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FILED  
ALAMEDA COUNTY

FEB 15 2017

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By \_\_\_\_\_

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

ANTHONY FERREIRO and EMA BELL,

Plaintiffs,

v.

MORRIS ROTHENBERG & SON, INC.,

Defendant.

Case No.: **RG17849567-**

**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**

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

Plaintiffs Anthony Ferreiro ("Ferreiro") and Ema Bell ("Bell") (collectively, "Plaintiffs"),  
by and through their attorneys, allege the following cause of action in the public interest of the  
citizens of the State of California.

**BACKGROUND OF THE CASE**

1. Plaintiffs bring 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.

1           2.       This complaint is a representative action brought by Plaintiffs in the public  
2 interest of the citizens of the State of California to enforce the People’s right to be informed of  
3 the health hazards caused by exposure to Di(2-ethylhexyl) phthalate (DEHP), a toxic chemical  
4 found in cargo bags and rainwear manufactured, sold and/or distributed by defendant Morris  
5 Rothenberg & Son, Inc. (“Rothco” or “Defendant”) in California.

6           3.       DEHP is a harmful chemical known to the State of California to cause cancer. On  
7 January 1, 1988, the State of California listed DEHP as a chemical known to cause cancer and it  
8 has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit.  
9 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On October 24, 2003, the  
10 State of California listed DEHP as a chemical known to cause reproductive toxicity.

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

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

21           6.       Plaintiffs allege that Defendant manufactures, distributes, sells, and/or offers for  
22 sale in California, without the required warning, cargo bags, including but not limited to Rothco  
23 Black Jumbo Military Cargo Bags, UPC No. 6 13902 81341 0, and rainwear, rain jackets, coats  
24 and ponchos, including but not limited to Rothco Reversible PVC Ponchos, UPC No. 6 13902  
25 36440 0 (collectively, the “Products”).

26           7.       Defendant’s failure to warn consumers, workers, and other individuals in  
27 California of the health hazards associated with exposure to DEHP in conjunction with the sale,  
28

1 manufacture, and/or distribution of the Products is a violation of Proposition 65 and subjects  
2 Defendant to the enjoinder and civil penalties described herein.

3 8. Plaintiffs seek civil penalties against Defendant for its violations of Proposition  
4 65 in accordance with Health and Safety Code § 25249.7(b).

5 9. Plaintiffs also seek injunctive relief, preliminarily and permanently, requiring  
6 Defendant to provide purchasers or users of the Products with the required warnings related to  
7 the dangers and health hazards associated with exposure to DEHP pursuant to Health and Safety  
8 Code § 25249.7(a).

### 9 PARTIES

10 10. Plaintiffs are each a citizen of the State of California acting in the interest of the  
11 general public to promote awareness of exposures to toxic chemicals in products sold in  
12 California and to improve human health by reducing hazardous substances contained in such  
13 items. They bring this action in the public interest pursuant to Health and Safety Code §  
14 25249.7(d).

15 11. Defendant Rothco is a wholesale distributors of army navy supplies, military,  
16 tactical gear, camouflage clothing and survival gear. Through its business, Rothco effectively  
17 manufactures, imports, distributes, sells, and/or offers the Products for sale or use in the State of  
18 California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or  
19 offers the Products for sale or use in the State of California.

20 12. Upon information and belief, Plaintiffs aver that at all relevant times herein,  
21 Rothco is a “person” in the course of doing business within the meaning of Health & Safety  
22 Code sections 25249.6 and 25249.11.

### 23 VENUE AND JURISDICTION

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

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

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

12                                   **SATISFACTION OF NOTICE REQUIREMENTS**

13           16.     On November 15, 2016, and on December 1, 2016, Bell and Ferreiro,  
14 respectively, gave notice of alleged violation of Health and Safety Code § 25249.6 (the  
15 “Notices”) to Defendant concerning the exposure of California citizens to DEHP contained in the  
16 Products without proper warning, subject to a private action to Defendant and to the California  
17 Attorney General’s office and the offices of the County District attorneys and City Attorneys for  
18 each city with a population greater than 750,000 persons wherein the herein violations allegedly  
19 occurred.

20           17.     The Notices complied with all procedural requirements of Proposition 65  
21 including the attachment of Certificates of Merit affirming that Plaintiffs’ counsel had consulted  
22 with at least one person with relevant and appropriate expertise who reviewed relevant data  
23 regarding DEHP exposure, and that counsel believed there was meritorious and reasonable cause  
24 for a private action.

25           18.     After receiving the Notices, and to Plaintiffs’ best information and belief, none of  
26 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted  
27 a cause of action against Defendant under Proposition 65 to enforce the alleged violations which  
28 are the subject of Plaintiff’s notice of violation.

1 19. Plaintiffs are commencing this action more than sixty (60) days from the dates of  
2 the Notices to Defendant, as required by law.

3 **FIRST CAUSE OF ACTION**

4 **(By Plaintiffs against Defendant for the Violation of Proposition 65)**

5 20. Plaintiffs hereby repeat and incorporate by reference paragraphs 1 through 19 of  
6 this complaint as though fully set forth herein.

7 21. Defendant has, at all times mentioned herein, acted as manufacturer, distributor,  
8 and/or retailer of the Products.

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

11 23. The Products do not comply with the Proposition 65 warning requirements.

12 24. Plaintiffs, based on their best information and belief, aver that at all relevant times  
13 herein, and at least since October 5, 2016, continuing until the present, that Defendant has  
14 continued to knowingly and intentionally expose California users and consumers of the Products  
15 to DEHP without providing required warnings under Proposition 65.

16 25. As it pertains to the and rainwear, rain jackets, coats and ponchos, the exposures  
17 that are the subject of this notice result from the purchase, acquisition, handling and  
18 recommended use of the product. Consequently, the primary route of exposure to these  
19 chemicals is through dermal exposure. The vinyl poncho is likely to be in constant contact with  
20 either bare, exposed skin or the users clothing. If the vinyl poncho is worn over bare exposed  
21 skin, dermal exposure is likely to occur. The hood of the poncho can come into contact with the  
22 user's face, ears, neck, and scalp where dermal exposure can occur. Should the wearer's skin  
23 perspire inside the vinyl poncho or the interior of the poncho become wet from precipitation,  
24 aqueous DEHP skin permeation rates have been reported to be faster than neat DEHP  
25 permeation. Clothing worn within the vinyl poncho are likely to absorb DEHP while the poncho  
26 is worn. The contaminated articles of clothing will continue to be a source of dermal transfer  
27 after the vinyl poncho is removed. If the vinyl poncho is stored or transported in a carrier, DEHP  
28 that leaches from the vinyl poncho may contaminate other articles contained within the carrier

1 bag that are subsequently handled by people. Finally, while mouthing of the product does not  
2 seem likely, some amount of exposure through ingestion can occur by handling the product with  
3 subsequent touching of the user's hand to mouth.

4 26. As it pertains to the cargo bags, the exposures that are the subject of this notice  
5 result from the purchase, acquisition, handling and recommended use of the product.  
6 Consequently, the primary route of exposure to these chemicals is through dermal exposure. The  
7 potential exists for dermal exposure of DEHP through direct contact with the user's bare hands  
8 when the user manipulates and touches the bag interior with bare hands. Items stored within the  
9 cargo bag will absorb DEHP directly through contact with the lining or through absorbing gas  
10 phase DEHP that has leached out of the lining into the enclosed bag. When these items are  
11 handled, used, or worn, dermal exposure to DEHP is possible. Should these items include food  
12 or toiletries that are used orally (toothbrush, lipstick, etc.) the potential exists for ingestion of  
13 absorbed DEHP. If wet items are stored in contact with the lining and handled, or the lining is  
14 handled with wet hands, DEHP skin permeation rates from aqueous solutions are faster than neat  
15 DEHP permeation. Finally, while mouthing of the product does not seem likely, some amount of  
16 exposure through ingestion can occur by handling the product with subsequent touching of the  
17 user's hand to mouth.

18 27. Plaintiffs, based on their best information and belief, aver that such exposures will  
19 continue every day until clear and reasonable warnings are provided to purchasers and users of  
20 the Products, or until this known toxic chemical is removed from the Products.

21 28. Defendant has knowledge that the normal and reasonably foreseeable use of the  
22 Products exposes individuals to DEHP, and Defendant intends that exposures to DEHP will  
23 occur by their deliberate, non-accidental participation in the manufacture, importation,  
24 distribution, sale and offering of the Products to consumers in California

25 29. Plaintiffs have engaged in good faith efforts to resolve the herein claims prior to  
26 this Complaint.

27 30. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above  
28 described acts, Defendant is liable for a maximum civil penalty of \$2,500 per day per violation.

1 31. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically  
2 authorized to grant injunctive relief in favor of Plaintiffs and against Defendant.


3  
4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiffs demand judgment against Defendant and requests the  
6 following relief:

- 7  
8 A. That the court assess civil penalties against Defendant in the amount of  
9 \$2,500 per day for each violation in accordance with Health and Safety  
10 Code § 25249.7(b);  
11 B. That the court preliminarily and permanently enjoin Defendant mandating  
12 Proposition 65 compliant warnings on the Products;  
13 C. That the court grant Plaintiffs reasonable attorney's fees and costs of suit.  
14 D. That the court grant any further relief as may be just and proper.

15 Dated: February 15, 2017

BRODSKY & SMITH, LLC

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