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FILED
ALAMEDA COUNTY

OCT 18 2018

CLERK OF THE SUPERIOR COURT
By *Danielle DeLeon*
Deputy

ENDORSED
FILED
ALAMEDA COUNTY
AUG 29 2018
CLERK OF THE SUPERIOR COURT
Roni Gill
Deputy

8 Attorneys for Plaintiff

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

12 PRECILA BALABBO,
13 Plaintiff,

14 v.

15 MAJOR SURPLUS AND SURVIVAL, INC.,
16 Defendant.

Case No.: RG16840290

CONSENT JUDGMENT

Judge: Julia Spain
Dept.: 520
Hearing Date: October 18, 2018
Hearing Time: 2:30 PM
Reservation #: R-1991943

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BY FAX

1 **1. INTRODUCTION**

2 **1.1 The Parties.** This Consent Judgment is entered into by and between Precila
3 Balabbo acting on behalf of the public interest (hereinafter “Balabbo”) and Major Surplus and
4 Survival, Inc. (“Major Surplus and Survival” or “Defendant”) with Balabbo and Defendant
5 collectively referred to as the “Parties” and each of them as a “Party.” Balabbo is an individual
6 residing in California who seeks to promote awareness of exposures to toxic chemicals and improve
7 human health by reducing or eliminating hazardous substances contained in consumer products.
8 Major Surplus and Survival is alleged to be a person in the course of doing business for purposes
9 of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

10 **1.2 Allegations and Representations.** Balabbo alleges that Defendant has exposed
11 individuals to diisononyl phthalate (DINP) and di(2-ethylhexyl)phthalate (DEHP) from its sales of
12 Mil-Spec rain ponchos and dry bags without providing clear and reasonable exposure warnings
13 under Proposition 65. DINP and DEHP are listed under Proposition 65 as chemicals known to the
14 State of California to cause cancer and/or reproductive toxicity.

15 **1.3 Notices of Violation/Complaint.** On or about July 25, 2016, Balabbo served Major
16 Surplus and Survival, and various public enforcement agencies with a document entitled “60-Day
17 Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “July Notice”), alleging
18 that Defendant was in violation of Proposition 65 for failing to warn consumers and customers that
19 use of Mil-Spec rain ponchos expose users in California to DINP. On March 27, 2018, the July
20 Notice was revised (the “March Notice”) and served on Major Surplus and Survival, and the same
21 enforcement agencies, in order to provide Major Surplus and Survival with notice that (a) use of
22 Mil-Spec rain ponchos expose users in California to DINP, and (b) use of Mil-Spec dry bags expose
23 users in California to DEHP. The July Notice and the March Notice are collectively referred to
24 herein as, the “Notice.” No public enforcer has brought and is diligently prosecuting the claims
25 alleged in the Notice. On November 28, 2016, Balabbo filed a complaint (the “Complaint”) in the
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1 matter against defendants Major Surplus and Survival, and California Surplus Mart, Inc¹. On July
2 25, 2018, Plaintiff file an amended complaint (the “Action”).

3 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
4 jurisdiction over Defendant as to the allegations contained in the Action filed in this matter, that
5 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
6 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
7 claims which were or could have been raised in the Complaint based on the facts alleged therein
8 and/or in the Notice.

9 1.5 Defendant denies the material allegations contained in the Notice and Action and
10 maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be
11 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
12 shall compliance with this Consent Judgment constitute or be construed as an admission by
13 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
14 denied by Defendant. However, this Section shall not diminish or otherwise affect the obligations,
15 responsibilities, and duties of Defendant under this Consent Judgment.

16 **2. DEFINITIONS**

17 2.1 **Covered Products.** The term “Covered Products” means Mil-Spec (a)
18 raincoats/rain jackets/ponchos/rainwear, and (b) dry bags that are manufactured, distributed and/or
19 offered for sale in California by Major Surplus and Survival.

20 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
21 entered as a Judgment of the Court.

22 **3. INJUNCTIVE RELIEF: WARNINGS**

23 3.1 Commencing ninety (90) days after the Effective Date, Major Surplus and Survival
24 shall not manufacture, import, or purchase for sale in California any Covered Products that contain
25 more than 1,000 parts per million DINP or DEHP, unless the Covered Products are accompanied
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27 ¹ On January 10, 2017, defendant California Surplus Mart, Inc. was dismissed from the
28 Action.

1 by a warning that complies with Article 6 of Title 27 of the California Code of Regulations
2 including either of the following warnings: (a) "WARNING: This product contains a chemical
3 known to the State of California to cause cancer, birth defects and other reproductive harm."; or (b)
4 "WARNING: This product can expose you to chemicals including [name of one or more
5 chemicals], which is [are] known to the State of California to cause cancer and birth defects or other
6 reproductive harm. For more information go to www.P65Warnings.ca.gov." There shall be no
7 obligation for Major Surplus and Survival to label Covered Products that entered the stream of
8 commerce prior to the Effective Date.

9 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
10 Covered Products' packaging or labeling. The warning shall be prominently affixed to or printed
11 on the packaging or labeling and displayed with such conspicuousness, as compared with other
12 words, statements, or designs as to render it likely to be read and understood by an ordinary
13 individual under customary conditions of purchase or use. A warning may be contained in the same
14 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,
15 concerning the use of the product and shall be at least the same size as those other safety warnings.

16 **4. MONETARY TERMS**

17 4.1 **Initial Civil Penalty.** Major Surplus and Survival shall pay \$1,500.00 as an Initial
18 Civil Penalty pursuant to Health and Safety Code § 25249.7(b), to be apportioned in accordance
19 with California Health & Safety Code § 25192, with 75% of these funds remitted to the State of
20 California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining
21 25% of the Civil Penalty remitted to Balabbo, as provided by California Health & Safety Code
22 § 25249.12(d).

23 4.1.1 Within ten (10) business days of the Effective Date, Major Surplus and
24 Survival shall issue two separate checks for the Initial Civil Penalty payment to (a) "OEHHA" in
25 the amount of \$1,125.00; and (b) "Brodsky & Smith, LLC in Trust for Balabbo" in the amount of
26 \$375.00. Payment owed to Balabbo pursuant to this Section shall be delivered to the following
27 payment address:
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1 Evan J. Smith, Esquire
2 Brodsky & Smith, LLC
3 Two Bala Plaza, Suite 510
4 Bala Cynwyd, PA 19004

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

7 For United States Postal Service Delivery:

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

13 For Non-United States Postal Service Delivery:

14 Mike Gyurics
15 Fiscal Operations Branch Chief
16 Office of Environmental Health Hazard Assessment
17 1001 I Street
18 Sacramento, CA 95814

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

21 4.2 **Final Civil Penalty.** Thirty (30) days after the Effective Date, Major Surplus and
22 Survival shall make a Final Civil Penalty payment of \$1,000.00 on the same terms as set forth in §
23 4.1.1 pertaining to the Initial Civil Penalty. Pursuant to Title 11 California Code of Regulations,
24 Section 3203(c), Balabbo agrees that the Final Civil Penalty payment shall be waived in its entirety
25 if, on or before the date the Final Civil Penalty payment is due, an officer of Major Surplus and
26 Survival provides Balabbo with a signed declaration certifying that all Covered Products it ships
27 for sale or distributes for sale in California as of the date of its certification are Reformulated
28 Products² or are marked with the exposure warnings required by this Consent Decree (hereinafter
"Labeled Product") and that Major Surplus and Survival will continue to offer only Reformulated
Products or Labeled Products in California in the future. The option to provide a declaration
certifying its complete early reformulation or labeling of the Covered Products in lieu of making

² "Reformulated Products" is defined as any Covered Products that contain no more than 0.1% (1,000 ppm) DINP or DEHP on any component to which consumers are exposed.

1 the Final Civil Penalty payment otherwise required by this Section is a material term, and time is
2 of the essence.

3 4.3 **Attorney Fees.** Major Surplus and Survival shall pay \$13,500.00 to Brodsky &
4 Smith, LLC (“Brodsky Smith”) as complete reimbursement for Plaintiff Balabbo’s attorneys’ fees
5 and costs incurred as a result of investigating, bringing this matter to Major Surplus and Survival’s
6 attention, litigating and negotiating and obtaining judicial approval of a settlement in the public
7 interest, pursuant to Code of Civil Procedure section 1021.5. Payment shall be made within ten
8 (10) business days of the Effective Date and sent to the address for Brodsky & Smith set forth in
9 section 4.1.1, above.

10 **5. RELEASE OF ALL CLAIMS**

11 5.1 This Consent Judgment is a full, final, and binding resolution between Balabbo
12 acting in the public interest, and Major Surplus and Survival, and its parents, shareholders,
13 divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their successors
14 and assigns (“Defendant Releasees”), and all entities from whom they obtain and to whom they
15 directly or indirectly distribute or sell Covered Products, including but not limited to manufacturers,
16 suppliers, distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and
17 cooperative members (“Downstream Defendant Releasees”), of all claims for violations of
18 Proposition 65 based on exposure to DINP and DEHP from use of Covered Products as set forth in
19 the Notice, with respect to any Covered Products manufactured, distributed or sold by Major
20 Surplus and Survival prior to the Effective Date or within ninety (90) days after the Effective Date.
21 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
22 with regard to the Covered Products.

23 5.2 In addition to the foregoing, Balabbo, on behalf of herself, her past and current
24 agents, representatives, attorneys, and successors and/or assignees, and *not* in her representative
25 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
26 legal action and releases any Major Surplus and Survival, Defendant Releasees, and Downstream
27 Defendant Releasees from any and all manner of actions, causes of action, claims, demands, rights,
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1 suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses,
2 costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity,
3 fixed or contingent, now or in the future, with respect to any alleged violations of Proposition 65
4 related to or arising from Covered Products manufactured distributed or sold by Major Surplus and
5 Survival or Defendant Releasees. With respect to the foregoing waivers and releases in this
6 paragraph, Balabbo hereby specifically waives any and all rights and benefits which she now has,
7 or in the future may have, conferred by virtue of the provisions of Section 1542 of the California
8 Civil Code, which provides as follows:

9
10 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
11 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
12 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
13 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
14 THE DEBTOR.

15 5.3 Major Surplus and Survival waives any and all claims against Balabbo, her attorneys
16 and other representatives, for any and all actions taken or statements made (or those that could have
17 been taken or made) by Balabbo and her attorneys and other representatives, whether in the course
18 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
19 and/or with respect to Covered Products.

20 **6. INTEGRATION**

21 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
22 any and all prior negotiations and understandings related hereto shall be deemed to have been
23 merged within it. No representations or terms of agreement other than those contained herein exist
24 or have been made by any Party with respect to the other Party or the subject matter hereof.

25 **7. GOVERNING LAW**

26 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
27 California and apply within the State of California. In the event that Proposition 65 is repealed or
28 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
to the extent that, Covered Products are so affected.

1 **8. NOTICES**

2 8.1 Unless specified herein, all correspondence and notices required to be provided
3 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
4 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
5 by the other party at the following addresses:

6 For Defendant:

7 The Law Office of Ethan H. Nelson
8 c/o Ethan Nelson
9 4 Park Plaza, Suite 1025
 Irvine, CA 92614

10 And

11 For Balabbo:

12 Evan Smith
13 Brodsky & Smith, LLC
14 2 Bala Plaza, Suite 510
 Bala Cynwyd, PA 19004

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

17 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

18 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
19 which shall be deemed an original, and all of which, when taken together, shall constitute one and
20 the same document.

21 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
22 **APPROVAL**

23 10.1 Balabbo agrees to comply with the requirements set forth in California Health &
24 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
25 and Defendant agrees it shall support approval of such Motion.

26 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
27 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
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1 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
2 30 days, the case shall proceed on its normal course.

3 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
4 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
5 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
6 its normal course on the trial court's calendar.

7 **11. MODIFICATION**

8 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
9 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

10 **12. ATTORNEY'S FEES**

11 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
12 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless
13 the unsuccessful party has acted with substantial justification. For purposes of this Consent
14 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
15 Discovery Act of 1986, Code of Civil Procedure Section 2016, *et seq.*

16 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
17 pursuant to law.

18 **13. RETENTION OF JURISDICTION**

19 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
20 Consent Judgment.

21 **14. AUTHORIZATION**

22 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
23 respective Parties and have read, understood and agree to all of the terms and conditions of this
24 document and certifies that he or she is fully authorized by the Party he or she represents to execute
25 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
26 explicitly provided herein each Party is to bear its own fees and costs.
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1 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.
2 Except as explicitly provided herein each Party is to bear its own fees and costs.
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4 **AGREED TO:**

AGREED TO:

5 Date: 8/10/18

Date: 08-07-2018

6 By: 
7 **PRECILA BALABBO**

By: 
8 **MAJOR SURPLUS AND SURVIVAL,**
9 **INC.**

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

11 Dated: OCT 18 2018


12 Judge of Superior Court
13 **JULIA A. SPAIN**

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