

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Reuben Yeroushalmi (SBN 193981)
Daniel D. Cho (SBN 105409)
Ben Yeroushalmi (SBN 232540)
YEROUSHALMI & ASSOCIATES
9100 Wilshire Boulevard, Suite 240W
Beverly Hills, California 90212
Telephone: 310.623.1926
Facsimile: 310.623.1930

ENDORSED
FILED
San Francisco County Superior Court

DEC 23 2013

CLERK OF THE COURT
DENNIS TOYAMA
BY: _____ Deputy Clerk

Attorneys for Plaintiff,
Consumer Advocacy Group, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

CONSUMER ADVOCACY GROUP, INC.,
in the public interest,

Plaintiff,

v.

FITNESS EM, LLC, a Nevada Limited
Liability Company; FITNESS EQUIPMENT
MANUFACTURING, LLC, a Nevada
Limited Liability Company; ROSS STORES,
INC. DBA DD'S DISCOUNTS, a Delaware
Corporation; and DOES 1-20;

Defendants.

CASE NO. **CGC - 13 - 536374**

COMPLAINT FOR PENALTY AND
INJUNCTION

Violation of Proposition 65, the Safe
Drinking Water and Toxic Enforcement
Act of 1986 (*Health & Safety Code*, §
25249.5, *et seq.*)

ACTION IS AN UNLIMITED CIVIL
CASE (exceeds \$25,000)

BY FAX

Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
defendants FITNESS EM, LLC, FITNESS EQUIPMENT MANUFACTURING, LLC; ROSS
STORES, INC. dba DD'S DISCOUNTS; and DOES 1-20 as follows:

//
//
//

THE PARTIES

- 1
2 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. (“Plaintiff” or “CAG”) is an
3 organization qualified to do business in the State of California. CAG is a person within
4 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting
5 as a private attorney general, brings this action in the public interest as defined under
6 Health and Safety Code section 25249.7, subdivision (d).
- 7 2. Defendant FITNESS EM, LLC (“FITNESS EM”) is a Nevada limited liability company,
8 doing business in the State of California at all relevant times herein.
- 9 3. Defendant FITNESS EQUIPMENT MANUFACTURING, LLC (“FITNESS
10 EQUIPMENT”) is a Nevada limited liability company, doing business in the State of
11 California at all relevant times herein.
- 12 4. Defendant ROSS STORES, INC. dba DD’S DISCOUNTS (“ROSS STORES”) is a
13 Delaware Corporation, doing business in the State of California at all relevant times
14 herein.
- 15 5. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,
16 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
17 complaint to allege their true names and capacities when ascertained. Plaintiff is
18 informed, believes, and thereon alleges that each fictitiously named defendant is
19 responsible in some manner for the occurrences herein alleged and the damages caused
20 thereby.
- 21 6. At all times mentioned herein, the term “Defendants” includes FITNESS EM, FITNESS
22 EQUIPMENT, ROSS STORES, and DOES 1-20.
- 23 7. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
24 times mentioned herein have conducted business within the State of California.
- 25 8. Upon information and belief, at all times relevant to this action, each of the Defendants,
26 including DOES 1-20, was an agent, servant, or employee of each of the other
27 Defendants. In conducting the activities alleged in this Complaint, each of the
28

1 Defendants was acting within the course and scope of this agency, service, or
2 employment, and was acting with the consent, permission, and authorization of each of
3 the other Defendants. All actions of each of the Defendants alleged in this Complaint
4 were ratified and approved by every other Defendant or their officers or managing agents.
5 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged
6 wrongful conduct of each of the other Defendants.

- 7 9. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
8 Defendants was a person doing business within the meaning of Health and Safety Code
9 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
10 employees at all relevant times.

11 JURISDICTION

- 12 10. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
13 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
14 those given by statute to other trial courts. This Court has jurisdiction over this action
15 pursuant to Health and Safety Code section 25249.7, which allows enforcement of
16 violations of Proposition 65 in any Court of competent jurisdiction.

- 17 11. This Court has jurisdiction over Defendants named herein because Defendants either
18 reside or are located in this State or are foreign corporations authorized to do business in
19 California, are registered with the California Secretary of State, or who do sufficient
20 business in California, have sufficient minimum contacts with California, or otherwise
21 intentionally avail themselves of the markets within California through their manufacture,
22 distribution, promotion, marketing, or sale of their products within California to render
23 the exercise of jurisdiction by the California courts permissible under traditional notions
24 of fair play and substantial justice.

- 25 12. Venue is proper in the County of San Francisco because one or more of the instances of
26 wrongful conduct occurred, and continues to occur, in the County of San Francisco
27
28

1 and/or because Defendants conducted, and continue to conduct, business in the County of
2 San Francisco with respect to the consumer product that is the subject of this action.
3

4 BACKGROUND AND PRELIMINARY FACTS

5 13. In 1986, California voters approved an initiative to address growing concerns about
6 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to
7 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
8 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
9 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
10 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
11 from contamination, to allow consumers to make informed choices about the products
12 they buy, and to enable persons to protect themselves from toxic chemicals as they see
13 fit.

14 14. Proposition 65 requires the Governor of California to publish a list of chemicals known to
15 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
16 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
17 chemicals and chemical families. Proposition 65 imposes warning requirements and
18 other controls that apply to Proposition 65-listed chemicals.

19 15. All businesses with ten (10) or more employees that operate or sell products in California
20 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
21 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
22 water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and
23 reasonable" warnings before exposing a person, knowingly and intentionally, to a
24 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

25 16. Proposition 65 provides that any person "violating or threatening to violate" the statute
26 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.
27 "Threaten to violate" means "to create a condition in which there is a substantial
28

1 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).

2 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
3 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

4 17. Plaintiff identified certain practices of manufacturers and distributors of Di (2-ethylhexy)
5 phthalate ("DEHP")-bearing products of exposing, knowingly and intentionally, persons
6 in California to the Proposition 65-listed chemicals of such products without first
7 providing clear and reasonable warnings of such to the exposed persons prior to the time
8 of exposure. Plaintiff later discerned that Defendants engaged in such practice.

9 18. On January 1, 1988, the Governor of California added DEHP to the list of chemicals
10 known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP
11 to the list of chemicals known to the State to cause developmental male reproductive
12 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
13 months after addition of DEHP to the list of chemicals known to the State to cause
14 reproductive toxicity, DEHP became fully subject to Proposition 65 warning
15 requirements and discharge prohibitions.

16 **SATISFACTION OF PRIOR NOTICE**

17 19. On or about April 17, 2013, Plaintiff gave notice of alleged violations of Health and
18 Safety Code section 25249.6, concerning consumer products exposures, subject to a
19 private action to FITNESS EM, FITNESS EQUIPMENT, ROSS STORES, the California
20 Attorney General, County District Attorneys, and City Attorneys for each city containing
21 a population of at least 750,000 people in whose jurisdictions the violations allegedly
22 occurred, concerning the products Weighted Jump Ropes containing DEHP.

23 20. Before sending the notices of alleged violation, Plaintiff investigated the consumer
24 products involved, the likelihood that such products would cause users to suffer
25 significant exposures to DEHP, and the corporate structure of each of the Defendants.

26 21. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
27 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
28

1 Plaintiff who executed the certificate had consulted with at least one person with relevant
2 and appropriate expertise who reviewed data regarding the exposures to DEHP, the
3 subject Proposition 65-listed chemical of this action. Based on that information, the
4 attorney for Plaintiff who executed the Certificate of Merit believed there was a
5 reasonable and meritorious case for this private action. The attorney for Plaintiff attached
6 to the Certificate of Merit served on the Attorney General the confidential factual
7 information sufficient to establish the basis of the Certificate of Merit.

8 22. Plaintiff's notices of alleged violations also included a Certificate of Service and a
9 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
10 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

11 23. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
12 gave notices of the alleged violations to ROSS STORES, and the public prosecutors
13 referenced in Paragraph 19.

14 24. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
15 any applicable district attorney or city attorney has commenced and is diligently
16 prosecuting an action against the Defendants.

17
18 **FIRST CAUSE OF ACTION**

19 **(By CONSUMER ADVOCACY GROUP, INC. and against FITNESS EM,
20 FITNESS EQUIPMENT, ROSS STORES, and DOES 1-20 for Violations of
21 Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986
(Health & Safety Code, §§ 25249.5, et seq.))**

22 **Weighted Jump Ropes**

23 25. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
24 reference paragraphs 1 through 24 of this complaint as though fully set forth herein.

25 26. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
26 distributor, promoter, or retailer of Weighted Jump Ropes, which includes but is not
27 limited to "Empower ® Weighted Jump Rope" ("JUMP ROPES").

28 27. JUMP ROPES contain DEHP.

1 28. Defendants knew or should have known that DEHP has been identified by the State of
2 California as a chemical known to cause reproductive toxicity and therefore was subject
3 to Proposition 65 warning requirements. Defendants were also informed of the presence
4 of DEHP in JUMP ROPES within Plaintiff's notice of alleged violations further discussed
5 above at Paragraph 19.

6 29. Plaintiff's allegations regarding JUMP ROPES concerns "[c]onsumer products
7 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
8 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
9 exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, §*
10 *25602(b)*. JUMP ROPES is a consumer product, and, as mentioned herein, exposures to
11 DEHP took place as a result of such normal and foreseeable consumption and use.

12 30. Plaintiff is informed, believes, and thereon alleges that between April 17, 2010 and the
13 present, each of the Defendants knowingly and intentionally exposed California
14 consumers and users of JUMP ROPES, which Defendants manufactured, distributed, or
15 sold as mentioned above, to DEHP, without first providing any type of clear and
16 reasonable warning of such to the exposed persons before the time of exposure.
17 Defendants have distributed and sold JUMP ROPES in California. Defendants know and
18 intend that California consumers will use and consume JUMP ROPES, thereby exposing
19 them to DEHP. Defendants thereby violated Proposition 65.

20 31. The principal routes of exposure are through dermal contact, ingestion and inhalation.
21 Persons sustain exposures by handling JUMP ROPES without wearing gloves or any
22 other personal protective equipment, or by touching bare skin or mucous membranes with
23 gloves after handling JUMP ROPES, as well as through direct and indirect hand to mouth
24 contact, hand to mucous membrane, or breathing in particulate matter dispersed from
25 JUMP ROPES.

26 32. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
27 Proposition 65 as to JUMP ROPES have been ongoing and continuous to the date of the
28

1 signing of this complaint, as Defendants engaged and continue to engage in conduct
2 which violates Health and Safety Code section 25249.6, including the manufacture,
3 distribution, promotion, and sale of JUMP ROPES, so that a separate and distinct
4 violation of Proposition 65 occurred each and every time a person was exposed to DEHP
5 by JUMP ROPES as mentioned herein.

6 33. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
7 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
8 violations alleged herein will continue to occur into the future.

9 34. Based on the allegations herein, Defendants are liable for civil penalties of up to
10 \$2,500.00 per day per individual exposure to DEHP from JUMP ROPES, pursuant to
11 Health and Safety Code section 25249.7(b).

12 35. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
13 filing this Complaint.

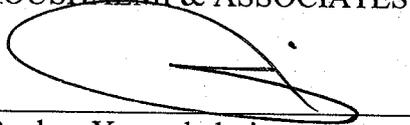
14
15 **PRAYER FOR RELIEF**

16 Plaintiff demands against each of the Defendants as follows:

- 17 1. A permanent injunction mandating Proposition 65-compliant warnings;
18 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
19 3. Costs of suit;
20 4. Reasonable attorney fees and costs; and
21 5. Any further relief that the court may deem just and equitable.

22
23 Dated: December 23, 2013

YEROUSHALMI & ASSOCIATES

24
25 BY: 

26 Reuben Yeroushalmi
27 Attorneys for Plaintiff,
28 Consumer Advocacy Group, Inc.