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ENDORSED
FILED
ALAMEDA COUNTY

JUL 26 2018

CLERK OF THE SUPERIOR COURT
By CURTIYAH GANTER
Deputy

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA

12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	PRECILA BALABBO, Plaintiff, vs. MAJOR SURPLUS AND SURVIVAL, INC., Defendant.	Case No.: RG16840290 FIRST AMENDED COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELEIF (Violation of Health & Safety Code §25249.5 et seq.) Dept.: 520 Judge: Julia Spain
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Plaintiff Precila Balabbo (“Plaintiff” or “Balabbo”), by and through her attorneys, alleges the following cause of action in the public interest of the citizens of the State of California.

BACKGROUND OF THE CASE

1. Plaintiff brings 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.

2. This amended complaint is a representative action brought by Plaintiff in the public interest of the citizens of the State of California to enforce the People’s right to be informed of the health hazards caused by exposure to diisononyl phthalate (DINP) and di(2-ethylhexyl) phthalate, from use of (a) Mil-Spec rain ponchos, and (b) Mil-Spec dry bags (collectively, the “Products”) that have been sold and/or distributed by defendant Major Surplus

BY FAX

1 and Survival, Inc. (“Major Surplus”) in California without a requisite Proposition 65 exposure
2 warning.

3 3. DINP and DEHP are harmful chemicals known to the State of California to cause
4 cancer and, in the case of DEHP, reproductive toxicity as well. On December 20, 2013 and
5 January 1, 1988, the State of California listed DINP and DEHP, respectively, as chemicals
6 known to cause cancer and each chemical has come under the purview of Proposition 65
7 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§
8 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed DEHP as a chemical
9 known to cause reproductive toxicity.

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

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

20 6. Plaintiff alleges that Defendant manufactures, distributes, sells and/or offers for
21 sale in California the Products sans a Proposition 65 exposure warning that use of the Products
22 will expose persons to DINP and/or DEHP.

23 7. Defendant’s failure to warn purchasers, users and other individuals in California
24 of the health hazards associated with exposure to DINP and DEHP in conjunction with the sale,
25 and/or distribution of the Products is a violation of Proposition 65 and subjects Defendant to the
26 enjoinder and civil penalties described herein.

27 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition
28 65 in accordance with Health and Safety Code § 25249.7(b).

1 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
2 Defendant to provide purchasers or users of the Products with an exposure warning related to the
3 dangers and health hazards associated with exposure to DINP and DEHP pursuant to Health and
4 Safety 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. She brings
9 this 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.

14 13. Defendant Major Surplus maintains a registered agent for service of process at c/o
15 Stephen K. Adkisson, 435 West Alondra Blvd., Gardena, CA 90248.

16 14. Plaintiff alleges that defendant Major Surplus is a “person” in the course of doing
17 business within the meaning of Health & Safety Code §§ 25249.6 and 25249.11.

18 **VENUE AND JURISDICTION**

19 15. Venue is proper in the County of Alameda, because one or more of the instances
20 of wrongful conduct occurred, and continue to occur in this county and/or because Defendant
21 conducted and continues to conduct, business in the County of Alameda with respect to the
22 Products.

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

28

1 17. This Court has jurisdiction over Defendant as Major Surplus is a citizen of the
2 State of California, has sufficient minimum contacts with the State of California, is registered
3 with the California Secretary of State as foreign corporations authorized to do business in the
4 State of California, and/or has otherwise purposefully availed itself of the California market.
5 Such purposeful availment has rendered the exercise of jurisdiction by California courts
6 consistent and permissible with traditional notions of fair play and substantial justice.

7 **SATISFACTION OF NOTICE REQUIREMENTS**

8 18. On July 25, 2016, Plaintiff gave notice of alleged violations of Health and Safety
9 Code § 25249.6 (the “July Notice”) concerning the exposure of California citizens to DINP in
10 the Mil-Spec ponchos without proper warning, subject to a private action to the Defendant and to
11 the California Attorney General’s office and the offices of the County District attorneys and City
12 Attorneys for each city with a population greater than 750,000 persons wherein the herein
13 violations allegedly occurred.

14 19. On March 27, 2018, the July Notice was revised and served on Defendant (the
15 “March Notice”). The purpose of the March Notice was to provide Major Surplus with notice of
16 alleged violations of Health and Safety Code § 25249.6 concerning the exposure of California
17 citizens to DINP and DEHP in the Products without proper warning, subject to a private action to
18 the Defendant and to the California Attorney General’s office and the offices of the County
19 District attorneys and City Attorneys for each city with a population greater than 750,000
20 persons wherein the herein violations allegedly occurred. The July Notice and the March Notice
21 are collectively referred to herein as, the “Notice.”

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

27 21. After receiving the Notice, and to Plaintiff’s best information and belief, none of
28 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted

1 a cause of action against Defendant under Proposition 65 to enforce the alleged violations which
2 are the subject of Plaintiff's notice of violation.

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

5 **FIRST CAUSE OF ACTION**

6 **(By Plaintiff against Defendant for Violation of Proposition 65)**

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

9 24. Defendant has, at all times mentioned herein, acted as manufacturer, distributor
10 and/or retailer of the Products.

11 25. The Products contain DINP and/or DEHP, hazardous chemicals found on the
12 Proposition 65 list of chemicals known to be hazardous to human health.

13 26. The Products do not comply with Proposition 65 warning requirements.

14 27. Plaintiff, based on her best information and belief, avers that at all relevant times
15 hereto, and at least since June 29, 2016, continuing until the present, that Defendant has
16 continued to knowingly and intentionally expose California users and consumers of the Products
17 to DINP and DEHP without providing exposure warnings under Proposition 65.

18 28. The exposures that are the subject of the Notice result from the purchase,
19 acquisition, handling and recommended use of the product. Consequently, the primary route of
20 exposure to DINP in the ponchos is through direct skin exposure. The vinyl poncho is likely to
21 be in constant contact with either bare, exposed skin or the users clothing. If the vinyl poncho is
22 worn over bare exposed skin, direct skin exposure is likely to occur. Should the wearer's skin
23 perspire inside the vinyl poncho or the interior of the poncho become wet from precipitation,
24 aqueous HMWP skin permeation rates have been reported to be faster than neat HMWP
25 permeation. Although the association between HMWP phthalates and atopic dermatitis have
26 never been elucidated as a multitude of chemicals are present in plastics that come into contact
27 with human skin, DEHP in headphones and hearing protection aids has been reported to induce
28 contact dermatitis. Clothing worn within the vinyl poncho are likely to absorb DINP while the

1 poncho is worn. The contaminated articles of clothing will continue to be a source of dermal
2 transfer after the vinyl poncho is removed. If the vinyl poncho is stored or transported in a
3 carrier, DINP that leaches from the vinyl poncho may contaminate other articles contained
4 within the carrier bag that are subsequently handled by people. The poncho can be expected to
5 emit gas phase DINP into the air over the lifetime of the product. This gas phase DINP can
6 potentially be inhaled or can be absorbed to dust that can be resuspended and potentially
7 ingested. Of concern is emission and inhalation of DINP from the poncho hood as this is the
8 proximity of the user's facial area. Finally, while mouthing of the product does not seem likely,
9 some amount of exposure through ingestion can occur by handling the product with subsequent
10 touching of the user's hand to mouth.

11 29. Similarly, the primary route of exposure to DEHP in the dry bags is through direct
12 skin exposure. Users may potentially be exposed to DEHP by dermal absorption through direct
13 skin contact with the bag during routine use when the bag compartment is opened or closed with
14 bare hands. If the yellow plastic becomes wet or is handled with wet hands, aqueous DEHP skin
15 permeation rates have been reported to be faster than neat DEHP permeation. DEHP that leaches
16 from the bag may contaminate items contained within the dry bag that are subsequently handled,
17 worn in direct contact with skin, mouthed, or ingested by the user. If the bag is stored or
18 transported in a carrier, DEHP that leaches from the yellow plastic may contaminate other
19 articles contained within the storage area or carrier that are subsequently handled, worn,
20 mouthed, or ingested by the user. Finally, while mouthing of the dry bag does not seem likely,
21 some amount of exposure through ingestion can occur by touching the product with subsequent
22 touching of the user's hand to mouth.

23 30. Plaintiff, based on her best information and belief, avers that such exposures will
24 continue every day until clear and reasonable warnings are provided to purchasers and users of
25 the Products, or until these known toxic chemicals are removed from the Products.

26 31. Defendant has knowledge that the normal and reasonably foreseeable use of the
27 Products expose individuals to DINP and/or DEHP, and Defendant intends that exposure to
28

1 DINP and DEHP will occur by its deliberate, non-accidental participation in the manufacture,
2 distribution and/or sale of the Products to consumers in California

3 32. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
4 Complaint without success.

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

7 34. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
8 authorized to grant injunctive relief in favor of Plaintiff and against Defendant.

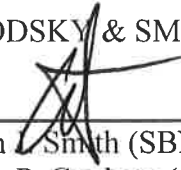
9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff demands judgment against Defendant and requests the
11 following relief:

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

19 Dated: July 25, 2018

BRODSKY & SMITH, LLC

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