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UNFORSEED
FILED
ALAMEDA COUNTY

OCT 15 2015

CLERK OF THE SUPERIOR COURT
By D. Oliver

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

10 EMA BELL,

11 Plaintiff,

12 vs.

13 FITNESS EM, LLC,

14 Defendant.

CASE NO.: *R* 15789623

JUDGE

DEPT.:

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

(Violation of Health & Safety Code §25249.5
et seq.)

BY FAX

18
19 Plaintiff Ema Bell ("Plaintiff" or "Bell"), by and through her attorneys, alleges the
20 following cause of action in the public interest of the citizens of the State of California.

21 BACKGROUND OF THE CASE

22 1. Plaintiff brings this representative action on behalf of all California citizens to
23 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified
24 at the Health and Safety Code § 25249.5 *et seq.* ("Proposition 65"), which reads, in relevant part,
25 "[n]o person in the course of doing business shall knowingly and intentionally expose any
26 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
27 giving clear and reasonable warning to such individual ...". Health & Safety Code § 25249.6.
28

1 2. This complaint is a representative action brought by Plaintiff in the public interest
2 of the citizens of the State of California to enforce the People’s right to be informed of the health
3 hazards caused by exposure to the chemicals Diisononyl phthalate (DINP) and Di-isodecyl
4 phthalate (DIDP) that are found in exercise balls sold and/or distributed by defendant Fitness
5 EM, LLC a/k/a Fitness Equipment Manufacturing, LLC (“Fitness EM” or “Defendant”) in
6 California.

7 3. DIDP is a harmful chemical known to the State of California to cause
8 reproductive toxicity. On April 20, 2007, the State of California listed DIDP as a chemical
9 known to the State to cause reproductive toxicity and it has come under the purview of
10 Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety
11 Code §§ 25249.8 & 25249.10(b).

12 4. DINP is a harmful chemical known to the State of California to cause cancer. On
13 December 20, 2013, the State of California listed DINP as a chemical known to cause cancer and
14 it has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit.
15 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

16 5. Proposition 65 requires all businesses with ten (10) or more employees that
17 operate within California or sell products therein to comply with Proposition 65 regulations.
18 Included in such regulations is the requirement that businesses must label any product containing
19 a Proposition 65-listed chemical with a “clear and reasonable” warning before “knowingly and
20 intentionally” exposing any person to it.

21 6. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
22 to be imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety
23 Code § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin
24 the actions of a defendant which “violate or threaten to violate” the statute. Health & Safety
25 Code § 25249.7.

26 7. Plaintiff alleges that Defendant produces, manufactures, distributes, imports, sells,
27 and/or offers for sale, without the required warning, exercise balls in California containing DIDP
28

1 and DINP. These products include, but are not limited to the *Empower 3-IN-1 Core Ball*, UPC#
2 8 31090 00197 0 (the "Product").

3 8. Defendant's failure to warn consumers, workers, and other individuals in
4 California of the health hazards associated with exposure to DIDP and/or DINP in conjunction
5 with the sale, manufacture, and/or distribution of the Product is a violation of Proposition 65 and
6 subjects Defendant to the enjoinder and civil penalties described herein.

7 9. Plaintiff seeks civil penalties against Defendant for its violations of Proposition
8 65 in accordance with Health and Safety Code § 25249.7(b).

9 10. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
10 Defendant to provide purchasers or users of the Product with the required warnings related to the
11 dangers and health hazards associated with exposure to DIDP and DINP pursuant to Health and
12 Safety Code § 25249.7(a).

13 PARTIES

14 11. Plaintiff is a citizen of the State of California acting in the interest of the general
15 public to promote awareness of exposures to toxic chemicals in products sold in California and
16 to improve human health by reducing hazardous substances contained in such items. He brings
17 this action in the public interest pursuant to Health and Safety Code § 25249.7(d).

18 12. Defendant Fitness EM designs, engineers, markets, and distributes personal
19 training and wellness products exclusively for women. Through its business, Fitness EM
20 effectively manufactures, imports, distributes, sells, and/or offers the Product for sale or use in
21 the State of California, or it implies by its conduct that it manufactures, imports, distributes, sells,
22 and/or offers the Product for sale or use in the State of California. Fitness EM maintains a
23 registered agent for service of process at c/o Steve Sandler, 320 7th Street, Huntington Beach, CA
24 92648. Fitness EM is a "person" in the course of doing business within the meaning of Health &
25 Safety Code §§ 25249.6 and 25249.11.

26 VENUE AND JURISDICTION

27 13. Venue is proper in the County of Alameda because one or more of the instances
28 of wrongful conduct occurred, and continue to occur in this county and/or because Defendant

1 conducted, and continues to conduct, business in the County of Alameda with respect to the
2 Product.

3 14. This Court has jurisdiction over this action pursuant to California Constitution
4 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
5 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the
6 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,
7 this Court has jurisdiction over this lawsuit.

8 15. This Court has jurisdiction over Defendant because it has sufficient minimum
9 contacts with the State of California, and/or has otherwise purposefully availed itself of the
10 California market. Such purposeful availment has rendered the exercise of jurisdiction by
11 California courts consistent and permissible with traditional notions of fair play and substantial
12 justice.

13 **SATISFACTION OF NOTICE REQUIREMENTS**

14 16. On June 1, 2015, Plaintiff gave notice of alleged violation of Health and Safety
15 Code § 25249.6 (the "Notice") to Defendant concerning the exposure of California citizens to
16 DIDP and DINP contained in the Product without proper warning, subject to a private action to
17 Defendant and to the California Attorney General's office and the offices of the County District
18 attorneys and City Attorneys for each city with a population greater than 750,000 persons
19 wherein the herein violations allegedly occurred.

20 17. The Notice complied with all procedural requirements of Proposition 65 including
21 the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at
22 least one person with relevant and appropriate expertise who reviewed relevant data regarding
23 DIDP and DINP exposure, and that counsel believed there was meritorious and reasonable cause
24 for a private action.

25 18. After receiving Plaintiff's Notice, and to Plaintiff's best information and belief,
26 none of the noticed appropriate public enforcement agencies have commenced and diligently
27 prosecuted a cause of action against Defendants under Proposition 65 to enforce the alleged
28 violations which are the subject of Plaintiff's Notice of violation.

1 19. Plaintiff is commencing this action more than sixty (60) days from the date of her
2 Notice to Defendants, as required by law.

3 **FIRST CAUSE OF ACTION**

4 **(By Plaintiff against Defendant for the Violation of Proposition 65)**

5 20. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of
6 this complaint as though fully set forth herein.

7 21. Defendant has, at all times mentioned herein, acted as a manufacturer, distributor,
8 and/or retailer of the Product.

9 22. The Product contains DIDP and DINP, hazardous chemicals found on the
10 Proposition 65 list of a chemical known to be hazardous to human health.

11 23. The Product does not comply with the Proposition 65 warning requirements.

12 24. Plaintiff, based on her best information and belief, avers that at all relevant times
13 herein, and at least since March 26, 2015, continuing until the present, that Defendant has
14 continued to knowingly and intentionally expose California users and consumers of the Product
15 to DIDP and DINP without providing required warnings under Proposition 65.

16 25. The exposures that are the subject of the Notice result from the purchase,
17 acquisition, handling and recommended use of the product. Consequently, the primary route of
18 exposure to these chemicals is through direct dermal exposure through contact between the
19 exercise ball surface and the user's exposed skin during exercise or during handling of the
20 exercise ball. Indirect dermal exposure can occur by transfer of DINP and DIDP to the user's
21 clothing with subsequent dermal absorption. Should the user perspire during exercising with the
22 product, phthalate skin permeation rates can potentially increase as aqueous phthalate skin
23 permeation rates are faster than neat phthalate permeation. Finally, while mouthing of the
24 product does not seem likely, some amount of exposure through ingestion can occur by handling
25 the product with subsequent touching of the users hand to mouth.

26 28. Plaintiff, based on her best information and belief, avers that such exposures will
27 continue every day until clear and reasonable warnings are provided to Product purchasers and
28 users or until this known toxic chemical is removed from the Product.

