

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

7 *Attorneys for Plaintiff*

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

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 THE SURPLUS STORE,

15 Defendant.

Case No.: RG17845857

**CONSENT JUDGMENT**

Judge: Victoria S. Kolakowski

Dept.: 23

Hearing Date: June 20, 2017

Hearing Time: 3:00 PM

Reservation #: R-1834913

1           **1. INTRODUCTION**

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

10           1.2     **Allegations and Representations.** Ferreiro alleges that Defendant has exposed  
11           individuals to Di(2-ethylhexyl) phthalate (DEHP) and Diisononyl phthalate (DINP) from PVC  
12           gloves and protective goggles without providing clear and reasonable warnings under Proposition  
13           65. DEHP and DINP are listed under Proposition 65 as chemicals known to the State of California  
14           to cause cancer and/or reproductive toxicity.

15           1.3     **Notices of Violation/Complaint.** On or about June 3, and June 15, 2016, and on  
16           February 20, 2017, Ferreiro served The Surplus Store, and various public enforcement agencies  
17           with a document entitled “60-Day Notices of Violation” pursuant to Health & Safety Code  
18           §25249.7(d) (collectively, the “Notices”), alleging that Defendant was in violation of Proposition  
19           65 for failing to warn consumers and customers that the Products exposed users in California to  
20           DEHP and/or DINP. No public enforcer has brought and is diligently prosecuting the claims  
21           alleged in the Notices. On January 17, 2017, Ferreiro filed a complaint in the matter as captioned  
22           above (the “Complaint”).

23           1.4     **Consent to Jurisdiction.** For purposes of this Consent Judgment only, the Parties  
24           stipulate that this Court has jurisdiction over Defendant as to the allegations contained in the  
25           Complaint filed in this matter, that venue is proper in the County of Alameda, and that this Court  
26           has jurisdiction to approve, enter, and oversee the enforcement of this Consent Judgment as a full  
27           and final binding resolution of all claims which were or could have been raised in the Complaint  
28

1 based on the facts alleged therein and/or in the Notices.

2           1.5    **No Admission.** Defendant denies the factual, legal, and material allegations  
3 contained in the Notices and Complaint and maintains that it has sold and distributed for sale in  
4 California, including the Products, which have been, and are, in compliance with all laws. The  
5 Surplus Store specifically maintains that it has not violated Proposition 65 or that it is subject to  
6 Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by Defendant  
7 of any fact, finding, issue of law, or violation of law; nor shall compliance with this Consent  
8 Judgment constitute or be construed as an admission by Defendant of any fact, finding, conclusion,  
9 issue of law, or violation of law, such being specifically denied by Defendant. However, this  
10 section shall not diminish or otherwise affect the obligations, responsibilities, and duties of  
11 Defendant under this Consent Judgment.

12    **2.        DEFINITIONS**

13           2.1    **Covered Products.** The term “Covered Products” means (a) Hawk Industrial  
14 Safety Goggles, UPC No. 768537001524, (b) Rapdom Tactical Gear Sniper Gloves, UPC No.  
15 847418019176, and (c) Red Steer PVC Gloves, UPC No. 0 46065 01843 7 that have been purchased  
16 for sale, imported, sold, and/or otherwise distributed by The Surplus Store for sale in California,  
17 and that contain DEHP and/or DINP (the “Products”).

18           2.2    **Effective Date.** The term “Effective Date” means the date this Consent Judgment is  
19 entered as a Judgment of the Court.

20    **3.        INJUNCTIVE RELIEF: WARNINGS**

21           3.1    Commencing ninety (90) days after the Effective Date, The Surplus Store shall not  
22 purchase for sale, import, sell or distribute in California any Covered Product that contains more  
23 than 1,000 parts per million DEHP and/or DINP, unless the Covered Product is accompanied by  
24 the following warning: “WARNING: This product contains a chemical known to the State of  
25 California to cause cancer, birth defects and other reproductive harm.”

26           3.2    The warning provided pursuant to Section 3.1 shall be affixed to or printed on the  
27 Covered Product’s packaging or labeling. The warning shall be prominently affixed to or printed  
28

1 on the packaging or labeling and displayed with such conspicuousness, as compared with other  
2 words, statements, or designs as to render it likely to be read and understood by an ordinary  
3 individual under customary conditions of purchase or use. A warning may be contained in the same  
4 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,  
5 concerning the use of the product and shall be at least the same size as those other safety warnings.

6 **4. MONETARY TERMS**

7 4.1 **Civil Penalty.** The Surplus Store shall pay a civil penalty of \$1,000.00 pursuant to  
8 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health  
9 & Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of  
10 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to  
11 Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

12 4.1.1 Within ten (10) business days of the Effective Date, The Surplus Store  
13 shall issue two separate checks for the civil penalty payment to (a) "OEHHA" in the amount of  
14 \$750.00; and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$250.00.  
15 Payment owed to Ferreiro pursuant to this Section shall be delivered to the following payment  
16 address:

17 Evan J. Smith, Esquire  
18 Brodsky & Smith, LLC  
19 Two Bala Plaza, Suite 510  
Bala Cynwyd, PA 19004

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

22 For United States Postal Service Delivery:

23 Mike Gyurics  
24 Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
25 P.O. Box 4010  
Sacramento, CA 95812-4010

26 For Non-United States Postal Service Delivery:

27 Mike Gyurics  
28 Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment

1 1001 I Street  
2 Sacramento, CA 95814

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

5 4.2 **Attorney Fees.** The Surplus Store shall pay \$11,500.00 to Brodsky & Smith, LLC  
6 (“Brodsky Smith”) as complete reimbursement for Plaintiff Ferreiro’s attorneys’ fees and costs  
7 incurred as a result of investigating, bringing this matter to The Surplus Store’s attention, litigating  
8 and negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to  
9 Code of Civil Procedure section 1021.5. Payment shall be made within ten (10) business days of  
10 the Effective Date and sent to the address for Brodsky & Smith set forth in section 4.1.1, above.

11 4.3 The Surplus Store shall pay the civil penalty and attorney fees in Sections 4.1 and  
12 4.2 within ten (10) days of the Effective Date.

13 **5. RELEASE OF ALL CLAIMS**

14 5.1 **Ferreiro’s Public Release of Proposition 65 Claims.** This consent judgment is a  
15 full, final, and binding resolution between Ferreiro acting on his own behalf and in the public  
16 interest, and constitutes a full and binding release as to The Surplus Store, and its parents,  
17 shareholders, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and  
18 their successors and assigns (“Defendant Releasees”), and all entities from whom they obtain and  
19 to whom they directly or indirectly distribute or sell Covered Products, including but not limited to  
20 manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees retailers,  
21 franchisees, and cooperative members (“Downstream Defendant Releasees”), of all claims for  
22 violations of Proposition 65 based on exposure to DEHP from Covered Products as set forth in the  
23 Notices, with respect to any Covered Products manufactured, distributed, or sold by The Surplus  
24 Store prior to the Effective Date. Compliance with the terms of this consent judgment constitutes  
25 compliance with Proposition 65 with regard to the Covered Products.

26 5.2 **Ferreiro’s Individual Release of Claims.** Ferreiro, in his individual capacity only  
27 and not in his representative capacity, also provides a release to The Surplus Store, Defendant  
28 Releasees, and Downstream Defendant Releasees. In addition to the foregoing, Ferreiro, on behalf

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

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

17 5.3 By executing this Consent Judgment, Ferreiro understands and acknowledges that  
18 the significance and consequence of this waiver of California Civil Code Section 1542 is that even  
19 if Ferreiro suffers future damages arising out of or resulting from, or related directly or indirectly  
20 to, in whole or in part, the Covered Products, including but not limited to any exposure to, or failure  
21 to warn with respect to exposure to DEHP from the Covered Products, Ferreiro will not be able to  
22 make any claim for those damages against The Surplus Store, Defendant Releasees, and  
23 Downstream Defendant Releasees, and the successors and assigns of any of them, who may  
24 manufacture, use, maintain, distribute, retail or sell the Covered Products. Furthermore, Ferreiro  
25 acknowledges that it intends these consequences for any such claims and any other claims which  
26 may exist as of the date of this release pertaining to the Covered Products listed in the Notices but  
27 which Ferreiro does not know exist, and which, if known, would materially affect its decision to  
28

1 enter into this Consent Judgment, regardless of whether its lack of knowledge is the result of  
2 ignorance, oversight, error, negligence, or any other cause.

3           5.4     The Surplus Store waives any and all claims against Ferreiro, his attorneys and other  
4 representatives, for any and all actions taken or statements made (or those that could have been  
5 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of  
6 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,  
7 and/or with respect to Covered Products.

8           **6.     INTEGRATION/ENTIRE AGREEMENT**

9           6.1     This Consent Judgment contains the sole and entire agreement of the Parties and  
10 any and all prior negotiations and understandings related hereto shall be deemed to have been  
11 merged within it. No representations or terms of agreement other than those contained herein exist  
12 or have been made by any Party with respect to the other Party or the subject matter hereof.

13           **7.     GOVERNING LAW**

14           7.1     The terms of this Consent Judgment shall be governed by the laws of the State of  
15 California and apply within the State of California. In the event that Proposition 65 is repealed or  
16 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then  
17 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and  
18 to the extent that, Covered Products are so affected.

19           **8.     NOTICES**

20           8.1     Unless specified herein, all correspondence and notices required to be provided  
21 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-  
22 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party  
23 by the other party at the following addresses:

24 For Defendant:

25                   Baret C. Fink  
26                   Perelman and Fink  
27                   1880 Century Park East, #315  
28                   Los Angeles, CA 90067

And

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

For Ferreiro:

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

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

**9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

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

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

**11. MODIFICATION**

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



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**12. SEVERABILITY**

12.1 If, subsequent to the Court’s approval and entry of this Consent Judgment as a judgment, any provision is held to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

**13. ATTORNEY’S FEES**

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

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

**14. RETENTION OF JURISDICTION**

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**15. AUTHORIZATION**

15.1 The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this document and certifies that he or she is fully authorized by the Party he or she represents to execute the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as explicitly provided herein each Party is to bear its own fees and costs.

**AGREED TO:**

**AGREED TO:**

Date: \_\_\_\_\_

Date: 3/13/2017

By: \_\_\_\_\_  
ANTHONY FERREIRO

By: J. Edell Naylor  
THE SURPLUS STORE  
JAIME EDELL NAYLOR  
SECRETARY

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

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

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

1 **15. AUTHORIZATION**

2 15.1 The undersigned are authorized to execute this Consent Judgment on behalf of their  
3 respective Parties and have read, understood and agree to all of the terms and conditions of this  
4 document and certifies that he or she is fully authorized by the Party he or she represents to execute  
5 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as  
6 explicitly provided herein each Party is to bear its own fees and costs.

7 **AGREED TO:**

**AGREED TO:**

8  
9 Date: 5/2/17

Date: \_\_\_\_\_

10 By: Anthony Ferreiro  
11 ANTHONY FERREIRO

By: \_\_\_\_\_  
THE SURPLUS STORE

12  
13 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

14  
15 Dated: \_\_\_\_\_

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