

VERIFIED FIRST AMENDED COMPLAINT

Plaintiff Kessler Corporation (“Plaintiff” or “Kessler”) amends its complaint in this action against Defendants Five Below, Inc. and Five Below Merchandising, Inc. (collectively “Five Below” or “Defendants”), and alleges as follows:

NATURE OF THE ACTION

1. This is an action for trademark infringement, false designation of origin, unfair competition, trademark counterfeiting, copyright infringement, design patent infringement and related claims under the United States Trademark (Lanham) Act of 1946, 15 U.S.C. §§ 1051 et seq. (as amended), and Commonwealth of Virginia law and Virginia common law. The Complaint arises from Defendants’ unauthorized copying and selling of a ball product that is nearly identical to Kessler’s unique and creative DROP DOTS ball design. In addition, Defendants’ use of the name DROP DOT BALL for goods that are nearly identical to goods offered by Plaintiff under the DROP DOTS trademark will inevitably confuse, mislead and deceive the general public into believing that Plaintiff manufactures, sells, sponsors, approves or licenses Defendants’ ball products which has and will continue to damage Plaintiff’s relationships with its business partners.

PARTIES

2. Plaintiff Kessler is a Nevada corporation with principal offices at 2040 Stoner Avenue, Los Angeles, California 90025. Kessler owns issued design patent (No. D829,287), two utility patent applications (15/598,658 and 15/982,513), a pending copyright (Copyright Case No. 1-6776319106) on its unique and creative ball design, a rejected copyright (Copyright Case

No. 1-6926659581) and a U.S. Trademark Application Serial No. 87/893,461 for the standard character mark “DROP DOTS” in international class 028 for balls for games; balls for sports; amusement products, namely, inflatable balls; beach balls; foot balls; play balls; rubber action balls; and sport balls. On September 18, 2018, U.S. Trademark Application Serial No. 87/893,461 was published for opposition. No third party filed an opposition to the registration of the DROP DOTS mark and no third party requested an extension of time to file an opposition to the registration. The registration of the mark DROP DOTS from this point is routine and the trademark will be registered shortly.

3. On information and belief, Defendant Five Below, Inc., is a Commonwealth of Pennsylvania corporation with corporate offices located at 701 Market Street, Suite 100, Philadelphia, PA 19106. On information and belief, Defendant Five Below Merchandising, Inc., is a Commonwealth of Pennsylvania corporation with corporate offices located at 701 Market Street, Philadelphia, PA 19106. On information and belief, Five Below has more than 725 department stores in the United States and at least twenty department stores in the Commonwealth of Virginia and stores within this District. According to Five Below’s website, it expects to “cut the ribbon” on approximately 125 new stores in 2018. Exhibit 1.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action under Section 39 of the Lanham Act, 15 U.S.C. § 1121, as well as 28 U.S.C. §§ 1331, 1332, and 1338, and the doctrine of supplemental jurisdiction, 28 U.S.C. § 1367. The amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and the parties are of diverse citizenship.

5. Personal jurisdiction over Defendants is proper because Defendants solicit, transact, and do business within the Commonwealth of Virginia and within this District, and the claims in this action arise out of such business in this District.

6. Defendants have caused and are causing injury to Plaintiff within this District by advertising, distributing, and selling counterfeit products, selling products which infringe Kessler's design patent, and referring to the product as a DROP DOT BALL which is nearly identical to Plaintiff's established DROP DOTS common law trademark in this District.

7. Venue is proper in this District under 28 U.S.C § 1391(b) because Defendants reside (*i.e.*, have numerous permanent places of business) within this District and a substantial part of the events giving rise to the claims alleged herein occurred, and are continuing to occur, in this District.

BACKGROUND

8. Kessler is a small family owned toy company that produces novel, creative and innovative toy products. Kessler relies on its partnerships with retailers for its family members to earn a living. The Kessler family has been focused on innovation for over three generations. Milton Kessler, father of Brian Kessler, and grandfather to Alex Kessler, started inventing during the great depression and World War II. He was the inventor of the Plastic Spin hoop, now known as the Hula Hoop. Brian Kessler followed in his father's footsteps, inventing many exciting new toys and consumer goods. He built the premier Spring Summer toy company Maui Toys, with a reputation for design, style and innovation. Alex Kessler is now following in his families' footsteps as head of Kessler Corporation. He has been creating/inventing new and

innovative products over the last three (3) years to continue innovative products sold under the Kessler family name.

9. On or around January 25, 2017, Kessler's family members created a new and innovative ball product referred to by the brand name DROP DOTS. Plaintiff Kessler sells various types of these balls under its DROP DOTS brand name. Kessler's DROP DOTS ball products have a unique product configuration including a unique look, tactile feel and bounce profile each of which functions as a source identifier. On information and belief, Kessler's DROP DOTS balls are on sale in at least 90 department stores in the Commonwealth of Virginia. On information and belief, in the spring/summer of 2018 Kessler's DROP DOTS balls were in the top five selling toy products in at least one national department store chain across the United States. The extent of these sales indicates that the unique look, tactile feel, and bounce profile of Kessler's DROP DOTS ball products have developed a secondary meaning. Kessler's DROP DOTS balls are sold in at least two sizes, MINI DROP DOTS balls and a regular size DROP DOTS ball. Sample images of Kessler's DROP DOTS products are provided in Exhibit 2 and are shown below:



10. Between May and November of 2017, Kessler was engaged in negotiations with Five Below for Five Below to sell Kessler's DROP DOTS ball products through Five Below's nationwide chain of department stores. During these negotiations, Kessler provided Five Below with confidential information related to Kessler's DROP DOTS ball products. The Power Point slides used by Kessler to present material to Five Below representatives included a slide that stated "For your eyes only. Please find enclosed proprietary information that you agree to hold in confidence. And you agree not to disclose any information in this document to a third party without express permission."

11. Five Below desired to purchase 30,000 DROP DOTS ball products from Kessler for distribution through its nationwide store chain. A final purchase order for DROP DOTS balls by Five Below was never completed and negotiations ceased after November 2017. Exhibit 3.

12. Kessler's DROP DOTS ball products were displayed and offered for sale under the DROP DOTS mark in Virginia and in other states at least as early as February 5, 2018.

13. On or around June 9, 2018, a Kessler employee noticed that a product which appeared to be a Kessler DROP DOTS ball product was on sale at a Five Below department store in Boardman, Ohio. A sample of this product was purchased. Exhibit 4, page 20. On June 16, 2018, another display of products which appeared to be Kessler DROP DOTS ball products was discovered in a Five Below department store in Downey, California. A sample of this product was also purchased. Exhibit 4, page 21. Kessler has also learned that what appear to be Kessler's DROP DOTS ball products are on sale in Maryland, Virginia and Washington, DC by Five Below. Samples of these products have also been purchased. Exhibit 4, pages 1-19. These "knock-off" products are being impermissibly sold at Five Below department stores. These "knock off" products copy the look and feel of Kessler's DROP DOTS ball product. These "knock off" products infringe Kessler's Design Patent. The receipts to these "knock-off" products identifies Five Below's product as a "Drop Dot Ball" which is nearly identical to Kessler's DROP DOTS mark. The use of Kessler's DROP DOTS brand name and copying its unique ball design by Five Below was not authorized.

14. Samples of Five Below's infringing products were purchased from six (6) locations in the Eastern District of Virginia including at Five Below Stores in Alexandria, Dulles, Chantilly (Fairfax) and Leesburg, Virginia. Samples of infringing products were also purchased in California, Ohio, Maryland and Washington, DC. In each case, the product is identified as a DROP DOT BALL on the sales receipt. A sample image of the Five Below DROP DOT BALL product along with a sales receipt identifying the product as a DROP DOT BALL (Exhibit 4) are shown below:



15. Five Below used the confidential information provided by Kessler and the sample DROP DOTS balls provided by Kessler to “knock-off” Kessler’s new and innovative product. On information and belief, Five Below is engaged in nationwide counterfeiting and sales of “knock off” copies of Kessler’s DROP DOTS balls, and nationwide infringement of Kessler’s legally issued design patent. Five Below refers to its knock-off products as Drop Dot Ball which is confusingly similar to Kessler’s DROP DOTS brand name. Five Below’s knock off product is an imitation of Kessler’s unique product configuration for Kessler’s DROP DOTS ball products.

16. On information and belief, the counterfeit by Five Below is a lower quality product that could be potentially dangerous to a consumer playing with or handling the product. Thus, sales of the counterfeit DROP DOT BALL product by Five Below could irreparably damage Kessler’s reputation.

17. On information and belief, Kessler has lost a major sales contract with a national department store chain due to Five Below's unauthorized counterfeiting of an inferior product at a lower price.

18. Five Below knew Kessler's confidential wholesale pricing and other wholesale business arrangements with other department stores chains and intentionally sells an inferior counterfeit product at a lower price to interfere with Kessler's business arrangements with these other department store chains.

COUNT ONE

Unfair Competition - Lanham Act § 43(a), 15 U.S.C. § 1125(a)

19. Plaintiff refers to and incorporates herein the allegations of each and every one of the above paragraphs, the same as if set forth herein.

20. Defendants market and sell DROP DOT BALL products at their Five Below department stores in the Eastern District of Virginia and in other locations in other states within the United States.

21. From its previous negotiations with Kessler, Defendants knew the DROP DOTS brand name and confidential information such as, the manufacturing method, product specifications, product configuration and wholesale pricing information. Instead of completing the negotiations with Kessler and obtaining authentic products from Kessler, Defendants used one or more of the sample balls Kessler provided to Defendants and the confidential information provided to Five Below to produce (or have produced) a nearly identical product. Defendants' intentional copying of the trade dress of Kessler's DROP DOTS ball product establishes a prima facie case of secondary meaning. In addition, because of the similarities between Kessler's DROP DOTS ball product and Defendants' "knock-off" ball products, there is a likelihood that

the Defendants' use of the trade dress will confuse the public. In addition, Five Below referred to this product with a nearly identical brand name and Five Below sold its product at a lower price. Five Below has passed off and intends to continue to pass off its product as Kessler's DROP DOTS balls. Defendants intend that consumers and commercial partners of Kessler will rely on this false information and form the belief that Defendants have the same product as Kessler's DROP DOTS ball at a much lower price.

22. Defendants' sale of a nearly identical product is literally and/or impliedly false and misleading. Defendants' use of a nearly identical brand name to the brand name of Kessler's product is literally and/or impliedly false and misleading. The Five Below DROP DOT BALL is an inferior product sold at a lower price.

23. Defendants' misuse of confidential information and sales of a nearly identical product constitutes unfair competition and false designation of origin under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), which provides in relevant part that "[a]ny person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person ... shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act."

24. By reason of Defendants' conduct and actions, Plaintiff has suffered and will continue to suffer, damage to their businesses, reputations and goodwill. Pursuant to 15 U.S.C. §

1117, Plaintiff is entitled to damages for Defendants' Lanham Act violations, an accounting of profits made by Defendants on sales of its DROP DOT BALL product and recovery of Plaintiff's costs and reasonable attorneys' fees incurred in this action.

25. Defendants' acts are willful, wanton, and calculated to deceive, and are undertaken in bad faith, making this an exceptional case entitling Plaintiff to recover additional damages and reasonable attorneys' fees pursuant to 15 U.S.C. § 1117.

26. Unless permanently enjoined by this Court, Defendants' acts will irreparably injure Plaintiff's goodwill and erode their market share. Pursuant to 15 U.S.C. § 1116, Plaintiff is entitled to preliminary and permanent injunctive relief to prevent Defendants' continuing acts.

COUNT TWO

Trademark Counterfeiting- Lanham Act 15 U.S.C. § 1114(1)

27. Plaintiff refers to and incorporates herein the allegations of each and every one of the above paragraphs, the same as if set forth herein.

28. Defendants market and sell DROP DOT BALL products at their Five Below department stores in the Eastern District of Virginia and in other locations in other states within the United States.

29. From its previous negotiations with Kessler, Defendants knew the DROP DOTS brand name, product specification, configuration of the product and pricing information. Instead of completing the negotiations with Kessler and offering authentic DROP DOTS balls, Defendants used one or more of the sample balls Kessler provided Defendants to produce (or have produced) a nearly identical ball with a nearly identical brand name at a lower price. Five Below intends to pass off its product as Kessler's DROP DOTS balls. Defendants intend that

consumers and commercial partners of Kessler will rely on this false information and form the belief that Defendants have the same product at a much lower price.

30. Defendants' sale of a nearly identical product with a nearly identical brand name is literally and/or impliedly false and misleading.

31. Defendants intentionally used a counterfeit mark in commerce in that Defendants offered the Five Below DROP DOT BALL product using Kessler's mark in commerce.

32. Defendants knew that the Five Below DROP DOT BALL product did not originate from Kessler and Defendants therefore knew that the mark they used was counterfeit.

33. Defendants sold, offered for sale, and distributed the Five Below DROP DOT BALL product using the counterfeit mark and therefore the use of the counterfeit mark occurred in connection with the sale, offering for sale, or distribution of goods.

34. Based on Defendants' use of a mark nearly identical to Kessler's mark and the configuration of Five Below's DROP DOT BALL product, Defendants' use of the counterfeit mark was likely to confuse consumers.

35. Plaintiff's U.S. Trademark Application Serial No. 87/893,461 for "DROP DOTS" was published in the Trademark Official Gazette on September 18, 2018, and is expected to issue in due course. By reason of Defendants' conduct and actions, Plaintiff has suffered and will continue to suffer, damage to their businesses, reputations and goodwill. Pursuant to 15 U.S.C. § 1117, Plaintiff is entitled to damages for Defendants' Lanham Act violations, an accounting of profits made by Defendants on sales of its DROP DOT BALL product and recovery of Plaintiff's costs and reasonable attorneys' fees incurred in this action.

36. Defendants' acts are willful, wanton, and calculated to deceive, and are undertaken in bad faith, making this an exceptional case entitling Plaintiff to recover additional damages and reasonable attorneys' fees pursuant to 15 U.S.C. § 1117.

37. Unless permanently enjoined by this Court, Defendants' acts will irreparably injure Plaintiff's goodwill and erode their market share. Pursuant to 15 U.S.C. § 1116, Plaintiff is entitled to preliminary and permanent injunctive relief to prevent Defendants' continuing acts.

COUNT THREE

Common Law Trademark Infringement and Unfair Competition

38. Plaintiff refers to and incorporates herein the allegations of each and every one of the above paragraphs, the same as if set forth herein.

39. Kessler has used, and continues to use DROP DOTS as a trademark in connection with its ball products.

40. The unique product configuration and appearance of Kessler's DROP DOTS balls functions as a source identifier. Kessler owns trade dress rights which consist of the unique look and feel of its DROP DOTS balls.

41. Plaintiff Kessler owns and enjoys common-law rights in the Commonwealth of Virginia in and to the unique product configuration used in connection with ball products. Plaintiff Kessler also owns and enjoys common law rights in the Commonwealth of Virginia to the mark DROP DOTS used in connection with ball products.

42. Defendants' use of the term "DROP DOT BALL" as a trademark constitutes unfair competition, trademark and trade dress infringement at common law. Defendants' counterfeiting of Kessler's ball product constitutes unfair competition, trademark and trade dress infringement at common law.

43. Defendants have used and continue to use the term DROP DOT BALL and produce a counterfeit ball product in a manner likely to cause confusion, to cause mistake, or to deceive as to the affiliation, connection, sponsorship, approval or association of Defendants with or by Plaintiff or Plaintiff's products or services, and/or is likely to create confusion as to the origin of Defendants' ball products.

44. As a direct and proximate cause of Defendants' conduct, Plaintiff has been damaged and will continue to suffer irreparable injury to its goodwill, its rights and to its business, unless and until Defendants are restrained from continuing their wrongful acts. Plaintiff is entitled to damages for Defendants' unfair competition, an accounting of profits made on sales of DROP DOT BALL products by Five Below and recovery of Plaintiff's costs of this action. In addition, Defendants knew, or should have known, that their conduct was reasonably likely to result in injury, damage or other harm, thus warranting the award of punitive damages.

COUNT FOUR
Copyright Infringement – 17 U.S.C. §§ 106, et seq.

45. Plaintiff refers to and incorporates herein the allegations of each and every one of the above paragraphs, the same as if set forth herein.

46. Kessler is the sole owner of the copyright in an original work that is fixed in tangible media of expression. The United States Copyright Office has accepted two applications for copyright registrations for the original work that have been assigned case numbers 1-6776319106 and 1-6926659581. The deposit, application and fee required for registration have been filed for each of these copyright applications. Copyright application case number 1-6776319106 is provided in Exhibit 5 and Copyright application case number 1-6926659581 is provided in Exhibit 6. On September 16, 2018, the U.S. Copyright Office refused registration of

application case number 1-6926659581 because the U.S. Copyright Office believed that the work lacked the authorship necessary to support a copyright claim. Exhibit 7.

47. Defendants have had access to Kessler's DROP DOTS ball product samples as well as access to DROP DOTS balls at other retail store locations. Defendants have produced, copied, reproduced, distributed, prepared derivative works and displayed a substantially similar work to Kessler's DROP DOTS ball product without Kessler's consent. Defendants are infringing the copyrights applied for in copyright case numbers 1-6776319106 and 1-6926659581. Defendants' acts violate Kessler's exclusive rights under the Copyright Act, 17 U.S.C. §§ 106 and 501, including Kessler's exclusive rights to produce, reproduce, prepare derivative works, and distribute copies of their work publicly, display and/or sell their work.

48. Defendants' infringement has been undertaken knowingly and with intent to financially gain from Kessler's protected copyrighted works. Accordingly, Defendants have directly infringed Kessler's copyrighted works.

49. Because of Defendants' infringing acts, Plaintiff is entitled to their actual damages and Defendants' profits attributable in an amount to be proved at trial and all other relief allowed under the Copyright Act.

50. Defendants' infringement has caused and is causing irreparable harm to Kessler, for which there is no adequate remedy at law. Unless this Court restrains Defendants from infringing Kessler's protected works, the harm will continue to occur in the future. Accordingly, Kessler is entitled to preliminary and permanent injunction.

COUNT FIVE
Infringement of United States Design Patent D829,287

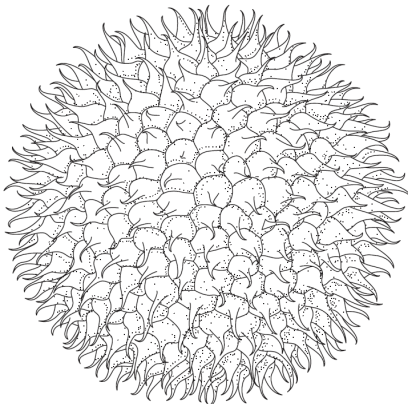
51. Plaintiff refers to and incorporates herein the allegations of each and every one of the above paragraphs, the same as if set forth herein.

52. On September 25, 2018, United States Design Patent No. D829,287 ('287 Patent) was issued by the United States Patent and Trademark Office. A copy of the '287 Patent is attached hereto as Exhibit 8 which remains in force.

53. Kessler Corp. is the exclusive owner of the '287 Patent with all substantial rights in and to the '287 Patent, including the right to bring this action for any past or present infringement, collect past and present damages and obtain injunctions, such conveyance having been memorialized in an assignment dated August 10, 2018, a copy of which is attached as Exhibit 9, which was recorded on August 14, 2018 at reel/frame number 046821/0076.

54. The '287 Patent is directed to a ball with a tactile surface. Kessler Corp has practiced the '287 Patent in connection with the commercialization of its Drop Dots and Mini Drop Dots balls, as shown for example in the side-by-side comparison below:

'287 Patent



Kessler Corp.'s Drop Dots ball

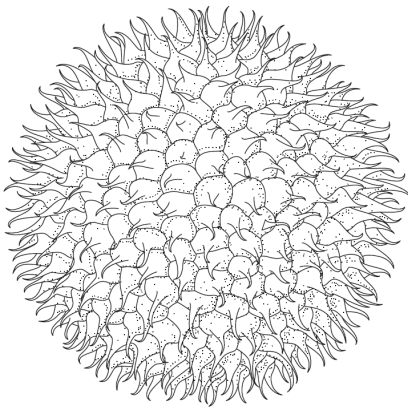


55. Five Below had actual notice of the Kessler's Drop Dots ball products through meetings between the parties beginning on or around May 2017. Instead of completing the

negotiations Five Below produced a competing product, referred to in sale receipts as Drop Dot Ball balls.

56. A side-by-side comparison of the '287 Patent and Five Below's Drop Dot Ball product is shown below:

'287 Patent



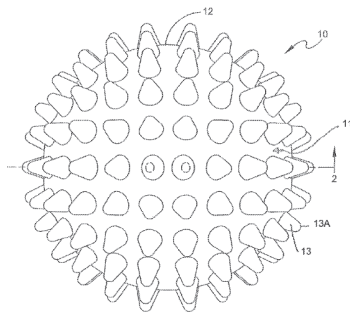
Five Below Drop Dot Ball product



57. As shown in the images, the Five Below Drop Dot Ball has a design that is the same or substantially the same as the design shown in the '287 Patent. The ball designs are so similar as to be nearly identical such that an ordinary observer, giving such attention as a purchaser usually gives, would be so deceived by the substantial similarity between the designs so as to be induced to purchase Five Below's Drop Dot Ball products believing them to be substantially the same as the ball design protected by the '287 Patent.

58. A three-way comparison of the '287 Patent and Five Below's Drop Dot Ball product in view of an example of the prior art in U.S. Application Publication Serial Number 2015/0005683 is shown below.

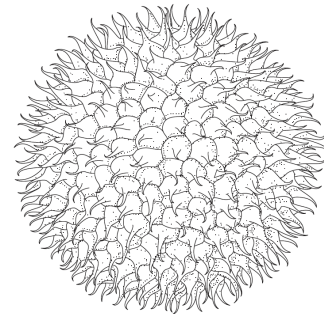
Prior Art



Accused Article



Kessler '287 Patent



59. As shown in the three- way comparison, the Five Below Drop Dot Ball has a design that is the same or substantially the same as the design shown in the '287 Patent in view of the prior art.

60. Kessler Corp. has not granted a license or any other authorization to Five Below to make use, offer for sale, sell or import balls that embody the design patented in the '287 Patent and which is proprietary to Kessler Corp.

61. Five Below has infringed Kessler Corp.'s rights, including infringement of the '287 Patent.

62. Kessler Corp. has been damaged by the foregoing infringing and wrongful acts of Five Below, including, without limitation, suffering actual damages.

63. The injury to Kessler Corp. is irreparable and Five Below's wrongful conduct and infringing activities will continue unless enjoined by this Court.

64. Five Below has engaged and is engaged in willful and deliberate infringement of the '287 Patent. Such willful and deliberate infringement justifies an increase of three times the

damages to be assessed pursuant to 35 U.S.C. § 284 and further qualifies this action as an exceptional case supporting an award of reasonable attorney's fees pursuant to 35 U.S.C. § 285.

65. Kessler Corp. is entitled to a permanent injunction preventing Five Below from further infringing the '287 Patent.

COUNT SIX

Trademark Infringement - Lanham Act 15 U.S.C. § 1114(1)

66. Plaintiff refers to and incorporates herein the allegations of each and every one of the above paragraphs, the same as if set forth herein.

67. U.S. Trademark Registration No. TBD for DROP DOTS will issue as a federally registered trademark shortly ("DROP DOTS Mark"). By virtue of this registration, the DROP DOTS Mark is entitled to protection under the Lanham Act, 15 U.S.C. §§ 1051, et seq.

68. Defendants' use of the Infringing DROP DOT BALL Mark is likely to cause confusion, mistake, or deception as to the origin, sponsorship, or approval of Defendants' ball products in that the public is likely to believe that those products are provided by, sponsored by, licensed by, affiliated, or associated with, or in some other way legitimately connected to Plaintiff or its products offered under the DROP DOTS Mark, in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1).

69. Plaintiff has been damaged by the aforementioned acts in an amount to be determined at trial.

70. Defendants' conduct, if it continues, will result in irreparable harm to Plaintiff and, specifically, to the goodwill and reputation associated with the DROP DOTS Mark, unless such conduct is enjoined.

RESERVATION OF ADDITIONAL CAUSES OF ACTION

71. Plaintiff is the owner of additional intellectual property assets that are currently pending that are relevant to this proceeding, such as, for example, U.S. patent application serial number 15/598,658 filed on May 18, 2017 and U.S. patent application serial number 15/982,513, attached hereto as Exhibits 10 and 11 respectively. Plaintiff intends to amend its complaint upon issuance of such additional intellectual property.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff request that the Court enter judgment in their favor and against Defendants as follows:

- A. A judgment and order that each Defendant, its agents, servants, employees, representatives, successors, and assigns, and those acting in privity or in concert with each Defendant, be preliminarily and permanently enjoined from further infringement of Kessler's DROP DOTS trademark;
- B. A judgment and order that each Defendant, its agents, servants, employees, representatives, successors, and assigns, and those acting in privity or in concert with each Defendant, be preliminarily and permanently enjoined from selling their counterfeit balls under any mark in violation of Kessler's trademark rights in the configuration of the ball;
- C. A judgment and order that each Defendant, its agents, servants, employees, representatives, successors, and assigns, and those acting in privity or in concert with each Defendant, be preliminarily and permanently enjoined from selling

their counterfeit balls under any mark in violation of Kessler's copyright rights in the configuration of the ball;

- D. A judgment and order that each Defendant, its agents, servants, employees, representatives, successors, and assigns, and those acting in privity or in concert with each Defendant, be preliminarily and permanently enjoined from infringing U.S. Design Patent No. D829,287 S;
- E. A judgment and order that each Defendant take corrective action to correct any erroneous impression persons may have derived concerning the source of Defendants' ball product, including without limitation the placement of corrective advertising to prevent the inducement of others from believing that Five Below sells Kessler's DROP DOTS balls;
- F. A judgment and order requiring Defendants to pay Plaintiff damages, including treble damages for willful infringement, and supplemental damages for any continuing post-verdict infringement up until entry of the final judgment with an accounting as needed;
- G. A judgment and order requiring Defendants to pay Plaintiff damages under 15 U.S.C. § 1117(a) in the amount of Plaintiff's actual and consequential damages and any profits of Defendants resulting from their advertisement, marketing and sale of DROP DOT BALL products;
- H. A judgment and order requiring Defendants to pay Plaintiff treble damages under 15 U.S.C. § 1117(b) for intentionally using a mark or designation, knowing that such mark or designation is a counterfeit mark;

- I. A judgment and order requiring Defendants to pay Plaintiff pre-judgment and post-judgment interest on the damages awarded and assessing all costs of this action against Defendants; and/or
- J. A judgment and order providing such other and further relief as the Court deems just and equitable.

DEMAND FOR JURY TRIAL

Plaintiff, under Rule 38 of the Federal Rules of Civil Procedure, requests a trial by jury of any issues so triable by right.

DATED November 19, 2018.

Respectfully submitted,

By: /s/ Steven War

Steven War (VSB # 45048)

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By: /s/ Kevin J. McNeely

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*ATTORNEY FOR PLAINTIFF KESSLER
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VERIFICATION

I, Alexander Kessler, declare under penalty of perjury that that I have read the foregoing First Amended Complaint and the exhibits, and that the information stated therein as factual is true and correct, and those factual matters which are stated upon information and belief are believed to be true and correct.

Executed on: November 19, 2018

A handwritten signature in black ink, appearing to read 'Alexander Kessler', written over a horizontal line.

Alexander Kessler
Chief Executive Officer
Kessler Corporation

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on November 19, 2018, I have caused a true and correct copy of the foregoing to be electronically filed with the Clerk of the District Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: November 19, 2018

By: /s/ Steven War
Steven War