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2021-09-30 20:43:32 GMT

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CENTER FOR ENVIRONMENTAL HEALTH

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA**

CENTER FOR ENVIRONMENTAL HEALTH,
a non-profit corporation,

Plaintiff,

v.

GYMSHARK USA, INC., *et al.*,

Defendants.

FILED BY FAX
ALAMEDA COUNTY

September 30, 2021

CLERK OF
THE SUPERIOR COURT
By Lynn Wiley, Deputy

CASE NUMBER:
RG21107796

Case No. RG21107796
ASSIGNED FOR ALL PURPOSES TO:
Judge Delbert C. Gee; Department 514

**FIRST AMENDED COMPLAINT
FOR INJUNCTIVE RELIEF AND
CIVIL PENALTIES**

Health & Safety Code §25249.6, *et seq.*

1 Plaintiff Center for Environmental Health, in the public interest, based on
2 information and belief and investigation of counsel, except for information based on knowledge,
3 hereby makes the following allegations:

4 **INTRODUCTION**

5 1. This Complaint seeks to remedy Defendants’ continuing failure to warn
6 individuals in California that they are being exposed to n-Nitrosodiethylamine (“NDEA”),
7 (collectively, “Nitrosamines”), a chemical known to the State of California to cause cancer. In
8 addition, certain Defendants expose users to n-Nitrosodimethylamine (“NDMA”) and NDEA,
9 (collectively, “Nitrosamines”). Nitrosamines are toxic chemicals that are often found in latex,
10 including the latex used in latex resistance bands. This Complaint addresses exposures that have
11 occurred, and continue to occur, through the manufacture, distribution, sale and/or use of
12 Defendants’ latex resistance bands (the “Products”). Individuals in California are exposed to
13 Nitrosamines when they use the Products during exercise.

14 2. Under California’s Proposition 65, Health & Safety Code §25249.5, *et seq.*, it is
15 unlawful for businesses to knowingly and intentionally expose individuals in California to
16 chemicals known to the State to cause cancer, birth defects, or other reproductive harm without
17 first providing clear and reasonable warnings to exposed individuals. Defendants introduce the
18 Products containing significant quantities of Nitrosamines into the California marketplace,
19 thereby exposing consumers of such Products to Nitrosamines.

20 3. Defendants provide no warnings whatsoever about the carcinogenic hazards
21 associated with Nitrosamines exposure. Defendants’ conduct thus violates the warning provision
22 of Proposition 65. Health & Safety Code §25249.6.

23 **PARTIES**

24 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH (“CEH”) is a non-profit
25 corporation dedicated to protecting the public from environmental health hazards and toxic
26 exposures. CEH is based in Oakland, California and incorporated under the laws of the State of
27 California. CEH is a “person” within the meaning of Health & Safety Code §25249.11(a) and
28 brings this enforcement action in the public interest pursuant to Health & Safety Code

1 §25249.7(d). CEH is a nationally recognized non-profit environmental advocacy group that has
2 prosecuted a large number of Proposition 65 cases in the public interest. These cases have
3 resulted in significant public benefit, including the reformulation of millions of products to
4 remove toxic chemicals and to make them safer. CEH also provides information to Californians
5 about the health risks associated with exposure to hazardous substances, where manufacturers and
6 other responsible parties fail to do so.

7 5. Defendant AMAZON.COM, INC. is a person in the course of doing business
8 within the meaning of Health & Safety Code §25249.11. Defendant AMAZON.COM, INC.
9 markets, distributes, and/or sells Products containing NDEA and NDMA for sale or use in
10 California. CEH’s allegations and claims against Defendant AMAZON.COM, INC. in this action
11 are limited to latex resistance bands sold under the “Amazon Basics” brand.

12 6. Defendant GYMSHARK USA, INC. is a person in the course of doing business
13 within the meaning of Health & Safety Code §25249.11. Defendant GYMSHARK USA, INC.
14 markets, distributes, and/or sells Products containing NDEA for sale or use in California.

15 7. Defendant EVRIHOLDER PRODUCTS, LLC is a person in the course of doing
16 business within the meaning of Health & Safety Code §25249.11. Defendant EVRIHOLDER
17 PRODUCTS, LLC markets, distributes, and/or sells Products containing NDEA for sale or use in
18 California.

19 8. Defendant MERRITHEW CORPORATION is a person in the course of doing
20 business within the meaning of Health & Safety Code §25249.11. Defendant MERRITHEW
21 CORPORATION markets, distributes, and/or sells Products containing NDEA for sale or use in
22 California.

23 9. Defendant GOFIT, LLC is a person in the course of doing business within the
24 meaning of Health & Safety Code §25249.11. Defendant GOFIT, LLC markets, distributes,
25 and/or sells Products containing NDEA for sale or use in California.

26 10. Defendant FIT FOR LIFE LLC is a person in the course of doing business within
27 the meaning of Health & Safety Code §25249.11. Defendant FIT FOR LIFE LLC markets,
28 distributes, and/or sells Products containing NDEA for sale or use in California.

1 California or by having such other contacts with California so as to render the exercise of
2 jurisdiction over it by the California courts consistent with traditional notions of fair play and
3 substantial justice.

4 19. Venue is proper in Alameda County Superior Court because one or more of the
5 violations arise in the County of Alameda.

6 **BACKGROUND FACTS**

7 20. The People of the State of California have declared by initiative under Proposition
8 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or
9 other reproductive harm.” Proposition 65, §1(b).

10 21. To effectuate this goal, Proposition 65 prohibits exposing people to chemicals
11 listed by the State of California as known to cause cancer, birth defects, or other reproductive
12 harm above certain levels without a “clear and reasonable warning” unless the business
13 responsible for the exposure can prove that it fits within a statutory exemption. Health & Safety
14 Code §25249.6 states, in pertinent part:

15 No person in the course of doing business shall knowingly and
16 intentionally expose any individual to a chemical known to the state to
17 cause cancer or reproductive toxicity without first giving clear and
reasonable warning to such individual. . .

18 22. On October 1, 1987, the State of California officially listed NDEA as a chemical
19 known to cause cancer. 27 California Code of Regulations (“C.C.R.”) §27001(b). On October 1,
20 1988, one year after it was listed as a chemical known to cause cancer, NDEA became subject to
21 the clear and reasonable warning requirement regarding carcinogens under Proposition 65.
22 Health & Safety Code §25249.10(b).

23 23. On October 1, 1987, the State of California officially listed NDMA as a chemical
24 known to cause cancer. 27 California Code of Regulations (“C.C.R.”) §27001(b). On October 1,
25 1988, one year after it was listed as a chemical known to cause cancer, NDMA became subject to
26 the clear and reasonable warning requirement regarding carcinogens under Proposition 65.
27 Health & Safety Code §25249.10(b).

1 24. Latex resistance bands are popular exercise products used to increase resistance
2 while performing certain exercises. Nitrosamines such as NDEA and NDMA can form during the
3 manufacturing process of latex products, including the Products. The formation of Nitrosamines
4 during latex processing is not necessary to the functionality of the Products, which can be made
5 without them. Yet, Defendants’ products contain sufficient quantities of Nitrosamines that such
6 individuals are exposed to Nitrosamines through the average use of the products. The primary
7 route of exposure for the violations is dermal exposure when consumers come into contact with
8 the Products during exercise. These exposures occur in homes, gymnasiums, and everywhere
9 else throughout California where Defendants’ Products are used.

10 25. No clear and reasonable warning is provided with Defendants’ Products regarding
11 the carcinogenic hazards of Nitrosamines. The failure to provide warnings regarding the
12 carcinogenicity of Nitrosamines in Defendants’ Products is of particular concern in light of the
13 extreme toxicity of NDEA and NDMA.

14 26. Any person acting in the public interest has standing to enforce violations of
15 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid
16 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
17 within such time. Health & Safety Code §25249.7(d).

18 27. More than sixty days prior to naming each Defendant in this lawsuit, CEH
19 provided a 60-Day “Notice of Violation” of Proposition 65 to the California Attorney General, to
20 the District Attorneys of every county in California, to the City Attorneys of every California city
21 with a population greater than 750,000, and to each of the named Defendants. In compliance with
22 Health & Safety Code §25249.7(d) and 27 C.C.R. §25903(b), each Notice included the following
23 information: (1) the name and address of each violator; (2) the statute violated; (3) the time period
24 during which violations occurred; (4) specific descriptions of the violations, including (a) the
25 routes of exposure to Nitrosamines from Defendants’ latex resistance bands, and (b) the specific
26 type of products sold and used in violation of Proposition 65; and (5) the name of the specific
27 Proposition 65-listed chemical that is the subject of the violations described in each Notice.

28

1 28. CEH also sent a Certificate of Merit for each Notice to the California Attorney
2 General, to the District Attorneys of every county in California, to the City Attorneys of every
3 California city with a population greater than 750,000, and to each of the named Defendants. In
4 compliance with Health & Safety Code §25249.7(d) and 11 C.C.R. §3101, each Certificate
5 certified that CEH’s counsel: (1) has consulted with one or more persons with relevant and
6 appropriate experience or expertise who reviewed facts, studies, or other data regarding the
7 exposures to Nitrosamines alleged in each Notice; and (2) based on the information obtained
8 through such consultations, believes that there is a reasonable and meritorious case for a citizen
9 enforcement action based on the facts alleged in each Notice. In compliance with Health &
10 Safety Code §25249.7(d) and 11 C.C.R. §3102, each Certificate served on the Attorney General
11 included factual information – provided on a confidential basis – sufficient to establish the basis
12 for the Certificate, including the identity of the person(s) consulted by CEH’s counsel and the
13 facts, studies, or other data reviewed by such persons.

14 29. None of the public prosecutors with the authority to prosecute violations of
15 Proposition 65 has commenced or is diligently prosecuting a cause of action against Defendants
16 under Health & Safety Code §25249.5, *et seq.*, based on the claims asserted in any of CEH’s
17 Notices regarding Nitrosamines in the Products.

18 30. Defendants both know and intend for individuals will come into contact with the
19 Products bands during exercise, thus exposing such individuals to Nitrosamines.

20 31. Defendants continue to expose consumers to Nitrosamines without prior clear and
21 reasonable warnings regarding the carcinogenic hazards of Nitrosamines.

22 32. CEH has engaged in good-faith efforts to resolve the claims alleged herein prior to
23 filing this Complaint.

24 33. Any person “violating or threatening to violate” Proposition 65 may be enjoined in
25 any court of competent jurisdiction. Health & Safety Code §25249.7. “Threaten to violate” is
26 defined to mean “to create a condition in which there is a substantial probability that a violation
27 will occur.” Health & Safety Code §25249.11(e). Proposition 65 provides for civil penalties not
28 to exceed \$2,500 per day for each violation of Proposition 65.

1 **FIRST CAUSE OF ACTION**
2 **(Violations of Health & Safety Code §25249.6)**

3 34. CEH realleges and incorporates by reference as if specifically set forth herein
4 Paragraphs 1 through 33, inclusive.

5 35. By placing the Products into the stream of commerce, each Defendant is a person
6 in the course of doing business within the meaning of Health & Safety Code §25249.11.

7 36. NDMA is a chemical listed by the State of California as known to cause cancer.

8 37. NDEA is a chemical listed by the State of California as known to cause cancer.

9 38. Each Defendant knows that average use of the Products will expose users of these
10 products to Nitrosamines. Each Defendant intends that the Products be used in a manner that
11 results in exposures to Nitrosamines from these products.

12 39. Each Defendant has failed, and continues to fail, to provide clear and reasonable
13 warnings regarding the carcinogenicity and reproductive toxicity of Nitrosamines to users of its
14 Products.

15 40. By committing the acts alleged above, each Defendant has at all times relevant to
16 this Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to
17 Nitrosamines without first giving clear and reasonable warnings to such individuals regarding the
18 carcinogenicity of Nitrosamines.

19 **PRAYER FOR RELIEF**

20 CEH prays for judgment against Defendants as follows:

21 1. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
22 permanently enjoin Defendants from offering the Products that will be sold in California without
23 either reducing the Nitrosamines levels in their latex resistance bands such that no Proposition 65
24 warnings are required or providing prior clear and reasonable warnings, as CEH shall specify in
25 further application to the Court;

26 2. That the Court, pursuant to Health & Safety Code §25249.7(b), assess civil
27 penalties against each Defendant in the amount of \$2,500 per day for each violation of
28 Proposition 65 according to proof;

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- 3. That the Court, pursuant to Health & Safety Code §25249.7(a), order Defendants to take action to stop ongoing unwarned exposures to Nitrosamines resulting from the use of latex resistance bands sold by Defendants, as CEH shall specify in further application to the Court;
- 4. That the Court, pursuant to Code of Civil Procedure §1021.5 or any other applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and
- 5. That the Court grant such other and further relief as may be just and proper.

Dated: September 30, 2021

Respectfully submitted,

LEXINGTON LAW GROUP



Mark N. Todzo
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH

1 **PROOF OF SERVICE**

2 I, Owen Sutter, declare:

3 I am a citizen of the United States and employed in the County of San Francisco, State of
4 California. I am over the age of eighteen (18) years and not a party to this action. My business
5 address is 503 Divisadero Street, San Francisco, CA 94117 and my email address is
osutter@lexlawgroup.com.

6 On September 30, 2021 I served the following document(s) on all interested parties in this
7 action by placing a true copy thereof in the manner and at the addresses indicated below:

8 **FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL
9 PENALTIES**

10 **BY MAIL:** I am readily familiar with the firm’s practice for collecting and processing mail
11 with the United States Postal Service (“USPS”). Under that practice, mail would be deposited
with USPS that same day with postage thereon fully prepaid at San Francisco, California in the
ordinary course of business. On this date, I placed sealed envelopes containing the above
mentioned documents for collection and mailing following my firm’s ordinary business practices.

12 **BY FACSIMILE:** I caused all pages of the document(s) listed above to be transmitted via
13 facsimile to the fax number(s) as indicated and said transmission was reported as complete and
without error.

14 **BY ELECTRONIC MAIL:** I transmitted a PDF version of the document(s) listed above via
15 email to the email address(es) indicated on the attached service list [or noted above] before 5 p.m.
on the date executed.

16 *See attached service list.*

17 **BY PERSONAL DELIVERY:** I placed all pages of the document(s) listed above in a sealed
18 envelope addressed to the party(ies) listed above, and caused such envelope to be delivered by
hand to the addressee(s) as indicated.

19 **BY OVERNIGHT DELIVERY:** I deposited such document(s) in a box or other facility
20 regularly maintained by FedEx, or delivered such document(s) to a courier or driver authorized by
FedEx, with delivery fees paid or provided for, and addressed to the person(s) being served
21 below.

22 I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct.

23 Executed on September 30, 2021 at San Francisco, California.

24 

25 _____
26 Owen Sutter

SERVICE LIST

CEH v. Gymshark USA, Inc., et al.

Case No. RG 21-107796

ADDRESS	PARTY
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