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FILED

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KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: K. Main, Deputy

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF MARIN
10 UNLIMITED CIVIL JURISDICTION

11 JOHN MOORE,

12 Plaintiff,

13 v.

14 EVERLAST WORLDWIDE INC.; GILL
15 ATHLETICS, INC.; KRACO ENTERPRISES,
16 LLC; POWER SYSTEMS, INC.; PRO
SPORTS, INC.; and DOES 1-150, inclusive,

17 Defendants.
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Case No. QIV 1004742

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Cal. Health & Safety Code § 25249.6 et seq.)

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff JOHN MOORE, in
3 the public interest of the citizens of the State of California, to enforce the People’s right to be
4 informed of the presence of di(2-ethylhexyl)phthalate (“DEHP”), a toxic chemical found in
5 exercise/fitness mats and general purpose mats sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failures to
7 warn California citizens about their exposure to DEHP, present in or on certain exercise/fitness
8 mats and general purpose mats that defendants manufacture, import, distribute, and/or offer for
9 sale to consumers throughout the State of California.

10 3. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986,
11 California Health & Safety Code § 25249.6 *et seq.* (“Proposition 65”), “No person in the course
12 of doing business shall knowingly and intentionally expose any individual to a chemical known
13 to the state to cause cancer or reproductive toxicity without first giving clear and reasonable
14 warning to such individual. . . .” (*Cal. Health & Safety Code § 25249.6.*)

15 4. On October 23, 2003, California identified and listed DEHP as a chemical known
16 to cause birth defects and other reproductive harm. DEHP became subject to the warning
17 requirement one year later and was, therefore, subject to the “clear and reasonable warning”
18 requirements of Proposition 65, beginning on October 23, 2004. (*27 CCR § 27001 (c); Cal.*
19 *Health & Safety Code § 25249.8.*)

20 5. DEHP shall be referred to hereinafter as the “Listed Chemical.”

21 6. Defendants manufacture, import, distribute, and/or sell exercise/fitness mats and
22 general purpose mats containing the Listed Chemical as follows:

23 a. Defendant EVERLAST WORLDWIDE INC. (“EVERLAST”)
24 manufactures, imports, distributes, and/or sells exercise/fitness mats containing
25 the Listed Chemical including, but not limited to, *Everlast Folding Exercise Mat,*
26 *Model: 8050 (# 0 09283 08050 1);*

27 b. Defendant GILL ATHLETICS, INC. (“GILL”) manufactures,
28 imports, distributes, and/or sells exercise/fitness mats containing the Listed

1 Chemical including, but not limited to, *Fitness Aerobic Mat 2'x 6', Item No.*
2 *TA3082*;

3 c. Defendant KRACO ENTERPRISES, LLC (“KRACO”)
4 manufactures, imports, distributes, and/or sells general purpose mats containing
5 the Listed Chemical including, but not limited to, *Utility All Purpose Mat, U-810*
6 *(#0 33299 25071 9)*;

7 d. Defendant POWER SYSTEMS, INC. (“POWER SYSTEMS”)
8 manufactures, imports, distributes, and/or sells exercise/fitness mats containing
9 the Listed Chemical including, but not limited to, *Power Systems Deluxe Fitness*
10 *Mat, Item #90804*;

11 e. Defendant PRO SPORTS, INC. (“PRO SPORTS”) manufactures,
12 imports, distributes, and/or sells exercise/fitness mats containing the Listed
13 Chemical including, but not limited to, *Economy 3-Fold Exercise Mat, MX24 (#7*
14 *10858 01572 8)*.

15 7. All such exercise/fitness mats and general purpose mats containing the Listed
16 Chemical, as listed in paragraphs 6 (a) – (e) above, shall hereinafter be collectively referred to as
17 the “PRODUCTS.” However, as to each individual defendant, “PRODUCTS” shall only refer to
18 the specific category/categories identified in paragraphs 6(a)-(e) in conjunction with that specific
19 defendant.

20 8. Defendants’ failure to warn adequately, if at all, a variety of California consumers,
21 businesses, employees, and other persons not covered by California’s Occupational Safety
22 Health Act, Labor Code §6300 *et seq.*, in the State of California about their exposure to the
23 Listed Chemical in conjunction with defendants’ distribution, importation, manufacturing, and
24 sale of the PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinder of
25 such conduct as well as civil penalties for each violation.

26 9. For defendants’ violations of Proposition 65, plaintiff seeks preliminary injunctive
27 and permanent injunctive relief to compel defendants to provide purchasers or users of the
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1 PRODUCTS with the required warning regarding the health hazards of the Listed Chemical.
2 (*Cal. Health & Safety Code § 25249.7(a).*)

3 10. Plaintiff also seeks civil penalties against defendants for their violations of
4 Proposition 65, as provided for by California Health & Safety Code § 25249.7(b).

5 **PARTIES**

6 11. Plaintiff JOHN MOORE is a citizen of the State of California who is dedicated to
7 protecting the health of California citizens through the elimination or reduction of toxic
8 exposures from consumer and commercial products, and brings this action in the public interest
9 pursuant to California Health & Safety Code § 25249.7.

10 12. Defendants EVERLAST, GILL, KRACO, POWER SYSTEMS, and PRO
11 SPORTS, are each persons doing business within the meaning of California Health & Safety
12 Code § 25249.11.

13 13. Defendants EVERLAST, GILL, KRACO, POWER SYSTEMS, and PRO
14 SPORTS, each manufacture, import, distribute, and/or offer the PRODUCTS for sale or use in
15 the State of California or imply by their conduct that they manufacture, import, distribute, and/or
16 offer the PRODUCTS for sale or use in the State of California.

17 14. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each persons
18 doing business within the meaning of California Health & Safety Code § 25249.11.

19 15. MANUFACTURER DEFENDANTS engage in the process of research, testing,
20 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
21 engage in the process of research, testing, designing, assembling, fabricating and/or
22 manufacturing, one or more of the PRODUCTS for sale or use in the State of California.

23 16. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons
24 doing business within the meaning of California Health & Safety Code § 25249.11.

25 17. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
26 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use in
27 the State of California.

1 18. Defendants DOES 101-150 (“RETAIL DEFENDANTS”) are each persons doing
2 business within the meaning of California Health & Safety Code § 25249.11.

3 19. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State
4 of California and, in some circumstances, may also be manufacturers and/or distributors.

5 20. At this time, the true names of Defendants DOES 1 through 150, inclusive, are
6 unknown to plaintiff, who therefore sues said defendants by their fictitious name pursuant to
7 Code of Civil Procedure § 474. Plaintiff is informed and believes, and on that basis alleges, that
8 each of the fictitiously named defendants is responsible for the acts and occurrences herein
9 alleged. When ascertained, their true names shall be reflected in an amended complaint.

10 21. EVERLAST, GILL, KRACO, POWER SYSTEMS, PRO SPORTS,
11 MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAIL
12 DEFENDANTS shall, where appropriate, collectively be referred to hereinafter as
13 “DEFENDANTS.”

14 **VENUE AND JURISDICTION**

15 22. Venue is proper in the Marin County Superior Court, pursuant to Code of Civil
16 Procedure §§ 394, 395, 395.5, because this Court is a court of competent jurisdiction, because
17 one or more instances of wrongful conduct occurred, and continues to occur, in the County of
18 Marin and/or because DEFENDANTS conducted, and continue to conduct, business in this
19 County with respect to the PRODUCTS.

20 23. The California Superior Court has jurisdiction over this action pursuant to
21 California Constitution Article VI, § 10, which grants the Superior Court “original jurisdiction in
22 all causes except those given by statute to other trial courts.” The statute under which this action
23 is brought does not specify any other basis of subject matter jurisdiction.

24 24. The California Superior Court has jurisdiction over DEFENDANTS based on
25 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation, or
26 association that either are citizens of the State of California, have sufficient minimum contacts in
27 the State of California, or otherwise purposefully avail themselves of the California market.
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1 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California
2 courts consistent with traditional notions of fair play and substantial justice.

3 **FIRST CAUSE OF ACTION**

4 **(Violation of Proposition 65 - Against All Defendants)**

5 25. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
6 Paragraphs 1 through 24, inclusive.

7 26. The citizens of the State of California have expressly stated in Proposition 65 that
8 they must be informed "about exposures to chemicals that cause cancer, birth defects and other
9 reproductive harm." (*Cal. Health & Safety Code § 25249.6.*)

10 27. Proposition 65 states, "[n]o person in the course of doing business shall knowingly
11 and intentionally expose any individual to a chemical known to the state to cause cancer or
12 reproductive toxicity without first giving clear and reasonable warning to such individual...."
13 (*Id.*)

14 28. On or about June 3, 2010, sixty-day notice of violations, together with the
15 requisite certificates of merit, were provided to EVERLAST, GILL, POWER SYSTEMS, PRO
16 SPORTS and various public enforcement agencies stating that as a result of EVERLAST, GILL,
17 POWER SYSTEMS and PRO SPORTS' sales of the PRODUCTS, purchasers and users in the
18 State of California were being exposed to DEHP resulting from the reasonably foreseeable uses
19 of the PRODUCTS, without the individual purchasers and users first having been provided with
20 a "clear and reasonable warning" regarding such toxic exposures.

21 29. On or about June 17, 2010, a sixty-day notice of violation, together with the
22 requisite certificate of merit, was provided to KRACO and various public enforcement agencies
23 stating that as a result of KRACO's sales of the PRODUCTS, purchasers and users in the State
24 of California were being exposed to DEHP resulting from the reasonably foreseeable uses of the
25 PRODUCTS, without the individual purchasers and users first having been provided with a
26 "clear and reasonable warning" regarding such toxic exposures.

27 30. DEFENDANTS have engaged in the manufacture, importation, distribution, and/or
28 offering of the PRODUCTS for sale or use in violation of California Health & Safety Code §

1 25249.6 and DEFENDANTS' manufacture, importation, distribution, and/or offering of the
2 PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 has
3 continued to occur beyond DEFENDANTS' receipt of plaintiff's sixty-day notices of violation.
4 Plaintiff further alleges and believes that such violations will continue to occur into the future.

5 31. After receipt of the claims asserted in the June 3, 2010 and June 17, 2010 sixty-day
6 notices of violation, the appropriate public enforcement agencies have failed to commence and
7 diligently prosecute a cause of action against DEFENDANTS under Proposition 65.

8 32. The PRODUCTS manufactured, imported, distributed, and/or offered for sale or
9 use in California by DEFENDANTS contained the Listed Chemical above the allowable state
10 limits.

11 33. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
12 imported, distributed, and/or offered for sale or use by DEFENDANTS in California contained
13 the Listed Chemical.

14 34. The Listed Chemical was present in or on the PRODUCTS in such a way as to
15 expose individuals to the Listed Chemical through dermal contact, ingestion, and/or inhalation
16 during the reasonably foreseeable use of the PRODUCTS.

17 35. The normal and reasonably foreseeable use of the PRODUCTS has caused and
18 continues to cause consumer and workplace exposures to the Listed Chemical, as such exposure
19 is defined by 27 California Code of Regulations ("CCR") § 25602(b).

20 36. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
21 the PRODUCTS would expose individuals to the Listed Chemical through dermal contact,
22 ingestion, and/or inhalation.

23 37. DEFENDANTS intended that such exposures to the Listed Chemical from the
24 reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-accidental
25 participation in the manufacture, importation, distribution, and/or offer for sale or use of
26 PRODUCTS to individuals in the State of California.

27 38. DEFENDANTS failed to provide a "clear and reasonable warning" to those
28 consumers and/or other individuals in the State of California who were or who could become

1 exposed to the Listed Chemical through dermal contact, ingestion, and/or inhalation during the
2 reasonably foreseeable use of the PRODUCTS.

3 39. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
4 directly by California voters, individuals exposed to the Listed Chemical through dermal contact
5 and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS, sold by
6 DEFENDANTS without a “clear and reasonable warning,” have suffered, and continue to suffer,
7 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

8 40. As a consequence of the above-described acts, DEFENDANTS are each liable for
9 a maximum civil penalty of \$2,500 per day for each violation pursuant to California Health &
10 Safety Code § 25249.7(b).

11 41. As a consequence of the above-described acts, California Health & Safety Code
12 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
13 DEFENDANTS.

14 **PRAYER FOR RELIEF**

15 Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

16 1. That the Court, pursuant to California Health & Safety Code § 25249.7(b), assess
17 civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation alleged
18 herein;

19 2. That the Court, pursuant to California Health & Safety Code § 25249.7(a),
20 preliminarily and permanently enjoin DEFENDANTS from manufacturing, importing,
21 distributing or offering the PRODUCTS for sale or use in California, without providing “clear
22 and reasonable warnings” as defined by 27 CCR § 25601, as to the harms associated with
23 exposures to the Listed Chemical;

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