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

11 PRECILA BALABBO,
12 Plaintiff,

13 v.

14 MAJOR SURPLUS AND SURVIVAL, INC.,
15 and CALIFORNIA SURPLUS MART, INC.,

16 Defendants.

Case No.: RG16840290

CONSENT JUDGMENT

Judge: Julia Spain

Dept.: 520

Hearing Date: January 31, 2018

Hearing Time: 2:00 PM

Reservation #: R-1903208

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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 a person in the course of doing business for purposes of Proposition
9 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 rain
12 ponchos and dry bags without providing clear and reasonable exposure warnings under Proposition
13 65. DINP and DEHP 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 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 “Notice”), alleging that
18 Defendant was in violation of Proposition 65 for failing to warn consumers and customers that *Mil-*
19 *Spec* waterproof products exposed users in California to DINP. No public enforcer has brought
20 and is diligently prosecuting the claims alleged in the Notice. On November 28, 2016, Balabbo
21 filed a complaint (the “Complaint”) in the matter.

22 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
24 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
25 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
26 claims which were or could have been raised in the Complaint based on the facts alleged therein
27 and/or in the Notice.
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1 1.5 Defendant denies the material allegations contained in Balabbo's Notice and
2 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
3 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
4 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
5 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
6 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
7 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term "Covered Products" means Mil-Spec rainwear, rain
10 coats, rain jackets, ponchos and/or dry bags that are manufactured, distributed and/or offered for
11 sale in California by Major Surplus and Survival, and that contain DEHP and/or DINP.

12 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
13 entered as a Judgment of the Court.

14 **3. INJUNCTIVE RELIEF: WARNINGS**

15 3.1 Commencing ninety (90) days after the Effective Date, Major Surplus and Survival
16 shall not manufacture, import, or purchase for sale in California any Covered Product that contains
17 more than 1,000 parts per million DINP or DEHP, unless the Covered Product is accompanied by
18 the following warning: "WARNING: This product contains a chemical known to the State of
19 California to cause cancer, birth defects and other reproductive harm" or "WARNING: This
20 product can expose you to chemicals including [name of one or more chemicals], which is [are]
21 known to the State of California to cause cancer and birth defects or other reproductive harm. For
22 more information go to www.P65Warnings.ca.gov." There shall be no obligation for Major
23 Surplus and Survival to label Covered Products that entered the stream of commerce prior to ninety
24 (90) days after the Effective Date.

25 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
26 Covered Product's packaging or labeling. The warning shall be prominently affixed to or printed
27 on the packaging or labeling and displayed with such conspicuousness, as compared with other
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1 words, statements, or designs as to render it likely to be read and understood by an ordinary
2 individual under customary conditions of purchase or use. A warning may be contained in the same
3 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,
4 concerning the use of the product and shall be at least the same size as those other safety warnings.

5 **4. MONETARY TERMS**

6 4.1 **Initial Civil Penalty.** Major Surplus and Survival shall pay an Initial Civil Penalty
7 of \$1,000.00 pursuant to Health and Safety Code section 25249.7(b), to be apportioned in
8 accordance with California Health & Safety Code § 25192, with 75% of these funds remitted to the
9 State of California's Office of Environmental Health Hazard Assessment and the remaining 25%
10 of the penalty remitted to Balabbo, as provided by California Health & Safety Code § 25249.12(d).

11 4.1.1 Within ten (10) business days of the Effective Date, Major Surplus and
12 Survival shall issue two separate checks for the Initial Civil Penalty payment to (a) "OEHHA" in
13 the amount of \$750.00; and (b) "Brodsky & Smith, LLC in Trust for Balabbo" in the amount of
14 \$250.00. Payment owed to Balabbo pursuant to this Section shall be delivered to the following
15 payment address:

16 Evan J. Smith, Esquire
17 Brodsky & Smith, LLC
18 Two Bala Plaza, Suite 510
19 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
25 Office of Environmental Health Hazard Assessment
26 P.O. Box 4010
27 Sacramento, CA 95812-4010

28 For Non-United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street

1 Sacramento, CA 95814

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

4 4.2 **Final Civil Penalty.** One Hundred Twenty (120) days after the Effective Date,
5 Major Surplus and Survival shall make a Final Civil Penalty payment of \$1,000.00 on the same
6 terms as set forth in Section 4.1.1 pertaining to the Initial Civil Penalty. Pursuant to Title 11
7 California Code of Regulations, Section 3203(c), Balabbo agrees that the Final Civil Penalty
8 payment shall be waived in its entirety if, on or before the Final Civil Penalty payment is due, an
9 officer of Major Surplus and Survival provides Balabbo with a signed declaration certifying that
10 all Covered Products it ships for sale or distributes for sale in California as of the date of its
11 certification are Reformulated Products¹ or are marked with the warnings required by this Consent
12 Decree (hereinafter “Labeled Product”) and that Major Surplus and Survival will continue to offer
13 only Reformulated Products or Labeled Products in California in the future. The option to provide
14 a declaration certifying its complete early reformulation or labeling of the Covered Products in lieu
15 of making the Final Civil Penalty payment otherwise required by this Section is a material term,
16 and time is of the essence.

17 4.3 **Attorney Fees.** Major Surplus and Survival shall pay \$14,000.00 to Brodsky &
18 Smith, LLC (“Brodsky Smith”) as complete reimbursement for Plaintiff Balabbo’s attorneys’ fees
19 and costs incurred as a result of investigating, bringing this matter to Major Surplus and Survival’s
20 attention, litigating and negotiating and obtaining judicial approval of a settlement in the public
21 interest, pursuant to Code of Civil Procedure section 1021.5. Payment shall be made within ten
22 (10) business days of the Effective Date and sent to the address for Brodsky & Smith set forth in
23 section 4.1.1, above.

24 **5. RELEASE OF ALL CLAIMS**

25 5.1 This consent judgment is a full, final, and binding resolution between Balabbo acting
26 in the public interest, and Major Surplus and Survival, and its parents, shareholders, divisions,

27 ¹ “Reformulated Products” is defined as any Covered Product that contains no more than
28 1,000 parts per million DINP or DEHP.

1 subdivisions, subsidiaries, partners, sister companies, and affiliates, and their successors and
2 assigns (“Defendant Releasees”), and all entities from whom they obtain and to whom they directly
3 or indirectly distribute or sell Covered Products, including but not limited to manufacturers,
4 suppliers, distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and
5 cooperative members (“Downstream Defendant Releasees”), of all claims for violations of
6 Proposition 65 based on exposure to DINP from Covered Products as set forth in the Notice, with
7 respect to any Covered Products manufactured, distributed, or sold by Major Surplus and Survival
8 prior to the Effective Date. Compliance with the terms of this consent judgment constitutes
9 compliance with Proposition 65 with regard to the Covered Products.

10 5.2 In addition to the foregoing, Balabbo, on behalf of herself, her past and current
11 agents, representatives, attorneys, and successors and/or assignees, and *not* in her representative
12 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
13 legal action and releases any Major Surplus and Survival, Defendant Releasees, and Downstream
14 Defendant Releasees from any and all manner of actions, causes of action, claims, demands, rights,
15 suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses,
16 costs, expenses, and attorneys’ fees, of any nature whatsoever, known or unknown, in law or equity,
17 fixed or contingent, now or in the future, with respect to any alleged violations of Proposition 65
18 related to or arising from Covered Products manufactured distributed or sold by Major Surplus and
19 Survival or Defendant Releasees. With respect to the foregoing waivers and releases in this
20 paragraph, Balabbo hereby specifically waives any and all rights and benefits which she now has,
21 or in the future may have, conferred by virtue of the provisions of Section 1542 of the California
22 Civil Code, which provides as follows:

23 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
24 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
25 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
26 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
27 THE DEBTOR.

28 5.3 Major Surplus and Survival waives any and all claims against Balabbo, her attorneys
and other representatives, for any and all actions taken or statements made (or those that could have

1 been taken or made) by Balabbo and her attorneys and other representatives, whether in the course
2 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
3 and/or with respect to Covered Products.

4 **6. INTEGRATION**

5 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
6 any and all prior negotiations and understandings related hereto shall be deemed to have been
7 merged within it. No representations or terms of agreement other than those contained herein exist
8 or have been made by any Party with respect to the other Party or the subject matter hereof.

9 **7. GOVERNING LAW**

10 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
11 California and apply within the State of California. In the event that Proposition 65 is repealed or
12 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
13 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
14 to the extent that, Covered Products are so affected.

15 **8. NOTICES**

16 8.1 Unless specified herein, all correspondence and notices required to be provided
17 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
18 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
19 by the other party at the following addresses:

20 For Defendant:

21 The Law Office of Ethan H. Nelson
22 c/o Ethan Nelson
23 4 Park Plaza, Suite 1025
Irvine, CA 92614

24 And

25 For Balabbo:

26 Evan Smith
27 Brodsky & Smith, LLC
28 2 Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

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

3 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

4 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
5 which shall be deemed an original, and all of which, when taken together, shall constitute one and
6 the same document.

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

9 10.1 Balabbo agrees to comply with the requirements set forth in California Health &
10 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
11 and Defendant agrees it shall support approval of such Motion.

12 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
13 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
14 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
15 30 days, the case shall proceed on its normal course.

16 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
17 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
18 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
19 its normal course on the trial court's calendar.

20 **11. MODIFICATION**

21 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
22 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

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12. ATTORNEY'S FEES

12.1 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.*

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

13. RETENTION OF JURISDICTION

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

14. AUTHORIZATION

14.1 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: 12/6/17

Date: 10.25.2017

By: 
PRECILLA BALABBO

By: 
MAJOR SURPLUS AND SURVIVAL,
INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court