

1 Reuben Yeroushalmi (SBN 193981)
2 Daniel D. Cho (SBN 105409)
3 Ben Yeroushalmi (SBN 232540)
4 **YEROUSHALMI & YEROUSHALMI**
5 An Association of Independent Law Corporations
6 9100 Wilshire Boulevard, Suite 240W
7 Beverly Hills, California 90212
8 Telephone: 310.623.1926
9 Facsimile: 310.623.1930

10 Attorneys for Plaintiffs,
11 Consumer Advocacy Group, Inc.

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **COUNTY OF SAN FRANCISCO**

14 **CONSUMER ADVOCACY GROUP, INC.,**
15 in the interest of the Public,

16 Plaintiff,

17 v.

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

24 Defendants.

25 CASE NO. CGC-13-536374

26 **CONSENT JUDGMENT [PROPOSED]**

27 Complaint filed: December 23, 2013
28 Trial Date: June 22, 2015

29 **I. INTRODUCTION**

30 1.1 This Consent Judgment is entered into by and between plaintiff Consumer
31 Advocacy Group, Inc. ("CAG") acting on behalf of itself and in the interest of the public, and
32 defendant FITNESS EM, LLC ("FITNESS" or "Defendant") with each a "Party" and collectively
33 referred to as "Parties."

34 1.2 It is alleged that Defendants named in the Complaint employ ten or more persons,
35 are persons in the course of doing business for purposes of the Safe Drinking Water and Toxic

1 Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 et seq. ("Proposition
2 65"), and manufactured, distributed, and/or sold Weighted Jump Ropes, including, but not
3 limited to, "Empower® Weighted Jump Rope," ("Covered Products") before the Effective Date
4 of this Consent Judgment.

5 **1.3 Notice of Violation.**

6 1.3.1 On or about April 17, 2013, CAG served the Defendants named in the Complaint
7 and various public enforcement agencies with a document entitled "60-Day Notice of Violation"
8 (the "April 17, 2013 Notice") that provided the recipients with notice of alleged violations of
9 Health & Safety Code § 25249.6 for failing to warn individuals in California of exposures to DEHP
10 contained in the Covered Products.

11 1.3.2 No public enforcer has commenced or diligently prosecuted the allegations
12 set forth in the April 17, 2013 Notice.

13 **1.4 Complaint.**

14 On December 23, 2013, CAG filed a Complaint for civil penalties and injunctive relief
15 ("Complaint") in San Francisco Superior Court, Case No. CGC-13-536374. The Complaint
16 alleges, among other things, that the named Defendants violated Proposition 65 by failing to give
17 clear and reasonable warnings of exposure to DEHP from Covered Products.

18 **1.5 Consent to Jurisdiction**

19 While otherwise disputed, for purposes of this Consent Judgment, the parties consent that
20 this Court has jurisdiction over the allegations of violations contained in the Complaint and
21 personal jurisdiction over the named Defendants as to the acts alleged in the Complaint, that venue
22 is proper in the City and County of San Francisco and that this Court has jurisdiction to enter this
23 Consent Judgment as a full settlement and resolution of the allegations contained in the Complaint
24 and of all claims which were or could have been raised by any person or entity based in whole or
25 in part, directly or indirectly, on the prior conduct of the parties or on the facts alleged in the
26 Complaint or arising therefrom or related to.

27 **1.6 No Admission**

28 This Consent Judgment resolves claims that are denied and disputed. The parties enter into

1 this Consent Judgment pursuant to a full and final settlement of any and all claims between the
2 parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall not
3 constitute an admission with respect to any material allegation of the Complaint, each and every
4 allegation of which Defendants denies including jurisdiction, nor may this Consent Judgment or
5 compliance with it be used as evidence of any wrongdoing, misconduct, culpability or liability on
6 the part of Defendants.

7 **2. DEFINITIONS**

8 2.1 "Covered Products" means Weighted Jump Ropes manufactured, sold, licensed,
9 and/or distributed only by Fitness EM LLC, ("Defendant") prior to Effective Date of this Consent
10 Judgment.

11 2.2 "Effective Date" means the date that this Consent Judgment is approved by the
12 Court.

13 **3. INJUNCTIVE RELIEF/REFORMULATION**

14 3.1 After the Effective Date, Defendant shall not sell, offer for sale in California, or
15 ship products for sale in California unless Defendant has reformulated the Covered Products to
16 the point where the level of DEHP does not exceed more than 0.1 % by weight or 100 ppm (parts
17 per million).

18 **4. SETTLEMENT PAYMENT**

19 **Total Payment:** Within 10 days after the Effective Date, Defendant shall mail via certified
20 mail, payments totaling sixty thousand dollars (\$60,000.00) as follows:

21 4.1 **Reimbursement of Attorneys' Fees and Costs:** Defendant shall pay \$42,000 to
22 "Yeroushalmi & Associates" as reimbursement for the investigation fees and costs, testing costs,
23 expert fees, attorney fees, and other litigation costs and expenses for all work performed through
24 the approval of this Consent Judgment.

25 4.2 **Civil Penalties.** Defendant shall issue two separate checks for a total amount of
26 twelve thousand dollars (\$12,000) as penalties pursuant to Health & Safety Code § 25249.12: (a)
27 one check made payable to the State of California's Office of Environmental Health Hazard
28 Assessment (OEHHA) in the amount of \$9,000 representing 75% of the total penalty; and (b) one

1 check to Consumer Advocacy Group, Inc. in the amount of \$3,000 representing 25% of the total
2 penalty. Two separate 1099s shall be issued for the above payments: The first 1099 shall be issued
3 to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the amount of \$9,000.
4 The second 1099 shall be issued in the amount of \$3,000 to CAG and delivered to: Yeroushalmi
5 & Associates, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills, California 90212.

6 **4.3 Payments in Lieu of Civil Penalties**

7 Defendant also shall separately pay \$6,000 to CAG as a payment in lieu of civil penalty
8 pursuant to Health & Safety Code §25249.7(b) and California Code of Regulations, Title 11 §
9 3203(b). CAG will use this payment for investigation of the public's exposure to Proposition 65
10 listed chemicals through various means, laboratory fees for testing for Proposition 65 listed
11 chemicals, expert fees for evaluating exposures through various mediums, including but not
12 limited to consumer product, occupational, and environmental exposures to Proposition 65 listed
13 chemicals, and the cost of hiring consulting and retained experts who assist with the extensive
14 scientific analysis necessary for those files in litigation, as well as administrative costs incurred
15 during the litigation, in order to reduce the public's exposure to Proposition 65 listed chemicals
16 by notifying those persons and/or entities believed to be responsible for such exposures and
17 attempting to persuade those persons and/or entities to reformulate their products or the source of
18 exposure to completely eliminate or lower the level of Proposition 65 listed chemicals, thereby
19 addressing the same public harm as allegedly in the instant Action.

20 4.4 Payments pursuant to 4.1, 4.2 and 4.3 shall be delivered to: Reuben Yeroushalmi,
21 Yeroushalmi & Yeroushalmi, 9100 Wilshire Blvd., Suite 240W, Beverly Hills, CA 90212 within
22 the time agreed upon by the Parties.

23 **5. MATTERS COVERED BY THIS CONSENT JUDGMENT**

24 5.1 This Consent Judgment is a full, final, and binding resolution between CAG on
25 behalf of itself and in the public interest and Defendant and its officers, directors, insurers,
26 employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, sister
27 companies, agents, contractors, vendors, and their successors and assigns ("Defendant
28 Releasees"), including but not limited to each of their suppliers, customers, distributors,

1 wholesalers, retailers, or any other person in the course of doing business, and the successors and
2 assigns of any of them, specifically including but not limited to Ross Stores Inc., DBA DD's
3 Discounts, who may use, maintain, distribute or sell Covered Products ("Downstream Defendant
4 Releasees"), for all conduct of the named Defendants prior to the Effective Date based on alleged
5 exposure to DEHP from Covered Products as set forth in the Notice. Defendants and Defendant
6 Releasees' compliance with this Consent Judgment shall constitute compliance with Proposition
7 65 with respect to DEHP from Covered Products.

8 5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys,
9 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or
10 indirectly, any form of legal action and releases all claims, including, without limitation, all
11 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages,
12 costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert
13 fees, and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or
14 contingent (collectively "Claims"), against Defendant, Defendant Releasees, and Downstream
15 Defendant Releasees arising from any allegations of violation of Proposition 65 or any other
16 statutory or common law regarding the failure to warn about exposure to DEHP from Covered
17 Products manufactured, distributed, or sold by Defendant and Defendant Releasees. In furtherance
18 of the foregoing, as to alleged exposures to DEHP from Covered Products, CAG hereby waives
19 any and all rights and benefits which it now has, or in the future may have, conferred upon it with
20 respect to the Claims arising from any violation of Proposition 65 or any other statutory or common
21 law regarding the failure to warn about exposure to DEHP from Covered Products by virtue of the
22 provisions of section 1542 of the California Civil Code, which provides as follows:

23 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
24 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT
25 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM,
 MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
 DEBTOR.

26 CAG understands and acknowledges that the significance and consequence of this waiver of
27 California Civil Code section 1542 is that even if CAG suffers future damages arising out of or
28 resulting from, or related directly or indirectly to, in whole or in part, the Claims arising from any

1 alleged violation of Proposition 65 or any other statutory or common law regarding the failure to
2 warn about exposure to DEHP from Covered Products, including but not limited to any exposure
3 to, or failure to warn with respect to exposure to DEHP from the Covered Products, CAG will not
4 be able to make any claim for those damages against Defendant or the Defendant Releasees or
5 Downstream Defendant Releasees. Furthermore, CAG acknowledges that it intends these
6 consequences for any such Claims arising from any alleged violation of Proposition 65 or any
7 other statutory or common law regarding the failure to warn about exposure to DEHP from
8 Covered Products as may exist as of the date of this release but which CAG does not know exist,
9 and which, if known, would materially affect their decision to enter into this Consent Judgment,
10 regardless of whether their lack of knowledge is the result of ignorance, oversight, error,
11 negligence, or any other cause.

12 **6. ENFORCEMENT OF JUDGMENT**

13 6.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
14 hereto. Except as otherwise agreed by the Parties, the Parties may, by noticed motion or order to
15 show cause before the Superior Court of California, City and County of San Francisco, giving the
16 notice required by law, enforce the terms and conditions contained herein. A Party may enforce
17 any of the terms and conditions of this Consent Judgment only after that Party first provides notice
18 to the Party allegedly failing to comply with the terms and conditions of this Consent Judgment
19 and provide 60 days in which the Parties shall attempt to resolve such Party's failure to comply in
20 an open and good faith manner.

21 6.2 **Notice of Violation.** Prior to bringing any motion, order to show cause, or other
22 proceeding to enforce any alleged violation of Section 3.1 of this Consent Judgment, CAG shall
23 provide a Notice of Violation ("NOV") to Defendants. The NOV shall include for each of the
24 Newly Alleged Products: the date(s) the alleged violation(s) was observed and the location at
25 which the Newly Alleged Products were offered for sale, and shall be accompanied by all test data
26 obtained by CAG regarding the Newly Alleged Products, including an identification of the
27 component(s) of the Newly Alleged Products that were tested. Before any destructive testing of
28 any Newly Alleged Products is conducted by or on behalf of CAG, CAG shall give Defendant(s)

1 an opportunity to inspect and verify at reasonable times and places the authenticity of any Newly
2 Alleged Product in violation of this Consent Judgment.

3 **6.2.1 Non-Contested NOV.** CAG shall take no further action regarding the
4 alleged violation if, within 60 days of receiving such NOV, Defendant serves a Notice of
5 Election ("NOE") that meets one of the following conditions:

6 (a) The Newly Alleged Products were shipped by Defendant for sale in
7 California before the Effective Date, or

8 (b) Since receiving the NOV Defendants have taken corrective action
9 by either (i) requesting that its customers in California remove the Newly Alleged Products
10 identified in the NOV from sale in California and destroy or return the Newly Alleged
11 Products to Defendants, or (ii) providing a clear and reasonable warning for the Newly
12 Alleged Products identified in the NOV pursuant to 27 Cal. Code Regs. § 25603.

13 **6.2.2 Contested NOV.** Defendant may serve an NOE informing CAG of its
14 election to contest the NOV within 60 days of receiving the NOV.

15 (a) In its election, Defendant may request that the sample(s) Covered
16 Products tested by CAG be subject to additional confirmatory testing at an EPA-accredited
17 laboratory.

18 (b) If the confirmatory testing establishes that the Newly Alleged
19 Products do not contain DEHP in excess of the level allowed in Section 3.1, CAG shall
20 take no further action regarding the alleged violation. If the testing does not establish
21 compliance with Section 3.1, Defendant may withdraw its NOE to contest the violation
22 and may serve a new NOE pursuant to Section 6.2.1.

23 (c) If Defendant does not withdraw an NOE to contest the NOV, the
24 Parties shall meet and confer for a period of no less than 30 days before CAG may seek an
25 order enforcing the terms of this Consent Judgment.

26 **6.3** In any proceeding brought by either Party to enforce this Consent Judgment, such
27 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
28 violation of Proposition 65 or this Consent Judgment.

1 **7. ENTRY OF CONSENT JUDGMENT**

2 7.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to
3 California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CAG and
4 Defendants waive their respective rights to a hearing or trial on the allegations of the Complaint.

5 7.2 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
6 and any and all prior agreements between the parties merged herein shall terminate and become
7 null and void, and the actions shall revert to the status that existed prior to the execution date of
8 this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the
9 negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall
10 have any effect, nor shall any such matter be admissible in evidence for any purpose in this Action,
11 or in any other proceeding; and (c) the Parties agree to meet and confer to determine whether to
12 modify the terms of the Consent Judgment and to resubmit it for approval.

13 **8. MODIFICATION OF JUDGMENT AND RIGHTS THEREUNDER**

14 8.1 This Consent Judgment may be modified only upon written agreement of the
15 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
16 any Party as provided by law and upon entry of a modified Consent Judgment by the Court. Any
17 Party may waive in writing any right it may have under this Consent Judgment.

18 8.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to
19 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

20 **9. RETENTION OF JURISDICTION**

21 9.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
22 of this Consent Judgment.

23 **10. DUTIES LIMITED TO CALIFORNIA**

24 This Consent Judgment shall have no effect on Covered Products sold outside the State of
25 California.

26 **11. SERVICE ON THE ATTORNEY GENERAL**

27 11.1 CAG shall serve a copy of this Consent Judgment, signed by both parties, on the
28 California Attorney General so that the Attorney General may review this Consent Judgment prior

1 to its submittal to the Court for approval. No sooner than forty five (45) days after the Attorney
2 General has received the aforementioned copy of this Consent Judgment, and in the absence of
3 any written objection by the Attorney General to the terms of this Consent Judgment, the Parties
4 may then submit it to the Court for approval.

5 **12. ATTORNEY FEES**

6 12.1 Except as specifically provided in Section 4.1 and 6.3, each Party shall bear its own
7 costs and attorney fees in connection with this action.

8 **13. GOVERNING LAW**

9 13.1 The validity, construction and performance of this Consent Judgment shall be
10 governed by the laws of the State of California, without reference to any conflicts of law provisions
11 of California law.

12 13.2 The Parties, including their counsel, have participated in the preparation of this
13 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
14 Consent Judgment was subject to revision and modification by the Parties and has been accepted
15 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
16 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
17 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
18 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
19 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in
20 this regard, the Parties hereby waive California Civil Code § 1654.

21 **14. EXECUTION AND COUNTERPARTS**

22 14.1 This Consent Judgment may be executed in counterparts and by means of facsimile
23 or portable document format (PDF), which taken together shall be deemed to constitute one
24 document.

25 **15. NOTICES**

26 15.1 Any notices under this Consent Judgment shall be by personal delivery or First
27 Class Mail.

28 If to CAG:

1 Reuben Yeroushalmi
2 9100 Wilshire Boulevard, Suite 240W
3 Beverly Hills, CA 90212
4 (310) 623-1926

5 If to Fitness EM, LLC

6 Michael Savage, CEO/President, or Current CEO/President
7 Fitness EM, LLC
8 660 Douglas Street
9 Uxbridge, MA 01569

10 With a Copy To

11 Elizabeth McNulty
12 Archer Norris, PLC
13 4695 MacArthur Court, Suite 350
14 Newport Beach, CA 92660

15 **16. AUTHORITY TO STIPULATE**

16 16.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
17 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
18 the party represented and legally to bind that party.
19

20 AGREED TO:

21 Date: _____, 2014

20 AGREED TO:

21 Date: _____, 2014

22 By: _____

23 Plaintiff, CONSUMER ADVOCACY
24 GROUP, INC.

22 By: _____

23 Defendant, FITNESS EM, LLC

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

AGREED TO:

Date: 11-12, 2014

By: 

Plaintiff, CONSUMER ADVOCACY
GROUP, INC.

AGREED TO:

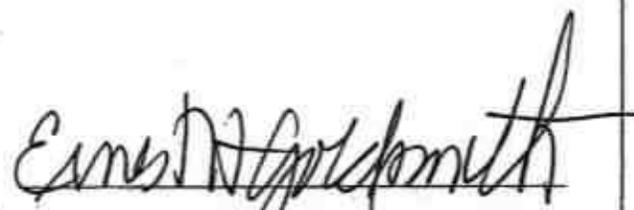
Date: 12 Nov, 2014

By: 

Defendant, FITNESS EM, LLC

IT IS SO ORDERED.

Date: JUN - 3 2015


JUDGE OF THE SUPERIOR COURT

ERNEST H. GOLDSMITH