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7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF ALAMEDA

10 EMA BELL,

11 Plaintiff,

12 vs.

13 FITNESS EM, LLC,

14 Defendant.

CASE NO.: RG15789623

JUDGE

DEPT.:

**[PROPOSED] CONSENT JUDGMENT**

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1           **1.     Introduction**

2           1.1     On April 14, 2015, Ema Bell (“Bell”) served Fitness EM, LLC (“Fitness EM”),  
3     Bed Bath & Beyond, Inc. (“Bed Bath & Beyond”), and various public enforcement agencies with  
4     a document entitled “Notice of Violation of California Health & Safety Code § 25249.6, *et seq.*”  
5     (the “Notice”). On June 1, 2015, the Notice was amended to provide Fitness EM and such others,  
6     including public enforcers, with notice that alleged that Fitness EM was in violation of California  
7     Health & Safety Code § 25249.6 (“Proposition 65”), for failing to warn consumers and customers  
8     that the Empower 3-IN-1 Core Ball, UPC# 8 31090 00197 0, MP-2686R (the “Product”) exposed  
9     users in California to the chemicals Diisononyl phthalate (DINP) and Di-isodecyl phthalate  
10    (DIDP). No public enforcer has diligently prosecuted the allegations set forth in the Notice.

11          1.2     On October 15, 2015, Bell filed a Complaint for Civil Penalties and Injunctive  
12    Relief (“Complaint”) in Alameda County Superior Court, Case No. RG15789623, against Fitness  
13    EM alleging violations of Proposition 65.

14          1.3     Fitness EM is a corporation that employs more than ten persons under California  
15    Health and Safety Code §25249.6 and offered the Product for sale within the State of California.

16          1.4     Bell’s Complaint alleges, among other things, that Fitness EM sold the Product in  
17    California and/or to California citizens, that the Product contains DINP and DIDP, and that the  
18    resulting exposure violated provisions of Proposition 65, by knowingly and intentionally  
19    exposing persons to chemicals known to the State of California to cause cancer, birth defects or  
20    other reproductive harm, without first providing a clear and reasonable warning to such  
21    individuals.

22          1.5     For purposes of this Consent Judgment only, the parties stipulate that this Court  
23    has jurisdiction over the allegations of violations contained in the Complaint and personal  
24    jurisdiction over Fitness EM as to the acts alleged in the Complaint, that venue is proper in the  
25    County of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a  
26    resolution of the allegations contained in the Complaint.

27          1.6     The parties enter into this Consent Judgment pursuant to a full settlement of  
28    disputed claims between the parties as alleged in the Complaint for the purpose of avoiding

1 prolonged litigation. By execution of this Consent Judgment, Fitness EM does not admit any  
2 violation of Proposition 65 and specifically denies that it has committed any such violation.  
3 Nothing in this Consent Judgment shall be construed as an admission by Fitness EM of any fact,  
4 issue of law or violation of law, nor shall compliance with the Consent Judgment constitute or be  
5 construed as an admission by Fitness EM of any fact, issue of law, or violation of law. Nothing  
6 in this Consent Judgment shall prejudice, waive, or impair any right, remedy or defense that  
7 Fitness EM may have in any other future legal proceeding. However, this paragraph shall not  
8 diminish or otherwise affect the obligations, responsibilities and duties of Fitness EM under this  
9 Consent Judgment.

10 1.7 For purposes of this Consent Judgment, the term "Effective Date" shall mean the  
11 date that the Consent Judgment is entered by the Court.

12 **2. Injunctive Relief**

13 2.1 Commencing on the Effective Date, and continuing thereafter, Fitness EM shall  
14 only ship, sell, or offer for sale in California, reformulated Product pursuant to Section 2.2 or  
15 Product that is labeled with a clear and reasonable warning pursuant to Section 2.3. Fitness EM  
16 and its downstream retailers shall have no obligation to label Product that entered the stream of  
17 commerce prior to the Effective Date. For purposes of this Settlement Agreement, a  
18 "Reformulated Product" is Product that is in compliance with the standard set forth below in  
19 section 2.2.

20 2.2 "Reformulated Product" shall mean Product that contains less than or equal to  
21 1,000 parts per million ("ppm") of each of DIDP and DINP when analyzed pursuant to CPSC-  
22 CH-C1001-09.3 Standard Operating Procedure for Determination of Phthalates method.

23 2.3 Commencing on the Effective Date, Fitness EM shall, for all Product it sells or  
24 distributes and which is intended for sale in California or which Fitness EM has reason to believe  
25 will be shipped or sold in California and that is not a Reformulated Product, provide clear and  
26 reasonable warnings as set forth in subsections 2.3(a) and (b) below. The warning shall be  
27 prominently placed with such conspicuousness as compared with other words, statements,  
28 designs, or devices as to render it likely to be read and understood by an ordinary individual

1 under customary conditions before purchase or use. Each warning shall be provided in a manner  
2 such that the consumer or user understands to which specific Product the warning applies, so as to  
3 minimize the risk of consumer confusion.

4 **(a) Retail Store Sales**

5 **(i) Product Labeling.** Fitness EM shall affix a warning to the  
6 packaging, labeling or directly on each Product sold in retail outlets in California  
7 by Fitness EM or any person selling the Product that states:

8 **PROPOSITION 65 WARNING:**

9 This product contains chemicals known to the State of California to cause cancer,  
10 birth defects or other reproductive harm.

11 **(ii) Point of Sale Warnings.** Alternatively, Fitness EM

12 may provide warning signs in the form below to its customers in California  
13 with instructions to post the warnings in close proximity to the point of  
14 display of the Product. Such instruction sent to Fitness EM customers shall  
15 be sent by certified mail, return receipt requested.

16 **PROPOSITION 65 WARNING:**

17 This product contains chemicals known to the State of California to cause cancer,  
18 birth defects or other reproductive harm.

19 **(b) Mail Order Catalog Warning.** In the event that Fitness EM directly

20 sells Product via mail order catalog directly to consumers located in California after the Effective  
21 Date that is not a Reformulated Product, Fitness EM shall provide a warning for such Product  
22 sold via mail order catalog to such California residents. A warning that is given in a mail order  
23 catalog shall be in the same type size or larger than the Product description text within the  
24 catalog. The following warning shall be provided on the same page and in the same location as  
25 the display and/or description of the Product:

26 **PROPOSITION 65 WARNING:**

27 This product contains chemicals known to the State of California to cause cancer,  
28 birth defects or other reproductive harm.

Where it is impracticable to provide the warning on the same page and in the same location as the

1 display and/or description of the Product, Fitness EM may utilize a designated symbol to cross  
2 reference the applicable warning and shall define the term “designated symbol” with the  
3 following language on the inside of the front cover of the catalog or on the same page as any  
4 order form for the Product:

5 **WARNING:** Certain products identified with this symbol ▼ and offered for sale  
6 in this catalog contain chemicals known to the State of California to cause cancer,  
7 birth defects or other reproductive harm.

8 The designated symbol must appear on the same page and in close proximity to the  
9 display and/or description of the Product. On each page where the designated symbol appears,  
10 Fitness EM must provide a header or footer directing the consumer to the warning language and  
11 definition of the designated symbol.

12 (c) **Internet Sales Warning.** In the event that Fitness EM directly sells  
13 Product via the internet directly to consumers located in California after the Effective Date that is  
14 not a Reformulated Product, Fitness EM shall provide a warning for such Product sold via the  
15 internet to such California residents. A warning that is given on the internet shall be in the same  
16 type size or larger than the Product description text and shall be given in conjunction with the  
17 direct sale of the Product. The warning shall appear either: (a) on the same web page on which  
18 the Product is displayed; (b) on the same web page as the order form for the Product; (c) on the  
19 same page as the price for the Product; or (d) on one or more web pages displayed to a purchaser  
20 during the checkout process. The following warning shall be provided:

21 **PROPOSITION 65 WARNING:**

22 This product contains chemicals known to the State of California to cause cancer, birth  
23 defects or other reproductive harm

24 2.4 The warning requirements set forth in Section 2.3 shall not apply to any  
25 Reformulated Product.

26 **3. Entry of Consent Judgment**

27 3.1 The parties hereby request that the Court promptly enter this Consent Judgment.  
28 Upon entry of this Consent Judgment, Bell and Fitness EM waive their respective rights to a

1 hearing or trial on the allegations of the Bell Complaint and 60-Day Notice.

2 3.2 In the event that the Attorney General objects or otherwise comments on one or  
3 more provisions of this Consent Judgment, Bell and Fitness EM agree to take reasonable steps to  
4 satisfy such concerns or objections.

5 **4. Matters Covered By This Consent Judgment**

6 4.1 This Consent Judgment is a final and binding resolution between Plaintiff Bell,  
7 acting on her own behalf, and on behalf of the public and in the public interest, and Defendant  
8 Fitness EM, and shall have preclusive effect such that no other person or entity, whether  
9 purporting to act in his, her, or its interests or the public interest shall be permitted to pursue  
10 and/or take any action with respect to: (i) any violation of Proposition 65 that was alleged in the  
11 Complaint, or that could have been brought pursuant to the Notice; or (ii) any other statutory or  
12 common law claim, to the fullest extent that any of the foregoing described in (i) or (ii) were or  
13 could have been asserted by any person or entity against Fitness EM based on its exposure of  
14 persons to the Product, or its failure to provide a clear and reasonable warning of exposure to  
15 such individuals, or (iii) as to alleged exposures to the Product, any other claim based on whole or  
16 in part on the facts alleged in the Complaint and the Notice, whether based on actions committed  
17 by Fitness EM. As to alleged exposures to the Product, compliance with the terms of this  
18 Consent Judgment resolves any issue, now and in the future, and is deemed sufficient to satisfy  
19 all obligations concerning, compliance by Fitness EM with the requirements of Proposition 65  
20 with respect to the Product, and any alleged resulting exposure.

21 4.2 As to alleged exposures to the Product, Bell waives all rights to institute any form  
22 of legal action, and releases all claims against Fitness EM, Bed Bath & Beyond (including their  
23 parents, subsidiaries or affiliates, and assigns of any of them, who may use, maintain, distribute or  
24 sell the Product) whether under Proposition 65 or otherwise, arising out of or resulting from, or  
25 related directly or indirectly to, in whole or in part, the Product, including but not limited to any  
26 exposure to, or failure to warn with respect to, the Product (referred to collectively in this Section  
27 as the "Claims"). In furtherance of the foregoing, as to alleged exposures to the Product, Bell  
28 waives any and all rights and benefits which she now has, or in the future may have, conferred

1 upon her with respect to the Claims by virtue of the provisions of § 1542 of the California Civil  
2 Code, which provides as follows:

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

8 Bell understands and acknowledges that the significance and consequence of this waiver of  
9 California Civil Code § 1542 is that even if Bell suffers future damages arising out of or resulting  
10 from, or related directly or indirectly to, in whole or in part, the Product, including but not limited  
11 to any exposure to, or failure to warn with respect to exposure to, the Product, Bell will not be  
12 able to make any claim for those damages against Fitness EM.

13 **5. Enforcement of Judgment**

14 5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties  
15 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of  
16 Alameda County, giving the notice required by law, enforce the terms and conditions contained  
17 herein. In any proceeding brought by either party to enforce this Consent Judgment, such party  
18 may seek whatever fines, costs, penalties or remedies as may be provided by law for any violation  
19 of Proposition 65 or this Consent Judgment.

20 **6. Modification of Judgment**

21 6.1 This Consent Judgment may be modified only by written agreement of the parties  
22 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as  
23 provided by law and upon an entry of a modified Consent Judgment by the Court.

24 6.2 Should any court enter final judgment in a case brought by Bell or the People  
25 involving the Product that sets forth standards defining when Proposition 65 warnings will or will  
26 not be required (“Alternative Standards”), or if the California Attorney General’s office otherwise  
27 provides written endorsement (i.e., a writing that is circulated by the Attorney General that is not  
28 intended for the purpose of soliciting further input or comments) of Alternative Standards

1 applicable to the products that are of the same general type and function as the Product and  
2 constructed from the same materials, Fitness EM shall be entitled to seek a modification of this  
3 Consent Judgment on forty-five (45) days' notice to Bell so as to be able to utilize and rely on  
4 such Alternative Standards in lieu of those set forth in Section 7 of this Consent Judgment. Bell  
5 shall not unreasonably contest any proposed application to effectuate such a modification  
6 provided that the Product for which such a modification is sought are of the same general type  
7 and function as those to which the Alternative Standards apply.

8 **7. Settlement Payment**

9 7.1 In settlement of all the claims referred to in this Consent Judgment, and without  
10 any admission of liability therefore, Fitness EM shall make the following monetary payments:

11 7.1.1 Fitness EM shall pay a total of \$3,500.00 in civil penalties in accordance  
12 with this Section. The civil penalty payment will be allocated in accordance with California  
13 Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the funds remitted to the California  
14 Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the  
15 civil penalty remitted to Bell. Each penalty payment shall be delivered to the addresses listed in  
16 Section 2.1.3 below.

17 7.1.2 In addition to the payment above, Fitness EM shall pay \$31,500.00 to  
18 Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Plaintiff Bell's  
19 attorneys' fees and costs, including any investigation and laboratory costs or expert fees, incurred  
20 in the course of bringing the Bell Action, and in enforcing Proposition 65, including without  
21 limitation, preparation of the 60-Day Notice letter and discussions with the office of the Attorney  
22 General. Payment shall be made within seven (7) days of the Effective Date.

23 7.1.3 Within seven (7) days of the Effective Date, Fitness EM shall issue two  
24 separate checks for the initial civil penalty payment to (a) "OEHHA" in the amount of \$2,625.00;  
25 and (b) "Brodsky & Smith, LLC in Trust for Bell" in the amount of \$875.00. Payment owed to  
26 Bell pursuant to this Section shall be delivered to the following payment address:

27 Evan J. Smith, Esquire  
28 Brodsky & Smith, LLC  
Two Bala Plaza, Suite 510

1 Bala Cynwyd, PA 19004

2 Payment owed to OEHHA (EIN: 68-0284486) pursuant to this Section shall be delivered directly  
3 to OEHHA (Memo Line "Prop 65 Penalties") at one of the following address(es):

4 For United States Postal Service Delivery:

5 Mike Gyurics  
6 Fiscal Operations Branch Chief  
7 Office of Environmental Health Hazard Assessment  
8 P.O. Box 4010  
9 Sacramento, CA 95812-4010

8 For Non-United States Postal Service Delivery:

9 Mike Gyurics  
10 Fiscal Operations Branch Chief  
11 Office of Environmental Health Hazard Assessment  
12 1001 I Street  
13 Sacramento, CA 95814

12 A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith, LLC at the address  
13 set forth above as proof of payment to OEHHA.

14 **8. Notices**

15 8.1 Any and all notices between the parties provided for or permitted under this  
16 Agreement, or by law, shall be in writing and personally delivered or sent by: (i) first-class  
17 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any  
18 party by the other party to the following addresses:

19 For Fitness EM:

20 Elizabeth V. McNulty  
21 ARCHER NORRIS  
22 A Professional Law Corporation  
23 4695 Mac Arthur Court, Suite 350  
24 Newport Beach, CA 92660  
25 T: 949.221.4645  
26 F: 949.975.8210

24 For Bell:

25 Evan J. Smith  
26 BRODSKY & SMITH, LLC  
27 Two Bala Plaza, Suite 510  
28 Bala Cynwyd, PA 19004  
T: 877.354.2590  
F: 610.667.9029

1 Any party, from time to time, may specify in writing to the other party a change of address to  
2 which all notices and other communications shall be sent.

3 **9. Authority to Stipulate**

4 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized  
5 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of  
6 the party represented and legally to bind that party.

7 **10. Counterparts**

8 10.1 This Stipulation may be signed in counterparts and shall be binding upon the  
9 parties hereto as if all said parties executed the original hereof.

10 **11. Retention of Jurisdiction**

11 11.1 This Court shall retain jurisdiction of this matter to implement the Consent  
12 Judgment.

13 **12. Service on the Attorney General**

14 12.1 Bell shall serve a copy of this Consent Judgment, signed by both parties, on the  
15 California Attorney General on behalf of the parties so that the Attorney general may review this  
16 Consent Judgment prior to its submittal to the Court for Approval. No sooner than forty-five (45)  
17 days after the Attorney General has received the aforementioned copy of this Consent Judgment,  
18 and in the absence of any written objection by the Attorney General to the terms of this Consent  
19 Judgment, the parties may then submit it to the Court for Approval.

20 **13. Entire Agreement**

21 13.1 This Consent Judgment contains the sole and entire agreement and understanding  
22 of the parties with respect to the entire subject matter hereof, and any and all discussions,  
23 negotiations, commitment and understandings related thereto. No representations, oral or  
24 otherwise, express or implied, other than those contained herein have been made by any party  
25 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed  
26 to exist or to bind any of the parties.

27 **14. Governing Law and Construction**

28 14.1 The validity, construction and performance of this Consent Judgment shall be

1 governed by the laws of the State of California, without reference to any conflicts of law  
2 provisions of California law.

3 **15. Court Approval**

4 15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or  
5 effect, and cannot be used in any proceeding for any purpose.

6 15.2 The Effective Date of this Consent Judgment shall be the date on which it is  
7 entered by the Court.

8 **IT IS SO STIPULATED:**

9  
10 Dated: 1/17/2016

Dated: \_\_\_\_\_

11  
12 By:   
13 Ema Bell

By: \_\_\_\_\_  
Fitness EM

14  
15 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

16  
17 Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of Superior Court

1 governed by the laws of the State of California, without reference to any conflicts of law  
2 provisions of California law.

3 **15. Court Approval**

4 15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or  
5 effect, and cannot be used in any proceeding for any purpose.

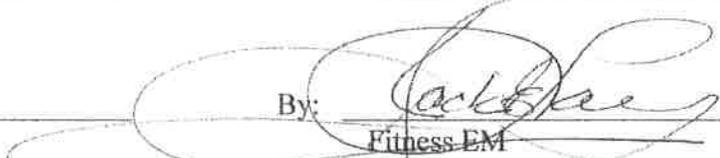
6 15.2 The Effective Date of this Consent Judgment shall be the date on which it is  
7 entered by the Court.

8 **IT IS SO STIPULATED:**

9  
10 Dated: \_\_\_\_\_

Dated: JANUARY 8, 2016

11  
12 By: \_\_\_\_\_  
13 Ema Bell

By:   
Fitness EM

14 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

15  
16 Dated: \_\_\_\_\_

\_\_\_\_\_  
17 Judge of Superior Court

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