

1 Evan Smith (Bar No. SBN 242352)  
2 Ryan P. Cardona, Esquire (SBN 302113)  
3 BRODSKY & SMITH, LLC  
4 9595 Wilshire Blvd., Ste. 900  
5 Beverly Hills, CA 90212  
6 Telephone: (877) 534-2590  
7 Facsimile: (310) 247-0160

8 *Attorneys for Plaintiff*

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

13

COUNTY OF ALAMEDA

14

ANTHONY FERREIRO and EMA BELL,

Case No.: RG17849567

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Plaintiffs,

**CONSENT JUDGMENT**

16

v.

Judge: Julia Spain

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MORRIS ROTHENBERG & SON, INC.,

Dept.: 19

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Defendant.

Hearing Date: June 7, 2017

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Hearing Time: 2:00 PM

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Reservation #: R-1842376

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1           **1. INTRODUCTION**

2           1.1   **The Parties.** This Consent Judgment is entered into by and between Anthony  
3           Ferreiro (“Ferreiro”) and Ema Bell (“Bell”), each acting on behalf of the public interest  
4           (collectively “Plaintiffs”) and Morris Rothenberg & Son, Inc. (“Rothco” or “Defendant”) with  
5           Plaintiffs and Defendant collectively referred to as the “Parties” and each of them as a “Party.”  
6           Ferreiro and Bell are individuals that reside in California, and that seek to promote awareness of  
7           exposures to toxic chemicals and improve human health by reducing or eliminating hazardous  
8           substances contained in consumer products. Rothco employs ten or more persons and is a person  
9           in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§  
10          25249.6 *et seq.*

11          1.2   **Allegations and Representations.** Plaintiffs allege that Defendant has exposed  
12          individuals to Di(2-ethylhexyl) phthalate (DEHP) from Rothco cargo bags and ponchos without  
13          providing clear and reasonable warnings under Proposition 65. DEHP is listed under Proposition  
14          65 as a chemical known to the State of California to cause cancer and reproductive toxicity.

15          1.3   **Notices of Violation/Complaint.** On or about November 15, 2016, and on  
16          December 1, 2016, Bell and Ferreiro, respectively, served Rothco, and various public enforcement  
17          agencies, with documents each entitled a “60-Day Notices of Violation” pursuant to Health &  
18          Safety Code §25249.7(d) (the “Notices”), alleging that Defendant was in violation of Proposition  
19          65 for failing to warn consumers and customers that Rothco cargo bags and Rothco ponchos  
20          exposed users in California to DEHP. No public enforcer has brought and is diligently prosecuting  
21          the claims alleged in the Notices. On February 15, 2017, Plaintiffs filed a complaint in the matter  
22          as captioned above (the “Complaint”).

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

2 1.5 Defendant denies the material allegations contained in Plaintiffs' Notices and  
3 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment  
4 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of  
5 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission  
6 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being  
7 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the  
8 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

9 **2. DEFINITIONS**

10 2.1 **Covered Products.** The term "Covered Products" means cargo bags, including but  
11 not limited to Rothco Black Jumbo Military Cargo Bags, UPC No. 6 13902 81341 0, and rainwear,  
12 rain jackets, coats and ponchos, including but not limited to Rothco Reversible PVC Ponchos, UPC  
13 No. 6 13902 36440 0, that are manufactured, distributed and/or offered for sale in California by  
14 Rothco.

15 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is  
16 entered as a Judgment of the Court.

17 **3. INJUNCTIVE RELIEF: WARNINGS**

18 3.1 Commencing ninety (90) days after the Effective Date, Rothco shall not  
19 manufacture, import, or purchase for sale in California any Covered Product that contains more  
20 than 1,000 parts per million DEHP, unless the Covered Product is accompanied by the following  
21 warning: "WARNING: This product contains a chemical known to the State of California to cause  
22 cancer, birth defects and other reproductive harm."

23 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the  
24 Covered Product's packaging or labeling. The warning shall be prominently affixed to or printed  
25 on the packaging or labeling and displayed with such conspicuousness, as compared with other  
26 words, statements, or designs as to render it likely to be read and understood by an ordinary  
27 individual under customary conditions of purchase or use. A warning may be contained in the same  
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1 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,  
2 concerning the use of the product and shall be at least the same size as those other safety warnings.

3 **4. MONETARY TERMS**

4 4.1 **Initial Civil Penalty.** Rothco shall pay an Initial Civil Penalty of \$1,500.00 pursuant  
5 to Health and Safety Code section 25249.7(b), to be apportioned in accordance with California  
6 Health & Safety Code § 25192, with 75% of these funds remitted to the State of California's Office  
7 of Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to  
8 Plaintiffs, as provided by California Health & Safety Code § 25249.12(d).

9 4.1.1 Within ten (10) business days of the Effective Date, Rothco shall issue  
10 three separate checks for the civil penalty payment to (a) "OEHHA" in the amount of \$1,125.00;  
11 (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$187.50; and (c) "Brodsky &  
12 Smith, LLC in Trust for Bell" in the amount of \$187.50. Payment owed to Plaintiffs pursuant to  
13 this Section shall be delivered to the following payment address:

14 Evan J. Smith, Esquire  
15 Brodsky & Smith, LLC  
16 Two Bala Plaza, Suite 510  
Bala Cynwyd, PA 19004

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

19 For United States Postal Service Delivery:

20 Mike Gyurics  
21 Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
22 P.O. Box 4010  
Sacramento, CA 95812-4010

23 For Non-United States Postal Service Delivery:

24 Mike Gyurics  
25 Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
26 1001 I Street  
Sacramento, CA 95814

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

3 4.2 **Final Civil Penalty.** Sixty (60) days after the Effective Date, Rothco shall make a  
4 Final Civil Penalty payment of \$1,500.00 on the same terms as set forth in Section 4.1.1 pertaining  
5 to the Initial Civil Penalty. Pursuant to Title 11 California Code of Regulations, Section 3203(c),  
6 Ferreiro and Bell agree that the Final Civil Penalty payment shall be waived in its entirety if, on or  
7 before the Final Civil Penalty payment is due, an officer of Rothco provides Plaintiffs with a signed  
8 declaration certifying that all Covered Products it ships for sale or distributes for sale in California  
9 as of the date of its certification are Reformulated Products or are marked with the warnings  
10 required by this Consent Decree (hereinafter "Labeled Product") and that Rothco will continue to  
11 offer only Reformulated Products or Labeled Products in California in the future. The option to  
12 provide a declaration certifying its complete early reformulation or labeling of the Covered  
13 Products in lieu of making the Final Civil Penalty payment otherwise required by this Section is a  
14 material term, and time is of the essence.

15 4.3 **Attorney Fees.** Rothco shall pay \$16,000.00 to Brodsky & Smith, LLC ("Brodsky  
16 Smith") as complete reimbursement for Plaintiffs' attorneys' fees and costs incurred as a result of  
17 investigating, bringing this matter to Rothco's attention, litigating and negotiating and obtaining  
18 judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure section  
19 1021.5. Payment shall be made within ten (10) business days of the Effective Date and sent to the  
20 address for Brodsky & Smith set forth in section 4.1.1, above.

21 4.4 Rothco shall pay the civil penalty and attorney fees in Sections 4.1 and 4.3 within  
22 ten (10) days of the Effective Date.

23 **5. RELEASE OF ALL CLAIMS**

24 5.1 This Consent Judgment is a full, final, and binding resolution between Plaintiffs  
25 acting in the public interest, and Rothco, and its parents, shareholders, divisions, subdivisions,  
26 subsidiaries, partners, sister companies, and affiliates, and their successors and assigns ("Defendant  
27 Releasees"), and all entities from whom they obtain and to whom they directly or indirectly  
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1 distribute or sell Covered Products, including but not limited to Amazon.com, Inc., H&M Military  
2 Supplies, Inc., manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees  
3 retailers, franchisees, and cooperative members (“Downstream Defendant Releasees”), of all  
4 claims for violations of Proposition 65 based on exposure to DEHP from Covered Products as set  
5 forth in the Notices, with respect to any Covered Products manufactured, distributed, or sold by  
6 Rothco prior to the Effective Date. Compliance with the terms of this Consent Judgment constitutes  
7 compliance with Proposition 65 with regard to the Covered Products.

8           5.2 In addition to the foregoing, Plaintiffs, each on behalf of himself or herself, their  
9 past and current agents, representatives, attorneys, and successors and/or assignees, and *not* in their  
10 representative capacity, hereby waives all rights to institute or participate in, directly or indirectly,  
11 any form of legal action and releases any Rothco, Defendant Releasees, and Downstream  
12 Defendant Releasees from any and all manner of actions, causes of action, claims, demands, rights,  
13 suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses,  
14 costs, expenses, and attorneys’ fees, of any nature whatsoever, known or unknown, in law or equity,  
15 fixed or contingent, now or in the future, with respect to any alleged violations of Proposition 65  
16 related to or arising from Covered Products manufactured distributed or sold by Rothco or  
17 Defendant Releasees. With respect to the foregoing waivers and releases in this paragraph,  
18 Plaintiffs hereby specifically waive any and all rights and benefits which he or she now has, or in  
19 the future may have, conferred by virtue of the provisions of Section 1542 of the California Civil  
20 Code, which provides as follows:

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

25           5.3 Rothco waives any and all claims against Plaintiffs, their attorneys and other  
26 representatives, for any and all actions taken or statements made (or those that could have been  
27 taken or made) by Plaintiffs and their attorneys and other representatives, whether in the course of  
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1 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,  
2 and/or with respect to Covered Products.

3 **6. INTEGRATION**

4 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and  
5 any and all prior negotiations and understandings related hereto shall be deemed to have been  
6 merged within it. No representations or terms of agreement other than those contained herein exist  
7 or have been made by any Party with respect to any other Party or the subject matter hereof.

8 **7. GOVERNING LAW**

9 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of  
10 California and apply within the State of California. In the event that Proposition 65 is repealed or  
11 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then  
12 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and  
13 to the extent that, Covered Products are so affected.

14 **8. NOTICES**

15 8.1 Unless specified herein, all correspondence and notices required to be provided  
16 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-  
17 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party  
18 by any other party at the following addresses:

19 For Defendant:

20 Meredith Jones-McKeown  
21 Sheppard, Mullin, Richter & Hampton LLP  
22 Four Embarcadero Center  
23 Seventeenth Floor  
24 San Francisco, CA 94111

25 And

26 For Plaintiffs:

27 Evan Smith  
28 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

1 which all notices and other communications shall be sent.

2 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

3 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of  
4 which shall be deemed an original, and all of which, when taken together, shall constitute one and  
5 the same document.

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

8 10.1 Plaintiffs agrees to comply with the requirements set forth in California Health &  
9 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment  
10 and Defendant agrees it shall support approval of such Motion.

11 10.2 This Consent Judgment shall not be effective until it is approved and entered by the  
12 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,  
13 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within  
14 30 days, the case shall proceed on its normal course.

15 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an  
16 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent  
17 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on  
18 its normal course on the trial court's calendar.

19 **11. MODIFICATION**

20 11.1 This Consent Judgment may be modified only by further stipulation of the Parties  
21 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

22 **12. ATTORNEY'S FEES**

23 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent  
24 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless  
25 the unsuccessful party has acted with substantial justification. For purposes of this Consent  
26 Judgment, the term substantial justification shall carry the same meaning as used in the Civil  
27 Discovery Act of 1986, Code of Civil Procedure Section 2016, *et seq.*

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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: \_\_\_\_\_

Date: 3/15/17

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

By:  \_\_\_\_\_  
MORRIS ROTHENBERG & SON, INC.

**AGREED TO:**

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

By: \_\_\_\_\_  
EMA BELL

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

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

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

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**AGREED TO:**

**AGREED TO:**

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

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

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

By: \_\_\_\_\_  
MORRIS ROTHENBERG & SON, INC.

**AGREED TO:**

Date: 4/15/17

By: *EMA Bell*  
EMA BELL

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

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

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

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**AGREED TO:**

**AGREED TO:**

Date: 4/15/17  
By: *Anthony Ferreiro*  
ANTHONY FERREIRO

Date: \_\_\_\_\_  
By: \_\_\_\_\_  
MORRIS ROTHENBERG & SON, INC.

**AGREED TO:**

Date: \_\_\_\_\_  
By: \_\_\_\_\_  
EMA BELL

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

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

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