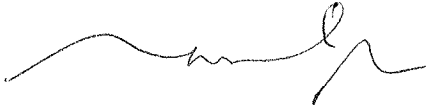


ENDORSED  
FILED  
ALAMEDA COUNTY

NOV 28 2016

CLERK OF THE SUPERIOR COURT



1 Evan J. Smith, Esquire (SBN 242352)  
Ryan P. Cardona, Esquire (SBN 302113)  
2 BRODSKY & SMITH, LLC  
9595 Wilshire Blvd., Ste. 900  
3 Beverly Hills, CA 90212  
Telephone: (877) 534-2590  
4 Facsimile: (310) 247-0160

5 *Attorneys for Plaintiff*

6  
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
8 COUNTY OF ALAMEDA  
9

10 PRECILA BALABBO,  
11 Plaintiff,  
12 vs.  
13 MAJOR SURPLUS AND SURVIVAL,  
INC., CALIFORNIA SURPLUS MART,  
14 INC.,  
15 Defendants.

Case No.: **RC 16840290**  
**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**  
**(Violation of Health & Safety Code §25249.5  
et seq.)**

BY FAX

16 Plaintiff Precila Balabbo ("Plaintiff" or "Ferreiro"), by and through her attorneys, alleges  
17 the following cause of action in the public interest of the citizens of the State of California.  
18

19 **BACKGROUND OF THE CASE**

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

26 2. This complaint is a representative action brought by Plaintiff in the public interest  
27 of the citizens of the State of California to enforce the People's right to be informed of the health  
28 hazards caused by exposure to Diisononyl phthalate (DINP), a toxic chemical found in rain  
ponchos, including but not limited to, Mil-Spec Heavy Duty Reversible Ponchos, UPC Number

1 783377027299 (the “Product”) that is manufactured, sold, and/or distributed by defendants  
2 Major Surplus and Survival, Inc. (“Major Surplus”), and California Surplus Mart, Inc. (“CA  
3 Surplus Mart”) in California. CA Surplus Mart and Major Surplus are collectively referred to  
4 herein as, “Defendants”.

5 3. DINP is a harmful chemical known to the State of California to cause cancer. On  
6 December 20, 2013, the State of California listed DINP as a chemical known to cause cancer and  
7 it has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit.  
8 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

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

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 distribute, manufacture, produce, import, sell,  
20 and/or offer for sale in California the Product without the required warning that the Product  
21 exposes users, purchasers, workers and other individuals to the chemical DINP.

22 7. Defendants’ failure to warn consumers, workers, and other individuals in  
23 California of the health hazards associated with exposure to DINP in conjunction with the sale,  
24 manufacture, and/or distribution of the Product is a violation of Proposition 65 and subjects  
25 Defendants to the enjoinder and 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

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

5 **PARTIES**

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

10 11. Defendant Major Surplus effectively manufactures, imports, distributes, sells,  
11 and/or offers the Product for sale or use in California, or it implies by its conduct that it  
12 manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of  
13 California. Major Surplus maintains a registered agent for service of process at c/o Stephen K.  
14 Adkisson, 435 West Alondra Blvd., Gardena, CA 90248.

15 13. Defendant CA Surplus Mart effectively manufactures, imports, distributes, sells,  
16 and/or offers the Product for sale or use in California, or it implies by its conduct that it  
17 manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of  
18 California. Defendant CA Surplus Mart can be served c/o Ovi Lalo at 5640 Golden Knoll Ct.,  
19 Encino, CA 91362.

20 14. Upon information and belief, Plaintiff avers that each defendant acted as an  
21 employee, servant, or agent of each other defendant at all times relevant to this action. Plaintiff  
22 further avers that in conducting the activities alleged in this Complaint, the Defendants acted  
23 within the scope of their agency or similarly situated relationship as toward one another.  
24 Therefore the Defendants acted with consent, permission, and authorization of each other in  
25 relation to all acts related to the scope of this Complaint.

26 15. Upon information and belief, Plaintiff avers that at all relevant times herein, each  
27 defendant was a person doing business within the meaning of Health and Safety Code §  
28

1 25249.11(b) and that each and every defendant had ten (10) or more employees at all relevant  
2 times.

3 **VENUE AND JURISDICTION**

4 16. Venue is proper in the County of Alameda, because one or more of the instances  
5 of wrongful conduct occurred, and continue to occur in this county and/or because Defendants  
6 conducted, and continue to conduct, business in the County of Alameda with respect to the  
7 Product.

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

13 18. This Court has jurisdiction over Defendants as each defendant either is a citizen  
14 of the State of California, has sufficient minimum contacts with the State of California, is  
15 registered with the California Secretary of State as foreign corporations authorized to do business  
16 in the State of California, and/or have otherwise purposefully availed themselves of the  
17 California market. Such purposeful availment has rendered the exercise of jurisdiction by  
18 California courts consistent and permissible with traditional notions of fair play and substantial  
19 justice.

20 **SATISFACTION OF NOTICE REQUIREMENTS**

21 19. On July 25, 2016, Plaintiff gave notice of alleged violations of Health and Safety  
22 Code § 25249.6, (the “Notice”) concerning the exposure of California citizens to DINP in the  
23 Product without proper warning, subject to a private action to the Defendants and to the  
24 California Attorney General’s office and the offices of the County District attorneys and City  
25 Attorneys for each city with a population greater than 750,000 persons wherein the herein  
26 violations allegedly occurred.

27 20. The Notice complied with all procedural requirements of Proposition 65 including  
28 the attachment of a Certificate of Merit affirming that Plaintiff’s counsel had consulted with at

1 least one person with relevant and appropriate expertise who reviewed relevant data regarding  
2 DINP exposure, and that counsel believed there was meritorious and reasonable cause for a  
3 private action.

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

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

10 **FIRST CAUSE OF ACTION**

11 **(By Plaintiff against all Defendants for the Violation of Proposition 65)**

12 23. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 22 of  
13 this complaint as though fully set forth herein.

14 24. Defendants have, at all times mentioned herein, acted as manufacturer, distributor,  
15 and/or retailer of the Product.

16 25. The Product contains DINP, a hazardous chemical found on the Proposition 65  
17 list of a chemical known to be hazardous to human health.

18 26. The Product does not comply with the Proposition 65 warning requirements.

19 27. Plaintiff, based on his best information and belief, avers that at all relevant times  
20 hereto, and at least since June 29, 2016, continuing until the present, that Defendants have  
21 continued to knowingly and intentionally expose California users and consumers of the Product  
22 to DINP without providing required warnings under Proposition 65.

23 28. The exposures that are the subject of this notice result from the purchase,  
24 acquisition, handling and recommended use of the product. Consequently, the primary route of  
25 exposure to these chemicals is through direct skin exposure. The vinyl poncho is likely to be in  
26 constant contact with either bare, exposed skin or the users clothing. If the vinyl poncho is worn  
27 over bare exposed skin, direct skin exposure is likely to occur. Should the wearer's skin perspire  
28 inside the vinyl poncho or the interior of the poncho become wet from precipitation, aqueous

1 HMWP skin permeation rates have been reported to be faster than neat HMWP permeation.  
2 Although the association between HMWP phthalates and atopic dermatitis have never been  
3 elucidated as a multitude of chemicals are present in plastics that come into contact with human  
4 skin, DEHP in headphones and hearing protection aids has been reported to induce contact  
5 dermatitis. Clothing worn within the vinyl poncho are likely to absorb DINP while the poncho is  
6 worn. The contaminated articles of clothing will continue to be a source of dermal transfer after  
7 the vinyl poncho is removed. If the vinyl poncho is stored or transported in a carrier, DINP that  
8 leaches from the vinyl poncho may contaminate other articles contained within the carrier bag  
9 that are subsequently handled by people. The product can be expected to emit gas phase DINP  
10 into the air over the lifetime of the product. This gas phase DINP can potentially be inhaled or  
11 can be absorbed to dust that can be resuspended and potentially ingested. Of concern is emission  
12 and inhalation of DINP from the poncho hood as this is the proximity of the user's facial area.  
13 Finally, while mouthing of the product does not seem likely, some amount of exposure through  
14 ingestion can occur by handling the product with subsequent touching of the user's hand to  
15 mouth.

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

19 30. Defendants have knowledge that the normal and reasonably foreseeable use of the  
20 Product expose individuals to DINP, and Defendants intend that exposure to DINP will occur by  
21 their deliberate, non-accidental participation in the manufacture, importation, distribution, sale  
22 and offering of the Product to consumers in California

23 31. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this  
24 Complaint without success.

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

28

