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**FILED**  
ALAMEDA COUNTY

JUN 16 2020

CLERK OF THE SUPERIOR COURT

By Manalfer

Deputy

1 Evan Smith (Bar No. SBN 242352)  
2 BRODSKY & SMITH, LLC.  
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7 *Attorneys for Plaintiff*

## SUPERIOR COURT OF THE STATE OF CALIFORNIA

## COUNTY OF ALAMEDA

PRECILA BALABBO,

Plaintiff,

v.

GLOBAL DESIGN CONCEPTS, INC., et al.,

Defendants.

Case No.: RG19041979

**CONSENT JUDGMENT**

Judge: Jeffrey Brand

Dept.: 22

Hearing Date: April 16, 2020

Hearing Time: 3:00 PM

Reservation #: R-2163042

**Filed By Fax****RECEIVED**  
FEB 26 2020

1  
2 **1. INTRODUCTION**

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

11 1.2 **Allegations and Representations.** Balabbo alleges that Defendant has exposed  
12 individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of Disney Minnie Mouse lunch  
13 bags, UPC # 693186449567 without providing a clear and reasonable exposure warning pursuant  
14 to Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of  
15 California to cause cancer and reproductive toxicity.

16 1.3 **Notice of Violation/Complaint.** On or about November 29, 2018, Balabbo served  
17 Global Design Concepts, Inc. ("GDC"), and various public enforcement agencies with documents  
18 entitled "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d) (the  
19 "Notice"), alleging that GDC violated Proposition 65 for failing to warn consumers and customers  
20 that use of Disney Minnie Mouse lunch bags, UPC # 693186449567 expose users in California to  
21 DEHP. No public enforcer has brought and is diligently prosecuting the claims alleged in the  
22 Notice. On November 5, 2019, Balabbo filed a complaint (the "Complaint") in the matter against  
23 defendant GDC. Bioworld was subsequently identified as the successor to GDC and on January 15,  
24 2020, Plaintiff amended the Complaint in order to name Bioworld as defendant (the "Amended  
25 Complaint"). The Complaint and Amended Complaint are collectively referred to herein as, the  
26 "Action."

27 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
28 jurisdiction over Defendant as to the allegations contained in the Action, that venue is proper in the

1 County of Alameda, and that this Court has jurisdiction to approve, enter, and oversee the  
2 enforcement of this Consent Judgment as a full and final binding resolution of all claims which  
3 were or could have been raised in the Action based on the facts alleged therein and/or in the Notice.

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

11 **2. DEFINITIONS**

12 2.1 **Covered Products.** The term "Covered Products" means children's lunch bags  
13 including without limitation Disney Minnie Mouse lunch bags, UPC # 693186449567 that are  
14 manufactured, distributed and/or offered for sale in California by Bioworld.

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 **Reformulation of Covered Products.** As of the Effective Date and continuing  
19 thereafter, Covered Products that Bioworld directly manufactures, imports, distributes, sells, or  
20 offers for sale in California shall either: (a) be Reformulated Products pursuant to § 3.2, below; or  
21 (b) be labeled with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4, below. For  
22 purposes of this Consent Judgment, a "Reformulated Product" is a Covered Product that is in  
23 compliance with the standard set forth in § 3.2 below. The warning requirement set forth in §§ 3.3  
24 and 3.4 shall not apply to any Reformulated Product.

25 3.2 **Reformulation Standard.** "Reformulated Products" shall mean Covered Products  
26 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP  
27 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A  
28

1 and 8270C or other methodology utilized by federal or state government agencies for the purpose  
2 of determining the phthalate content in a solid substance.

3       **3.3 Clear and Reasonable Warning.** As of the date this Consent Judgment is signed  
4 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in  
5 this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufacturers.  
6 imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There  
7 shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream  
8 of commerce prior to the date this Consent Judgment is signed by both Parties. The warning shall  
9 consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

10       (a) **Warning.** The "Warning" shall consist of the statement:

11       **⚠ WARNING:** This product can expose you to chemicals including di(2-  
12 ethylhexyl) phthalate (DEHP), which is known to the State of California to cause  
13 cancer and birth defects or other reproductive harm. For more information go to  
14 [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

15       (b) **Alternative Warning:** Bioworld may, but is not required to, use the alternative  
16 short-form warning as set forth in this § 3.3(b) ("**Alternative Warning**") as follows:

17       **⚠ WARNING:** Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

18       **3.4 A Warning or Alternative Warning** provided pursuant to § 3.3 must print the word  
19 "**WARNING:**" in all capital letters and in bold font, followed by a colon. The warning symbol to  
20 the left of the word "**WARNING:**" must be a black exclamation point in a yellow equilateral  
21 triangle with a black outline, except that if the sign or label for the Covered Product does not use  
22 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller  
23 than the height of the word "**WARNING:**". The warning shall be affixed to or printed on the  
24 Covered Product's packaging or labeling, or on a placard, shelf tag, sign or electronic device or  
25 automatic process, providing that the warning is displayed with such conspicuousness, as compared  
26 with other words, statements, or designs as to render it likely to be read and understood by an  
27 ordinary individual under customary conditions of purchase or use. A warning may be contained  
28 in the same section of the packaging, labeling, or instruction booklet that states other safety

1 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as  
2 those other safety warnings.

3 If Bioworld sells Covered Products via an internet website to customers located in  
4 California, the warning requirements of this section shall be satisfied if the foregoing warning  
5 appears either: (a) on the same web page on which a Covered Product is displayed and/or described;  
6 (b) on the same page as the price for the Covered Product; or (c) on one or more web pages  
7 displayed to a purchaser prior to purchase during the checkout process. Alternatively, a symbol  
8 consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent  
9 to or immediately following the display, description, price, or checkout listing of the Covered  
10 Product, if the warning statement appears elsewhere on the same web page in a manner that clearly  
11 associates it with the product(s) to which the warning applies.

12 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in  
13 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent  
14 Judgment or by complying with warning requirements adopted by the State of California's Office  
15 of Environmental Health Hazard Assessment ("OEHHA") after the Effective Date.

16 **4. MONETARY TERMS**

17 4.1 **Civil Penalty.** Bioworld shall pay \$4,500.00 as a Civil Penalty pursuant to Health  
18 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &  
19 Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the  
20 Civil Penalty remitted to Balabbo, as provided by California Health & Safety Code § 25249.12(d).

21 4.1.1 Within ten (10) days of the Effective Date, Bioworld shall issue two  
22 separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$3,375.00; and  
23 to (b) "Brodsky & Smith, LLC in Trust for Balabbo" in the amount of \$1,125.00. Payment owed  
24 to Balabbo pursuant to this Section shall be delivered to the following payment address:

25 Evan J. Smith, Esquire  
26 Brodsky & Smith, LLC  
27 Two Bala Plaza, Suite 510  
28 Bala Cynwyd, PA 19004

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

3 For United States Postal Service Delivery:

4 Mike Gyurics  
5 Fiscal Operations Branch Chief  
6 Office of Environmental Health Hazard Assessment  
7 P.O. Box 4010  
8 Sacramento, CA 95812-4010

9 For Non-United States Postal Service Delivery:

10 Mike Gyurics  
11 Fiscal Operations Branch Chief  
12 Office of Environmental Health Hazard Assessment  
13 1001 I Street  
14 Sacramento, CA 95814

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

17 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Bioworld shall pay  
18 \$38,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Balabbo's  
19 attorneys' fees and costs incurred as a result of investigating, bringing this matter to Bioworld  
20 attention, litigating and negotiating and obtaining judicial approval of a settlement in the public  
21 interest, pursuant to Code of Civil Procedure § 1021.5.

22 **5. RELEASE OF ALL CLAIMS**

23 5.1 This Consent Judgment is a full, final, and binding resolution between Balabbo  
24 acting on her own behalf, and on behalf of the public interest, and Bioworld, and its parents,  
25 shareholders, members, directors, officers, managers, employees, representatives, agents,  
26 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their  
27 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they  
28 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but  
not limited to manufacturers, suppliers, distributors, wholesalers, customers (including Target  
Corporation), licensors, licensees retailers, franchisees, and cooperative members ("Downstream  
Releasees"), of all claims for violations of Proposition 65 based on exposure to DEHP from

1 Covered Products as set forth in the Notice, with respect to any Covered Products manufactured,  
2 distributed, or sold by Bioworld prior to the Effective Date. This Consent Judgment shall have  
3 preclusive effect such that no other person or entity, whether purporting to act in his, her, or its  
4 interests or the public interest shall be permitted to pursue and/or take any action with respect to  
5 any violation of Proposition 65 that was alleged in the Action, or that could have been brought  
6 pursuant to the Notice against Bioworld and/or the Downstream Releasees of the Covered Products  
7 ("Proposition 65 Claims"). Compliance with the terms of this Consent Judgment constitutes  
8 compliance with Proposition 65 with regard to the Covered Products.

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

22 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE  
23 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO  
24 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE  
25 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE  
26 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE  
27 DEBTOR OR RELEASED PARTY.

28 5.3 Bioworld 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 been  
taken or made) by Balabbo and her attorneys and other representatives, whether in the course of

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 the 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 the other party at the following addresses:

19 For Defendant:

20 John J. Allen  
21 Allen Matkins Leck Gamble Mallory & Natsis LLP  
22 865 South Figueroa Street, Suite 2800  
Los Angeles, CA 90017-2543

23 And

24 For Balabbo:

25 Evan Smith  
26 Brodsky & Smith, LLC  
27 9595 Wilshire Blvd., Ste. 900  
Beverly Hills, CA 90212

28 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 Balabbo 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 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, the  
13 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30  
14 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.

25 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions  
26 pursuant to law.

1 **13. RETENTION OF JURISDICTION**

2 13.1 This Court shall retain jurisdiction of this matter to implement or modify the  
3 Consent Judgment.

4 **14. AUTHORIZATION**

5 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their  
6 respective Parties and have read, understood and agree to all of the terms and conditions of this  
7 document and certify that he or she is fully authorized by the Party he or she represents to execute  
8 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as  
9 explicitly provided herein each Party is to bear its own fees and costs.

10  
11 **AGREED TO:**

**AGREED TO:**

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

Date: Feb 12 2020

13 By: \_\_\_\_\_  
14 **PRECILA BALABBO**

By: [Signature]  
**BIOWORLD MERCHANDISING INC.**

15  
16  
17 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

18  
19 Dated: \_\_\_\_\_

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

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 certify 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:

02/08/2020

Date:

By:

PRECILA BALABBO

By:

BIOWORLD MERCHANDISING INC.

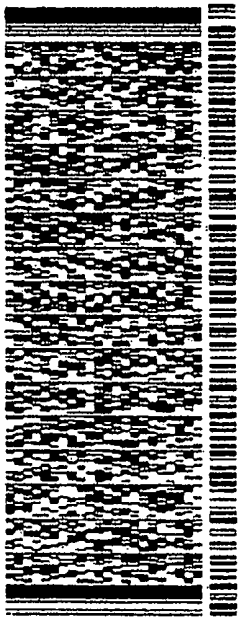

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated:

6/16/2020

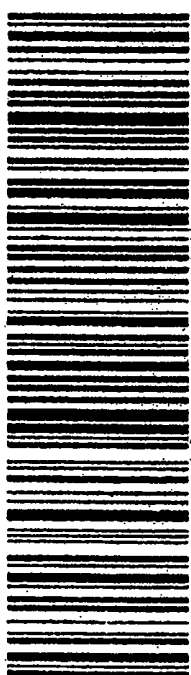
Judge of Superior Court

# EXHIBIT "B"

|  |  |  |
|--|--|--|
| ORIGIN ID: HARA (610) 667-6200<br>BRODSKY & SMITH<br>333 E. CITY AVENUE, SUITE 510<br>BALA CYNMMD, PA 19004<br>UNITED STATES US                                      |  | SHIP DATE: 19FEB20<br>ACTWGT:<br>CAD: 108015843INET4220<br>BILL SENDER |
| TO ATT: PROP 65 COORDINATOR<br>OFFICE OF THE CA ATTORNEY GENERAL<br>1515 CLAY STREET, SUITE 2000<br>POST OFFICE BOX 70550<br>OAKLAND CA 94612<br>(610) 667-6200 REF: |  |  |
| PO: DEPT:  |  |  |
|    |  |  |
|    |  |  |
| 56B.2049E/FE4A   |  |  |

|                             |  |                    |
|-----------------------------|--|--------------------|
| TRK# 7778 1162 7355<br>0201 | THU - 20 FEB 3:00P<br>STANDARD OVERNIGHT | 94612<br>CA-US OAK |
|-----------------------------|--|--------------------|

**XH JEMA**

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Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on [fedex.com](http://fedex.com). FedEx will not be responsible for any claim in excess of \$100 per package, whether the result of loss, damage, delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim. Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special is limited to the greater of \$100 or the authorized declared value. Recovery cannot exceed actual documented loss. Maximum for items of extraordinary value is \$1,000, e.g. jewelry, precious metals, negotiable instruments and other items listed in our Service Guide. Written claims must be filed within strict time limits, see current FedEx Service Guide.

# EXHIBIT "C"

**EDMUND G. BROWN JR.**  
*Attorney General*

*State of California*  
**DEPARTMENT OF JUSTICE**



1515 CLAY STREET, 20TH FLOOR  
P.O. BOX 70550  
OAKLAND, CA 94612-0550

Public: (510) 622-2100  
Telephone: (510) 622-4038  
Facsimile: (510) 622-2270  
E-Mail: Timothy.Sullivan@doj.ca.gov

December 3, 2008

VIA E-MAIL & FIRST CLASS MAIL  
cfalvey@cpsc.gov

Cheryl A. Falvey, Esq.  
General Counsel  
Office of the General Counsel  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

RE: Implementation of California State Law Restricting Phthalates

Dear Ms. Falvey:

In light of the recent public debate concerning the applicability of the federal phthalate restrictions in the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), we are writing to explain our position on the applicability of California's phthalate limits on toys and child care articles. In short, California's phthalate restrictions become effective January 1, 2009, and prohibit the manufacture, sale, or distribution of toys and child care articles with excessive levels of certain phthalates, regardless of when or where those items were manufactured.

Your letter of November 17, 2008, stated that the federal phthalate restrictions in section 108 of the new CPSIA apply only to products manufactured after that provision's effective date of February 10, 2009. Under this interpretation of the federal law, manufacturers can continue making toys with significant amounts of phthalates, and sell them in this country for years to come, so long as they were made by February 9, 2009. In response to your letter, members of Congress have sent letters to CPSC objecting to this interpretation and explaining that Congress intended that children's toys and child care articles with excessive level of phthalates cannot be sold after February 10, 2009, even if they were manufactured earlier.

Regardless of which of these interpretations of the federal CPSIA prevails, toys and child care articles containing excessive levels of phthalates cannot be sold or distributed in California after January 1, 2009, no matter when or where they were manufactured. This California requirement is not preempted or otherwise affected by the federal CPSIA phthalate restrictions. While it is not CPSC's obligation to advise companies on the applicability of state law, we are concerned that since your November 17, 2008, letter does not mention the existence of state phthalate requirements, readers could mistakenly conclude that there will be no phthalate

Cheryl A. Falvey, Esq.  
December 3, 2008  
Page 2

limitations in effect anywhere in the United States on January 1, 2009. We hope that this letter will provide guidance to the public as to how the federal and state phthalate laws interact.

#### California's phthalate restrictions

In October of 2007, Governor Schwarzenegger signed Assembly Bill 1108 ("A.B. 1108"), which limits the phthalate content of toys and child care articles<sup>1</sup> manufactured, distributed, or sold in California. (Cal. Health & Saf. Code, §§ 108935-108939, Stats. 2007, c. 672, A.B. 1108.) This California law restricts six particular phthalates, which are the same as those restricted by the federal CPSIA: di-(2-ethylhexyl) phthalate ("DEHP"), dibutyl phthalate ("DBP"), benzyl butyl phthalate ("BBP"), diisononyl phthalate ("DINP"), diisodecyl phthalate ("DIDP"), and di-n-octyl phthalate ("DnOP"). Three of the phthalates, DEHP, DBP and BBP ("Group 1"), may not be present in concentrations exceeding 0.1 percent in any toy or child care article. The remaining three phthalates, DINP, DIDP, and DnOP ("Group 2"), are restricted to 0.1 percent only in those toys and child care articles "intended for use by a child under three years of age if that product can be placed in the child's mouth." (Cal. Health & Saf. Code, § 108937, subd. (b).)

A.B. 1108's restrictions take effect January 1, 2009. On that date, "no person or entity shall manufacture, sell, or distribute in commerce" any of the toys or child care articles violating its provisions. (Cal. Health & Saf. Code, § 108937, subd. (a), (b).) Thus, even if a product was manufactured before January 1, 2009, it cannot be sold in California by a retailer after that date unless it meets the A.B. 1108 phthalate standards.

A violation of A.B. 1108's phthalate standards is an unlawful act in violation of California's Unfair Competition Law.<sup>2</sup> (Cal. Bus. & Prof. Code, § 17200, et seq.) Violations of the Unfair Competition Law may be enforced through a civil action brought by the Attorney General or a district attorney in the name of the People, by certain city attorneys, and by individual persons who have "suffered injury in fact and lost money or property" as a result of the violation. (Cal. Bus. & Prof. Code, § 17204.)

In addition, while manufacturers and distributors have no express duty under A.B. 1108 to stop distributing and manufacturing products that do not comply with A.B. 1108 before January 1, 2009, sale of a non-compliant product at a time and place that makes it likely that the product will be offered for sale after January 1, 2009, could violate other legal duties. It may violate warranties or other contractual agreements among the parties in the chain of distribution,

<sup>1</sup> A "toy" is defined as a "products designed or intended by the manufacturer to be used by children when they play." (Cal. Health & Saf. Code, § 108935, subd. (a).) A "child care article" is defined as "all products designed or intended by the manufacturer to facilitate sleep, relaxation, or the feeding of children, or to help children with sucking or teething." (Cal. Health & Saf. Code, § 108935, subd. (b).)

<sup>2</sup> A.B. 1108 does not contain any provision authorizing any agency to adopt implementing regulations or guidelines, nor does it contain any enforcement provisions itself.



Cheryl A. Falvey, Esq.  
December 3, 2008  
Page 3

or it may create a threatened violation of A.B. 1108, which the Attorney General can seek to enjoin under the Unfair Competition Law. Thus, distributors and manufacturers should assess their chain of distribution and take action to assure that these issues do not arise.

Finally, even before January 1, 2009, it is illegal in California to expose persons to certain phthalates without providing a clear and reasonable warning. (Cal. Health & Saf. Code, §§ 25249.5-25249.13 [commonly known as "Proposition 65"].) As discussed further below, this requirement has been in effect and will continue to be in effect after January 1, 2009.

No federal preemption of California's phthalate restrictions

California's A.B. 1108 phthalate restrictions are not preempted by the new federal CPSIA. To the extent that federal and California phthalate restrictions overlap, they are identical. To the extent that there are any products that are subject to A.B. 1108's phthalate standards for which there are no federal phthalate requirements at all, there is no federal requirement that could preempt state law. CPSIA, therefore, does not preempt California's phthalate restrictions.

Section 108 (d) of CPSIA provides that the standards for phthalates are "consumer product safety standards," which apparently means that they have the preemptive effect given by section 26(a) of the Consumer Product Safety Act. (15 U.S.C. § 2075(a).) That section states that a federal consumer product safety standard preempts a state law that — as to a risk of injury associated with a given consumer product — "prescribes any requirements as to the performance, composition, contents design, finish, construction, packaging or labeling of such product," "unless such requirements are identical to the requirements of the Federal standard." (*Id.*)

Even if A.B. 1108's phthalate restrictions are considered to be requirements on "composition" or "contents" of a product, A.B. 1108 is not preempted because its restrictions on the phthalate content of a given consumer product are identical to any applicable federal restriction. Indeed, CPSIA adopted the same phthalate restrictions that had previously been enacted in A.B. 1108. CPSIA sets the same concentration limit (0.1 percent) on the same six phthalates as does A.B. 1108, and both statutes use the same Group 1/Group 2 approach to the types of products covered by their standards. A product that is subject to and complies with CPSIA's phthalate limits would also comply with A.B. 1108's phthalate limits, and vice versa. As to all products that fall under the scope of both statutes, A.B. 1108 and CPSIA apply the same percentage content restrictions to the same phthalates. Because state and federal law are identical in this respect, the state law is not preempted. (15 U.S.C. § 2075(a).)

To the extent that A.B. 1108 may apply its standards to a broader category of products than does CPSIA, those additional products are not subject to a federal standard at all, and therefore there is no preemption. For instance, A.B. 1108 defines child care articles to include things that facilitate "sleep, relaxation, or the feeding of children," while CPSIA omits the term "relaxation." CPSIA limits child care articles to those intended for children age three or

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younger, while A.B. 1108 contains no age limitation. CPSIA defines toys as products intended for play by children "12 years of age or younger," while A.B. 1108 contains no age limitation on "children." CPSIA has a specific definition of what "can be placed in a child's mouth," while A.B. 1108 does not. Importantly, A.B. 1108 does not apply different requirements to the products covered by CPSIA, it simply applies the identical standard to a somewhat broader class of products. In other words, there may be some products to which CPSIA provides no phthalate limits at all that would be subject to regulation under A.B. 1108.

Furthermore, during the time in which there is no federal phthalate consumer product safety standard in effect as to a product, there is no preemption. Section 26(a) of the Consumer Product Safety Act preempts a non-identical state requirement on a product only during the time when "a consumer product safety standard . . . is in effect and applies to a risk of injury associated with a product." (15 U.S.C. § 2075(a).) Prior to February 10, 2009, there is no federal consumer product safety standard in effect at all with respect to phthalates in toys and child care articles, so there can be no preemption prior to that date under any circumstance.

In addition, if the position in your November 17, 2008, letter is correct that the federal CPSIA phthalate limits do not apply to products manufactured prior to February 10, 2009 (an issue we do not address), then as to those products there can be no preemption of state law either, because there is no federal consumer product safety standard in effect and applicable to them.

Thus, A.B. 1108's phthalate standards are not preempted under section 26(a) of the Consumer Product Safety Act because, as to any given product, A.B. 1108 requirements are identical to federal requirements, and, as to some products regulated by A.B. 1108, there is no applicable federal standard.

Finally, CPSIA explicitly provides that neither it nor the Consumer Product Safety Act "shall be construed to preempt or otherwise affect any State requirement with respect to any phthalate alternative not specifically regulated in a consumer product safety standard under the Consumer Product Safety Act." (CPSIA § 108(d).) A.B. 1108 requires manufacturers to use "the least toxic alternative" when replacing phthalates, and replacement chemicals cannot include certain known or suspected carcinogens. (Cal. Health & Saf. Code, § 108939, subd. (a).) Congress expressly protected from preemption A.B. 1108's prohibitions on substitute chemicals.

#### Role of Proposition 65

Proposition 65 applies to products regulated by both A.B. 1108 and CPSIA and will continue to do so after those two statutes take effect, but we expect that it will have little practical significance because products that comply with A.B. 1108 and CPSIA would not, with a few possible exceptions, require a Proposition 65 warning. Thus, Proposition 65 actions should become largely unnecessary for products that comply with the other laws.

California's Proposition 65 requires that businesses provide a warning before knowingly and intentionally exposing persons to chemicals identified by the state as known to cause cancer

or reproductive toxicity, unless the business can show that the level of exposure is below the level of significant health risk, as established under the statute and regulation. (Cal. Health & Saf. Code, §§ 25249.5-25249.13; Cal. Code of Regs., title 27, chapter 1 (§§ 25102-27001).) All of the Group 1 phthalates (DEHP, DBP and BBP) are listed reproductive toxicants under Proposition 65. Of the Group 2 phthalates, DIDP is a listed reproductive toxicant, while DINP and DnOP are not. One additional phthalate not covered by either A.B. 1108 or CPSIA, however, is a listed reproductive toxicant under Proposition 65: DnHP. Proposition 65 may be enforced by the Attorney General and district attorneys in the name of the People, by certain city attorneys, and by "any person in the public interest" who meets specific requirements, including issuance of a notice of violation and execution of a Certificate of Merit. (Cal. Health & Saf. Code, § 25249.7(c).)

Proposition 65 is not directly affected by A.B. 1108 or CPSIA. First, A.B. 1108 does not purport to repeal or limit Proposition 65, so compliance with both laws is required. Second, the warning requirement of Proposition 65 is not preempted by CPSIA, the Federal Hazardous Substance Act, or the Consumer Product Safety Act. CPSIA includes an express savings provision that protects Proposition 65 from preemption, stating that "Nothing in this Act [CPSIA] or the Federal Hazardous Substances Act shall be construed to preempt or otherwise affect any warning requirement relating to consumer products or substances that is established pursuant to State law that was in effect on August 31, 2003." (CPSIA § 231(b).) Furthermore, because Proposition 65 does not impose requirements on the "content" or "composition" of a product, and because it is not a "labeling" requirement,<sup>3</sup> it is not expressly preempted by section 26(a) of the Consumer Product Safety Act.

Thus, the requirements of Proposition 65, A.B. 1108, and CPSIA on products containing phthalates will all coexist simultaneously. For example, a violation of A.B. 1108 or CPSIA that is also an independent violation of Proposition 65 can be enforced through Proposition 65. It is also conceivable that a toy or child care article containing phthalates below the A.B. 1108 and CPSIA limits could still require a Proposition 65 warning. Based on our analysis of the products in question, however, we expect that the phthalate exposure from a toy or child care article that complies with the A.B. 1108 and CPSIA standards would be so low that no Proposition 65 warning would be required, with a few possible exceptions.

### Conclusion

As of January 1, 2009, it will be illegal to sell, distribute, or manufacture toys and child care articles in California with greater than 0.1 percent of six specified phthalates, regardless of when or where the products were manufactured. The effective date of the federal CPSIA does not affect implementation of California's phthalate restrictions. Because A.B. 1108 will have

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<sup>3</sup> Proposition 65 allows warnings to be provided through point-of-sale materials that are not "labeling." (*Chemical Specialty Manufacturers Assn. v. Allenby* (9th Cir. 1992) 958 F.2d 941; *People ex rel. Lungren v. Cotter & Co.* (1997) 53 Cal App. 4th 1373.)

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been on the books for over 14 months before its phthalate limits take effect, we believe that industry has had sufficient time to prepare to comply with the requirements that take effect on January 1, 2009. The Attorney General, and other public enforcers, can and will enforce California's phthalate ban after that date.

If you would like to discuss this letter further, please contact Tim Sullivan at (510) 622-4038.

Sincerely,



TIMOTHY E. SULLIVAN  
Deputy Attorney General



EDWARD G. WEIL  
Supervising Deputy Attorney General

For EDMUND G. BROWN JR.  
Attorney General

EXHIBIT "D"

**FEE & COST SUMMARY: GLOBAL DESIGN CONCEPTS, INC., et al.**

**SUMMARY**

|                                |                    |
|--------------------------------|--------------------|
| Category I: Investigation Fees | \$8,160.00         |
| Category II: Notice Fees       | \$3,750.00         |
| Category III: Litigation Fees  | \$5,055.00         |
| Category IV: Settlement Fees   | \$10,970.50        |
| Category V: Approval Fees      | \$6,080.00         |
| Category VI: Associated Costs  | \$7,187.28         |
| <b>Total:</b>                  | <b>\$47,202.78</b> |

**CATEGORY I: INVESTIGATION, CONSULTATION & INTAKE**

| Subcategory  | Staff | Rate  | Hours       | Fees              |
|--|-------|-------|-------------|-------------------|
| (1) Field Investigation and Attorney Consultation(s) | JLB   | \$695 | 6.5         | \$4,517.50        |
|  | DA    | \$130 | 3           | \$390.00          |
| (2) Intake Process                                   | DA    | \$130 | 9           | \$1,170.00        |
| <b>Subtotal:</b>                                     |       |       | <b>18.5</b> | <b>\$6,077.50</b> |

**CATEGORY II: PRODUCTION OF THE 60-DAY NOTICE**

| Staff            | Year | Rate  | Hours    | Fees              |
|------------------|------|-------|----------|-------------------|
| JAS              | 2018 | \$495 | 3        | \$1,485.00        |
| DA               | 2018 | \$130 | 3        | \$390.00          |
| <b>Subtotal:</b> |      |       | <b>6</b> | <b>\$1,875.00</b> |

**CATEGORY III: LITIGATION**

**Complaints**

| Staff            | Year        | Rate  | Hours    | Fees              |
|------------------|-------------|-------|----------|-------------------|
| EJS              | 2019 - 2020 | \$695 | 1        | \$695.00          |
| JAS              | 2019 - 2020 | \$495 | 2        | \$990.00          |
| DA               | 2019 - 2020 | \$130 | 2        | \$260.00          |
| <b>Subtotal:</b> |             |       | <b>5</b> | <b>\$1,945.00</b> |

**Case Management**

| <b>Staff</b>     | <b>Year</b> | <b>Rate</b> | <b>Hours</b> | <b>Fees</b>       |
|------------------|-------------|-------------|--------------|-------------------|
| EJS              | 2019 - 2020 | \$695       | 2.5          | \$1,737.50        |
| JAS              | 2019 - 2020 | \$495       | 2.5          | \$1,112.50        |
| DA               | 2019 - 2020 | \$130       | 2            | \$260.00          |
| <b>Subtotal:</b> |             |             | <b>7</b>     | <b>\$3,110.00</b> |

**CATEGORY IV: SETTLEMENT**

**Settlement Negotiations**

| <b>Staff</b>     | <b>Year</b> | <b>Rate</b> | <b>Hours</b> | <b>Fees</b>       |
|------------------|-------------|-------------|--------------|-------------------|
| EJS              | 2019 - 2020 | \$695       | 5.5          | \$3,822.50        |
| JAS              | 2019 - 2020 | \$495       | 5.5          | \$2,722.50        |
| DA               | 2019 - 2020 | \$130       | 1            | \$130.00          |
| <b>Subtotal:</b> |             |             | <b>12</b>    | <b>\$6,675.00</b> |

**Consent Judgment**

| <b>Staff</b>     | <b>Year</b> | <b>Rate</b> | <b>Hours</b> | <b>Fees</b>       |
|------------------|-------------|-------------|--------------|-------------------|
| JLB              | 2019 - 2020 | \$695       | 1            | \$695.00          |
| EJS              | 2019 - 2020 | \$695       | 2.5          | \$1,737.50        |
| JAS              | 2019 - 2020 | \$495       | 3.5          | \$1,732.50        |
| DA               | 2020        | \$130       | 1            | \$130.00          |
| <b>Subtotal:</b> |             |             | <b>8</b>     | <b>\$4,295.50</b> |

**CATEGORY V: MOTION TO APPROVE**

| <b>Staff</b> | <b>Year</b> | <b>Rate</b> | <b>Hours</b> | <b>Fees</b> |
|--------------|-------------|-------------|--------------|-------------|
| EJS          | 2020        | \$695       | 5            | \$3,475.00  |
| JAS          | 2020        | \$495       | 5            | \$2,475.00  |
| DA           | 2020        | \$130       | 1            | \$130.00    |

|                  |           |                   |
|------------------|-----------|-------------------|
| <b>Subtotal:</b> | <b>11</b> | <b>\$6,080.00</b> |
|------------------|-----------|-------------------|

**CATEGORY VI: ASSOCIATED COSTS**

|                                 |   |                   |
|---------------------------------|---|-------------------|
| <b>Filing Fees:</b>             | <b>Complaints and Amended Complaint</b>   | <b>\$500.00</b>   |
| <b>Service of Process Fees:</b> | <b>Complaints</b>   | <b>\$325.00</b>   |
|                                 | <b>Motion to Approve</b>  | <b>\$274.50</b>   |
|                                 | <b>Notice of Entry of Judgment</b>  | <b>\$18.00</b>    |
| <b>MLE:</b>                     | <b>Field Investigation, Diagnostic Screening, Laboratory Testing,<br/>and Exposure Analysis</b> | <b>\$6,000.00</b> |
| <b>Postage:</b>                 | <b>United States Postal Service</b>   | <b>\$69.78</b>    |
|                                 | <b>Subtotal:</b>  | <b>\$7,187.28</b> |