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ENDORSED
FILED
ALAMEDA COUNTY

AUG 20 2019

CLERK OF THE SUPERIOR COURT
By [Signature] Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

Case No.: **RG19031889**

GABRIEL ESPINOSA,

Plaintiff,

vs.

TKO STRENGTH & PERFORMANCE
INC., ROSS STORES, INC.,

Defendants.

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

Plaintiff Gabriel Espinosa ("Plaintiff"), by and through his attorneys, alleges the
following cause of action in the public interest of the citizens of the State of California.

BACKGROUND OF THE CASE

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

2. This complaint is a representative action brought by Plaintiff in the public interest
of the citizens of the State of California to enforce the People's right to be informed of the health
hazards caused by exposure to di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in

COPY

BY FAX

1 TKO jump ropes sold and/or distributed by defendants TKO Strength & Performance Inc.
2 (“TKO”) and Ross Stores, Inc. (“Ross Stores”) (collectively, “Defendants”) in California.

3 3. DEHP is a harmful chemical known to the State of California to cause cancer and
4 reproductive toxicity. On January 1, 1988, the State of California listed DEHP as a chemical
5 known to the State to cause cancer and it has come under the purview of Proposition 65
6 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§
7 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed DEHP as a chemical
8 known to cause reproductive toxicity.

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

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

19 6. Plaintiff alleges that Defendants manufacture, distribute and/or offer for sale in
20 California, without a requisite exposure warning, TKO jump ropes (the “Products”) that expose
21 persons to DEHP.

22 7. Defendants’ failure to warn consumers and other individuals in California of the
23 health hazards associated with exposure to DEHP in conjunction with the sale and/or distribution
24 of the Products is a violation of Proposition 65 and subjects Defendants to the enjoinder and
25 civil penalties described herein.

26 8. Plaintiff seeks civil penalties against Defendants for their violations of
27 Proposition 65 in accordance with Health and Safety Code § 25249.7(b).
28

9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring Defendants to provide purchasers or users of the Products with required warnings related to the dangers and health hazards associated with exposure to DEHP pursuant to Health and Safety Code § 25249.7(a).

PARTIES

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

11. Defendant TKO, through its business, effectively manufactures, imports, distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the Products for sale or use in the State of California. Plaintiff alleges that defendant TKO is a “person” in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

12. Defendant Ross Stores, through its business, effectively imports, distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies by its conduct that it imports, distributes, sells, and/or offers the Products for sale or use in the State of California. Plaintiff alleges that defendant Ross Stores is a “person” in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11

VENUE AND JURISDICTION

13. Venue is proper in the County of Alameda because one or more of the instances of wrongful conduct occurred, and continue to occur in this county and/or because Defendants conducted, and continue to conduct, business in the County of Alameda with respect to the Products.

14. This Court has jurisdiction over this action pursuant to California Constitution Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the

1 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,
2 this Court has jurisdiction over this lawsuit.

3 15. This Court has jurisdiction over Defendants because each Defendant is either a
4 citizen of the State of California, has sufficient minimum contacts with the State of California, is
5 registered with the California Secretary of State as foreign corporations authorized to do business
6 in the State of California, and/or has otherwise purposefully availed itself of the California
7 market. Such purposeful availment has rendered the exercise of jurisdiction by California courts
8 consistent and permissible with traditional notions of fair play and substantial justice.

9 **SATISFACTION OF NOTICE REQUIREMENTS**

10 16. On August 22, 2018, Plaintiff gave notice of alleged violation of Health and
11 Safety Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California
12 citizens to DEHP contained in the Products without proper warning, subject to a private action to
13 Defendants and to the California Attorney General's office and the offices of the County District
14 attorneys and City Attorneys for each city with a population greater than 750,000 persons
15 wherein the herein violations allegedly occurred.

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

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

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

27 **FIRST CAUSE OF ACTION**

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

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

3 21. Defendants have, at all times mentioned herein, acted as either a manufacturer,
4 distributor, and/or retailer of the Product.

5 22. The Products contain DEHP, a hazardous chemical found on the Proposition 65
6 list of chemicals known to be hazardous to human health.

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

8 24. Plaintiff, based on his best information and belief, avers that at all relevant times
9 herein, and at least since August 22, 2018, continuing until the present, that Defendants have
10 continued to knowingly and intentionally expose California users and consumers of the Product
11 to DEHP without providing required warnings under Proposition 65.

12 25. The exposures that are the subject of the Notice result from the purchase,
13 acquisition, handling and recommended use of the Product. Consequently, the primary route of
14 exposure to these chemicals is through dermal absorption. Users can be exposed to DEHP by
15 dermal absorption through direct skin contact with the Product during routine use when the
16 Product is handled with bare hands. If the Product is handled with wet hands or comes into
17 contact with wet skin due to perspiration when exercising, DEHP skin permeation rates from
18 aqueous solutions are faster than neat DEHP permeation. When the Product comes into contact
19 with bare skin during jump rope exercise, direct dermal exposure to DEHP is possible. When the
20 Product comes into contact with clothing during jump rope exercise, DEHP from the Product can
21 absorb to clothes and these clothes will become a source of DEHP dermal exposure. If the
22 Product is stored or transported in a carrier, DEHP that leaches from the cord may contaminate
23 other articles contained within these closed spaces are subsequently handled, worn, mouthed, or
24 consumed. Finally, while direct mouthing of the Product does not seem likely, some amount of
25 exposure through ingestion can occur by touching the Product with subsequent touching of the
26 user's hand to mouth.

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

4 27. Defendants have knowledge that the normal and reasonably foreseeable use of the
5 Product exposes individuals to DEHP, and Defendants intend that exposures to DEHP will occur
6 by their deliberate, non-accidental participation in the manufacture, importation, distribution,
7 sale and offering of the Products to consumers in California.

8 28. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
9 Complaint.

10 29. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
11 described acts, Defendants are liable for a maximum civil penalty of \$2,500 per day per
12 violation.

13 30. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
14 authorized to grant injunctive relief in favor of Plaintiff and against Defendants.


15 **PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiff demands judgment against Defendants and requests the
17 following relief:

- 18 A. That the court assess civil penalties against each Defendant in the amount
19 of \$2,500 per day for each violation in accordance with Health and Safety
20 Code § 25249.7(b);
- 21 B. That the court preliminarily and permanently enjoin Defendants
22 mandating Proposition 65 compliant warnings on the Product;
- 23 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- 24 D. That the court grant any further relief as may be just and proper.

25 Dated: August 19, 2019

BRODSKY & SMITH, LLC

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