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

11 PRECILA BALABBO,
12 Plaintiff,

13 v.

14 GLOBAL DESIGN CONCEPTS, INC., et al.,
15 Defendants.

Case No.: RG19041979

CONSENT JUDGMENT

Judge: Jeffrey Brand

Dept.: 22

Hearing Date: April 16, 2020

Hearing Time: 3:00 PM

Reservation #: R-2163042

1 **1. INTRODUCTION**

2 **1.1 The Parties.** This Consent Judgment is entered into by and between Precila Balabbo
3 acting on behalf of the public interest (hereinafter “Balabbo”) and Bioworld Merchandising Inc.
4 (“Bioworld” or “Defendant”) with Balabbo and Defendant collectively referred to as the “Parties”
5 and each of them as a “Party.” Balabbo is an individual residing in California that 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. Bioworld is alleged to be a person in the
8 course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et
9 seq.

10 **1.2 Allegations and Representations.** Balabbo alleges that Defendant has exposed
11 individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of Disney Minnie Mouse lunch
12 bags, UPC # 693186449567 without providing a clear and reasonable exposure warning pursuant
13 to Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of
14 California to cause cancer and reproductive toxicity.

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

26 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court has
27 jurisdiction over Defendant as to the allegations contained in the Action, that venue is proper in the
28

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

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

2. DEFINITIONS

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

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

3. INJUNCTIVE RELIEF: WARNINGS

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

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

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

11 (a) **Warning.** The “Warning” shall consist of the statement:

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

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

18 **⚠ WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

19 **3.4 A Warning or Alternative Warning** provided pursuant to § 3.3 must print the word
20 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
21 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
22 triangle with a black outline, except that if the sign or label for the Covered Product does not use
23 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
24 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
25 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
26 automatic process, providing that the warning is displayed with such conspicuousness, as compared
27 with other words, statements, or designs as to render it likely to be read and understood by an
28 ordinary individual under customary conditions of purchase or use. A warning may be contained
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
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 Bioworld, Defendant Releasees, and Downstream Releasees from any and
14 all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,
15 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of
16 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the
17 future, with respect to any alleged violations of Proposition 65 related to or arising from Covered
18 Products manufactured, distributed, or sold by Bioworld, Defendant Releasees or Downstream
19 Releasees. With respect to the foregoing waivers and releases in this paragraph, Balabbo hereby
20 specifically waives any and all rights and benefits which she now has, or in the future may have,
21 conferred by virtue of the provisions of § 1542 of the California Civil Code, which provides as
22 follows:

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

26 5.3 Bioworld waives any and all claims against Balabbo, her attorneys and other
27 representatives, for any and all actions taken or statements made (or those that could have been
28 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
13 Date: _____

Date: Feb 12 2020

14 By: _____

By: [Signature]

15 PRECILA BALABBO

BIOWORLD MERCHANDISING INC.

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

18
19 Dated: _____

Judge of Superior Court

1 **13. RETENTION OF JURISDICTION**

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

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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: 02/08/2020

Date: _____

13 By: 
14 PRECILA BALABBO

15 By: _____
16 BIOWORLD MERCHANDISING INC.

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

18
19 Dated: _____

Judge of Superior Court

EXHIBIT “B”

ORIGIN ID: HARA (610) 667-6200 BRODSKY & SMITH 333 E. CITY AVENUE, SUITE 510 BALA CYNWYD, PA 19004 UNITED STATES US		SHIP DATE: 19FEB20 ACT/MGT: CAD: 108015843/NET 4220
TO ATT: PROP 65 COORDINATOR OFFICE OF THE CA ATTORNEY GENERAL 1515 CLAY STREET, SUITE 2000 POST OFFICE BOX 70550 OAKLAND CA 94612 (610) 667-6200 REF:		BILL SENDER
PO: DEPT:		

TRK# 7778 1162 7355 0201	THU - 20 FEB 3:00P STANDARD OVERNIGHT	94612 CA-US OAK
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After printing this label:

1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.

Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on 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

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 articles¹ 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.² (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,

¹ 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).)

² 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.

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

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,³ 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

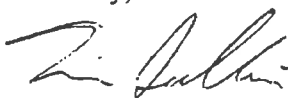
³ Proposition 65 allows warnings to be provided through point-of-sale materials that are not "labeling." (*Chemical Specialty Manufacturers Assn. v. Allenby* (9th Cir. 1992) 958 F.2d 941; *People ex rel. Lungren v. Cotter & Co.* (1997) 53 Cal App. 4th 1373.)

Cheryl A. Falvey, Esq.
December 3, 2008
Page 6

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
Total:	\$47,202.78

CATEGORY I: INVESTIGATION, CONSULTATION & INTAKE

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

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
Subtotal:			6	\$1,875.00

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
Subtotal:			5	\$1,945.00

Case Management

Staff	Year	Rate	Hours	Fees
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
Subtotal:			7	\$3,110.00

CATEGORY IV: SETTLEMENT**Settlement Negotiations**

Staff	Year	Rate	Hours	Fees
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
Subtotal:			12	\$6,675.00

Consent Judgment

Staff	Year	Rate	Hours	Fees
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
Subtotal:			8	\$4,295.50

CATEGORY V: MOTION TO APPROVE

Staff	Year	Rate	Hours	Fees
EJS	2020	\$695	5	\$3,475.00
JAS	2020	\$495	5	\$2,475.00
DA	2020	\$130	1	\$130.00

Subtotal:	11	\$6,080.00
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CATEGORY VI: ASSOCIATED COSTS

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