment shall be made by certified or cashier’s checks made payable to “New Jersey Division of Consumer Affairs” and shall be forwarded to:

Jah-Juin Ho, Deputy Attorney General  
State of New Jersey  
Office of the Attorney General  
Department of Law and Public Safety  
Division of Law  
Consumer Fraud Prosecution Section  
124 Halsey Street - 5<sup>th</sup> Floor  
P.O. Box 45029  
Newark, New Jersey 07101

4.4 Upon making the Settlement Payment, Respondent shall immediately be fully divested of any interest in, or ownership of, the moneys paid. All interest in the moneys, and any subsequent interest or income derived therefrom, shall inure entirely to the benefit of the State pursuant to the terms herein.

## **5. GENERAL PROVISIONS**

5.1 This Consent Order is entered into by the Parties as their own free and voluntary act and with full knowledge and understanding of the obligations and duties imposed by this Consent Order.

5.2 This Consent Order shall be governed by, and construed and enforced in accordance with, the laws of the State.

5.3 The Parties have negotiated, jointly drafted and fully reviewed the terms of this Consent Order and the rule that uncertainty or ambiguity is to be construed against the drafter shall not apply to the construction or interpretation of this Consent Order.

5.4 This Consent Order contains the entire agreement among the Parties. Except as otherwise provided herein, this Consent Order shall be modified only by a written instrument signed by or on behalf of the Parties.

5.5 Except as otherwise explicitly provided in this Consent Order, nothing herein shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of the State.

5.6 If any portion of this Consent Order is held invalid or unenforceable by operation of law, the remaining terms of this Consent Order shall not be affected.

5.7 This Consent Order shall be binding upon Respondent, successors and assigns, and any entity or device through which it may now or hereafter act, as well as any Persons who have authority to control or who, in fact, control and direct its business.

5.8 This Consent Order shall be binding upon the Parties and their successors in interest. In no event shall assignment of any right, power or authority under this Consent Order avoid compliance with this Consent Order.

5.9 This Consent Order is agreed to by the Parties and entered into for settlement purposes only. Neither the fact of, nor any provision contained in this Consent Order shall constitute or be construed as: (a) an approval, sanction or authorization by the Division or any other governmental unit of the State of any act or practice of Respondent; or (b) an admission by Respondent that any of its acts or practices described in or prohibited by this Consent Order are unfair, or deceptive or violate the CFA and the Yo-Yo Waterball Act. This Consent Order is not intended, and shall not be deemed, to constitute evidence or precedent of any kind except in: (a) an action or proceeding by one of the Parties to enforce, rescind or otherwise implement any or all of the terms herein; or (b) an action or proceeding involving a Released Claim (as defined in Section 7) to support a defense of res judicata, collateral estoppel, release or other theory of claim preclusion, issue preclusion or similar defense.

5.10 Unless otherwise prohibited by law, any signatures by the Parties required for filing of this Consent Order may be executed in counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same Consent Order.

5.11 This Consent Order is a public document subject to the New Jersey Open Records Act, N.J.S.A. 47:1A-1 et seq.

## **6. REPRESENTATIONS AND WARRANTIES**

6.1 The Parties Represent and warrant that their signatories to this Consent Order have authority to act for and bind the respective Parties.

6.2 Respondent Represents and warrant that it has fully read and understands this Consent Order, that it understands the legal consequences involved in signing the Consent Order and that there are no other Representations or agreements not stated in writing herein.

## **7. RELEASE**

7.1 In consideration of the injunctive relief, payments, undertakings, mutual promises and obligations provided for in this Consent Order and conditioned on Respondent making the Settlement Payment in the manner specified in Section 4, the Division hereby agrees to release Respondent from any and all civil claims or Consumer related administrative claims, to the extent permitted by State law, which the Division could have brought against Respondent for violations of the CFA and the Yo-Yo Waterball Act prior to the Effective Date for matters arising out of the Investigation as well as the matters addressed in this Consent Order (the "Released Claims").

7.2 Notwithstanding any term of this Consent Order, the following do not comprise Released claims: (a) private rights of action; (b) actions to enforce this Consent Order; and (c) any claims against Respondent by any other agency or subdivision of the State.

## **8. PENALTIES FOR FAILURE TO COMPLY**

8.1 The Attorney General (or designated representative) shall have authority to enforce the injunctive provisions of this Consent Order or to seek sanctions for violations hereof or both.

8.2 The Parties agree that any future violations of the injunctive provisions of this Consent Order as well as the CFA and/or Yo-Yo Waterball Act shall constitute a second or

succeeding violation under N.J.S.A. 56:8-13 and/or N.J.S.A. 2A:65B-3 and that Respondent may be liable for enhanced civil penalties.

#### **9. COMPLIANCE WITH ALL LAWS**

- 9.1 Except as provided in this Consent Order, no provision herein shall be construed as:
- (a) Relieving Respondent of its obligation to comply with all State and Federal laws, regulations or rules, as now constituted or as may hereafter be amended, or as granting permission to engage in any acts or practices prohibited by any such laws, regulations or rules; or
  - (b) Limiting or expanding any right the Division may otherwise have to obtain information, documents or testimony from Respondent pursuant to any State or Federal law, regulation or rule, as now constituted or as may hereafter be amended, or limiting or expanding any right Respondent may otherwise have pursuant to any State or Federal law, regulation or rule, to oppose any process employed by the Division to obtain such information, documents or testimony.

#### **10. NOTICES UNDER THIS CONSENT ORDER**

10.1 Except as otherwise provided herein, any notices or other documents required to be sent to the Parties pursuant to this Consent Order shall be sent by United States mail, Certified Mail Return Receipt Requested, or other nationally recognized courier service that provides for tracking services and identification of the Person signing for the documents. Such notices and/or documents shall be sent to the following addresses:

For the Division:

Jah-Juin Ho, Deputy Attorney General  
State of New Jersey  
Office of the Attorney General  
Department of Law and Public Safety  
Division of Law  
Consumer Fraud Prosecution Section  
124 Halsey Street - 5<sup>th</sup> Floor  
P.O. Box 45029  
Newark, New Jersey 07101

For the Respondent:

Charles S. Marion, Esq.  
Pepper Hamilton, LLP  
3000 Two Logan Square  
18<sup>th</sup> and Arch Streets  
Philadelphia, Pennsylvania 19103-2799

Ken Bull  
Chief Financial Officer  
Five Below, Inc.  
1616 Walnut Street, Ste 400  
Philadelphia, Pennsylvania 19103

IT IS ON THE 18<sup>th</sup> DAY OF August, 2009 SO ORDERED.


ANNE MILGRAM  
ATTORNEY GENERAL OF NEW JERSEY

By: David M. Szuchman  
DAVID M. SZUCHMAN, DIRECTOR  
DIVISION OF CONSUMER AFFAIRS

**THE PARTIES CONSENT TO THE FORM, CONTENT AND ENTRY OF THIS CONSENT ORDER ON THE DATES UNDER THEIR RESPECTIVE SIGNATURES.**

FOR THE DIVISION:

ANNE MILGRAM  
ATTORNEY GENERAL OF NEW JERSEY

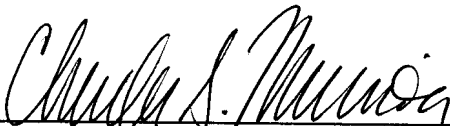
By:   
\_\_\_\_\_  
Jah-Juin Ho  
Deputy Attorney General

Dated: 8/17/09, 2009

124 Halsey Street - 5<sup>th</sup> Floor  
P.O. Box 45029  
Newark, New Jersey 07101

FOR RESPONDENT:

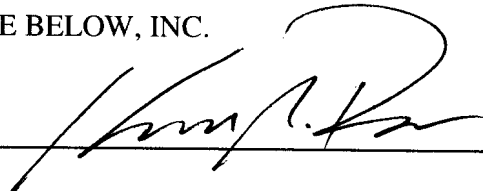
PEPPER HAMILTON, LLP

By:   
\_\_\_\_\_  
Charles S. Marion, Esq.

Dated: 8-12-09, 2009

3000 Two Logan Square  
18<sup>th</sup> and Arch Streets  
Philadelphia, Pennsylvania 19103-2799

FIVE BELOW, INC.

By:   
\_\_\_\_\_

Dated: 8/11/09, 2009

1616 Walnut Street, Ste 400  
Philadelphia, PA 19103