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Inc., Ambassador Toys LLC, California Chamber of  
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SC

TOY INDUSTRY ASSOCIATION, INC.,  
AMBASSADOR TOYS LLC,  
CALIFORNIA CHAMBER OF  
COMMERCE, and AMERICAN  
CHEMISTRY COUNCIL

Plaintiffs,

v.

CITY AND COUNTY OF SAN  
FRANCISCO, GAVIN NEWSOM, in his  
official capacity as Mayor of the City and  
County of San Francisco, and EDWIN LEE,  
in his official capacity as City Administrator  
of the City and County of San Francisco

Defendants.

ORIGINAL  
FILED

NOV 16 2006

RICHARD W. WIEKING  
CLERK U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CASE NO. 06

7111

COMPLAINT FOR DECLARATORY  
JUDGMENT AND INJUNCTIVE RELIEF

1 Plaintiffs Toy Industry Association, Inc. ("TIA"), Ambassador Toys LLC ("Ambassador  
2 Toys"), California Chamber of Commerce ("CalChamber"), and American Chemistry Council  
3 ("ACC") (collectively, "Plaintiffs"), by their attorneys, Latham & Watkins, file this Complaint  
4 against defendants the City and County of San Francisco ("City and County"), Gavin Newsom,  
5 and Edwin Lee (collectively, "Defendants"), as follows.

6 Plaintiffs seek a declaratory judgment stating that San Francisco Ordinance No. 120-06,  
7 which bans the manufacture, sale, and distribution of toys or other child care articles made with  
8 or containing six listed phthalates, constitutes an unlawful regulation of consumer products and  
9 is preempted in part by the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. §§ 1261-  
10 1278, and formal, affirmative decisions by the federal Consumer Product Safety Commission  
11 (the "CPSC" or the "Commission") made pursuant to the FHSA. Plaintiffs also seek an Order  
12 enjoining Defendants from enforcing this unlawful ordinance against the manufacture, sale, and  
13 distribution of toys or other child care articles containing the six listed phthalates.

#### 14 JURISDICTION AND VENUE

15 1. This Court has jurisdiction over the present action pursuant to 28 U.S.C. § 1331,  
16 and has authority to grant the relief requested under 28 U.S.C. §§ 2201 and 2202. Specifically,  
17 as hereinafter more fully appears, the present action arises under Article VI, Clause 2 of the  
18 United States Constitution, commonly known as the Supremacy Clause, the Federal Hazardous  
19 Substances Act, 15 U.S.C. §§ 1261-1278, and formal decisions by the federal Consumer Product  
20 Safety Commission.

21 2. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b), as all Defendants  
22 reside in this District and the events giving rise to this action occurred within this District.

#### 23 OVERVIEW

24 3. Phthalates are chemicals commonly added during the fabrication of polyvinyl  
25 chloride ("PVC" or "vinyl") plastic to make the plastic less brittle. Because phthalates have been  
26 used in a wide variety of flexible vinyl products, including soft vinyl children's toys, for more  
27 than 50 years, they are among the most extensively studied substances in commerce today.

28 4. In 1998, the CPSC—the federal agency charged by Congress with regulating

1 consumer product safety—received a petition requesting a rulemaking to ban the use of PVC  
2 containing phthalates from all toys and products intended for children five years of age and  
3 under. In response to this petition, the CPSC, over a four-year period, conducted numerous  
4 rigorous studies to determine the safety of soft vinyl toys and other children's products  
5 containing phthalates. Based upon these studies, in 2003, the CPSC formally rejected the  
6 petition, expressly concluding that soft vinyl toys and other articles intended for use by children  
7 containing phthalates pose no demonstrated health risk to children.

8 5. Manufacturers and retailers of children's products, including the Plaintiffs in this  
9 action, have relied upon the CPSC's informed and formal regulatory determination that these  
10 products are safe and, on this basis, have continued to produce and sell soft plastic toys and other  
11 products containing phthalates.

12 6. Notwithstanding the CPSC's conclusive determination that phthalates in toys and  
13 children's products are safe and accordingly should not be regulated, in June 2006, the City and  
14 County of San Francisco passed Ordinance No. 120-06, which bans the manufacture, sale, and  
15 distribution of toys or other child care articles made with or containing certain concentrations of  
16 six listed phthalates. This ordinance is preempted by the FHSA and by the CPSC's affirmative  
17 decision not to ban or regulate these products because they present no significant health risk.  
18 Absent relief from the application of this ordinance, which becomes operative on December 1,  
19 2006, local retailers and consumers and national manufacturers will suffer irreparable harm from  
20 the City and County's unlawful prohibition on the manufacture, distribution, and sale of these  
21 safe products.

## 22 PARTIES

23 7. Plaintiff Toy Industry Association, Inc. ("TIA") is a national trade association  
24 representing U.S. manufacturers and importers of toys, games, and children's entertainment  
25 products. TIA has played a leading role in the development of toy safety standards in the United  
26 States, and works with consumer organizations to communicate to consumers the importance of  
27 safe play.

28 8. Plaintiff Ambassador Toys LLC ("Ambassador Toys") is a local retailer of games,

1 toys, and other articles designed for use by children. Ambassador Toys' two stores are both  
2 located in the City and County of San Francisco.

3 9. The California Chamber of Commerce ("CalChamber") is a non-profit  
4 corporation and is the largest, voluntary business association within the state of California.  
5 CalChamber has more than 15,000 members, both individual and corporate, representing  
6 virtually every economic interest in the state. CalChamber acts on behalf of the business  
7 community to improve the state's economic and jobs climate by representing business on a broad  
8 range of legislative, regulatory and legal issues. Its members include businesses that  
9 manufacture, and/or sell or distribute within the City and County of San Francisco, toys or other  
10 children's products containing phthalates.

11 10. Plaintiff American Chemistry Council ("ACC") is a nonprofit trade association  
12 representing the leading companies engaged in the business of chemistry. ACC members apply  
13 the science of chemistry to make innovative products and services that make people's lives  
14 better, healthier, and safer. ACC is committed to improved environmental, health, and safety  
15 performance through Responsible Care®, common-sense advocacy designed to address major  
16 public policy issues, and health and environmental research and product testing. ACC's  
17 members include all major manufacturers and some users of the primary phthalate esters in  
18 commerce in the United States. ACC's Phthalate Esters Panel is committed to the continued  
19 research and testing of phthalates and works closely with government agencies to guide the safe  
20 use of these materials in a wide array of products consumers find valuable in everyday life.

21 11. Defendant City and County of San Francisco is a municipal entity constituted  
22 under the Constitution and the laws of the State of California.

23 12. Defendant Gavin Newsom is the Mayor of the City and County of San Francisco.  
24 He is sued in his official capacity. The Mayor signs and enacts ordinances passed by the Board  
25 of Supervisors of the City and County of San Francisco and is responsible for the enforcement of  
26 these ordinances.

27 13. Defendant Edwin Lee is the City Administrator of the City and County of San  
28 Francisco. Defendant Lee is sued in his official capacity. The Mayor appoints, and the Board of

Supervisors approves, the City Administrator, who has overall responsibility for the management and implementation of policies, rules, and regulations promulgated by the Mayor, the Board of Supervisors, and the voters.

#### THE REGULATORY FRAMEWORK

14. Consumer product safety has long been governed by a highly developed federal regulatory scheme. The FHSA governs the sale of consumer products that are or contain "hazardous substances."

15. The FHSA, as originally enacted in 1960 and entitled the Federal Hazardous Substances Labeling Act, Pub. L. 86-613, 74 Stat. 372, authorized what was then known as the Department of Health, Education, and Welfare (now Health and Human Services) to impose labeling requirements on hazardous substances. The statute defined "hazardous substance" as any substance that (1) is toxic, an irritant, a strong sensitizer, flammable, or generates pressure through decomposition, heat or other means, and (2) may cause substantial personal injury or substantial illness during or as a proximate cause of any customary or reasonably foreseeable use, including reasonably foreseeable ingestion by children.

16. The statute was amended by the Child Protection Act of 1966, Pub. L. 89-756, 80 Stat. 1303, which changed the statute's short title to the Federal Hazardous Substances Act and, among other things, banned the sale of toys and other children's articles that are or contain "hazardous substances."

17. Administration of the FHSA was transferred to the CPSC upon the Commission's creation in 1972, through the enactment of the Consumer Product Safety Act, Pub. L. 92-573, 86 Stat. 1207.

18. The stated purpose and effect of the Consumer Product Safety Act and the resultant establishment of the CPSC was, in part, to permit the establishment, where necessary, of uniform standards for consumer products. Congress expressly determined that "control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers." 15 U.S.C. § 2051(a)(4).

19. To resolve the problems caused by disparate safety standards promulgated by

1 state and local governments, Congress expressly authorized the CPSC to “develop uniform  
2 safety standards for consumer products and to minimize conflicting State and local regulations.”  
3 15 U.S.C. § 2051(b)(3). The CPSC is not required to promulgate standards governing *all* safety  
4 concerns regarding consumer products, but when the CPSC makes a determination and adopts  
5 standards governing a product or set of products, that determination establishes a preemptive  
6 nationwide standard.

7 20. The FHSA’s preemption and savings clauses ensure that where the CPSC has  
8 made affirmative determinations under the FHSA regarding product safety, these decisions  
9 preempt state or local action. The FHSA preemption provision states, in pertinent part:

10 “(b)(1)(B) Except as provided in paragraphs (2), (3), and (4), if under  
11 regulations of the Commission promulgated under or for the enforcement of  
12 section 2(q) [15 U.S.C. § 1261(q) – which defines the term “banned hazardous  
13 substance”] a requirement is established to protect against a risk of illness or  
14 injury associated with a hazardous substance, no State or political subdivision of a  
15 State may establish or continue in effect a requirement applicable to such  
16 substance and designed to protect against the same risk of illness or injury unless  
17 such requirement is identical to the requirement established under such  
18 regulations.

19 (2) The Federal Government and the government of any State or political  
20 subdivision of a State may establish and continue in effect a requirement  
21 applicable to a hazardous substance for its own use (or to the packaging of such a  
22 substance) which requirement is designed to protect against a risk of illness or  
23 injury associated with such substance and which is not identical to a requirement  
24 described in paragraph (1) applicable to such substance (or packaging) and  
25 designed to protect against the same risk of illness or injury if the Federal, State,  
26 or political subdivision requirement provides a higher degree of protection from  
27 such risk of illness or injury than the requirement described in paragraph (1).

28 (3)(A) Upon application of a State or political subdivision of a State, the

Commission may, by regulation promulgated in accordance with subparagraph (B), exempt from paragraph (1), under such conditions as may be prescribed in such regulation, any requirement of such State or political subdivision designed to protect against a risk of illness or injury associated with a hazardous substance if—

(i) compliance with the requirement would not cause the hazardous substance (or its packaging) to be in violation of the applicable requirement described in paragraph (1), and

(ii) the State or political subdivision requirement (I) provides a significantly higher degree of protection from such risk of illness or injury than the requirement described in paragraph (1), and (II) does not unduly burden interstate commerce.

In determining the burden, if any, of a State or political subdivision requirement on interstate commerce the Commission shall consider and make appropriate (as determined by the Commission in its discretion) findings on the technological and economic feasibility of complying with such requirement, the cost of complying with such requirement, the geographic distribution of the substance to which the requirement would apply, the probability of other States or political subdivisions applying for an exemption under this paragraph for a similar requirement, and the need for a national, uniform requirement under this Act [15 U.S.C. §§ 1261 *et seq.*] for such substance (or its packaging).

(B) A regulation under subparagraph (A) granting an exemption for a requirement of a State or political subdivision of a State may be promulgated by the Commission only after it has provided, in accordance with section 553(b) of title 5, United States Code, notice with respect to the promulgation of the regulation and has provided opportunity for the oral presentation of views respecting its promulgation.”

15 U.S.C. § 1261 note (“Effect upon Federal and State Law”).

22. Interested parties, including state and local governments, may also seek issuance, amendment, or revocation of product safety rules through formal petition to the CPSC. *See generally* 16 C.F.R. § 1051.

### Background Information On Phthalates

27. Because phthalates have been used so widely and for so long, the properties of



1 phthalates—and of DINP, in particular—have been extensively studied. Phthalates are among  
2 the most comprehensively tested compounds in commerce today.

3 *Petition To CPSC To Ban PVC In Toys And Other Products*  
4 *Intended For Children Five Years Of Age And Under*

5 28. The Consumer Product Safety Act permits any interested party to petition the  
6 CPSC to issue, amend, or revoke a consumer product safety rule. *See* 15 U.S.C. § 2058(i). The  
7 FHSA similarly permits any interested person to petition the CPSC to initiate a rulemaking to  
8 designate a substance or product as a “hazardous substance” or a “banned hazardous substance.”  
9 *See* 15 U.S.C. § 1262(j).

10 29. A petition under either statute must describe the substance of the rule or rule  
11 change sought, include the facts that render the rule or rule change necessary, and request that  
12 the Commission initiate rulemaking proceedings to effect the desired rule or rule change. 16  
13 C.F.R. § 1051.5(a). Where the petitioner seeks a product ban, the petitioner should state why a  
14 safety standard would not be sufficient. The petitioner should also include documentation  
15 sufficient to show the prospective harms rendering a safety standard insufficient and a ban  
16 warranted. The CPSC encourages a petitioner to submit as much constructive information as  
17 possible related to the petition. Requested information includes known documentation, technical  
18 studies, medical findings, and impact analyses relating to the petition. This information is  
19 intended to assist the Commission in its evaluation of a petition. 16 C.F.R. § 1051.5(b).

20 30. On November 19, 1998, the National Environmental Trust and 11 other  
21 organizations submitted a petition to the CPSC, requesting that the Commission initiate a  
22 rulemaking to ban PVC from all toys and products intended for children five years of age and  
23 under. The petition also requested that the CPSC issue a national advisory on the health risks  
24 allegedly associated with PVC toys and products. The organizations attached to their petition  
25 four academic papers alleging health risks associated with exposure to phthalates in vinyl  
26 children’s products.

27 31. The CPSC docketed the petition as a petition for rulemaking under section 3(j) of  
28 the FHSA (15 U.S.C. § 1262(j)) on December 7, 1998, and labeled it Petition No. HP 99-01

1 ("Petition 99-1"). The request that the CPSC issue a national advisory was not docketed because  
2 it would not require rulemaking to implement.

3 32. The decision whether to grant or deny a petition for rulemaking is a formal and  
4 highly regulated process. In making the decision whether to grant a petition and commence  
5 rulemaking, the Commission must consider, *inter alia*:

- 6 • Whether the product involved presents an unreasonable risk of injury;
- 7 • Whether a rule is reasonably necessary to eliminate or reduce the risk of injury;
- 8 and
- 9 • Whether failure of the Commission to institute the rulemaking proceeding  
10 requested would unreasonably expose the petitioner or other consumers to the risk  
11 of injury which the petitioner alleges is presented by the product.

12 16 C.F.R. § 1051.9.

13 33. For the Commission to proceed to formal rulemaking, the petition must set forth  
14 reasonable grounds for the requested action. In evaluating Petition 99-1, the Commission was  
15 required to determine whether PVC products intended for use by children were hazardous and  
16 whether these products may cause substantial injury or illness as a result of any reasonably  
17 foreseeable use, "including reasonably foreseeable ingestion by children." 15 U.S.C. §  
18 1261(f)(1)(A).

19 *CPSC's Initial Study of Health Risks*

20 34. Recognizing the gravity of its undertaking, the Commission engaged in extensive  
21 study of the potential health effects of exposure to phthalates in children's products before  
22 deciding whether to initiate the rulemaking requested in Petition 99-1.

23 35. In December 1998, the CPSC staff completed the first of its comprehensive risk  
24 assessments of phthalates in children's products. The staff concluded, "based upon the best  
25 available information about the amount of DINP released from the products tested by the staff  
26 and relying on the mouthing duration data from [an earlier] Dutch study, few, if any, children are  
27 at risk of liver or other organ toxicity from mouthing teethingers, rattles, and other PVC toys that  
28 contain DINP." Michael A. Babich, Ph.D., U.S. Consumer Product Safety Commission,

1 Executive Summary, The Risk of Toxicity Associated with Exposure to Diisononyl Phthalate  
2 (DINP) in Children's Products (December 1998), *available at*  
3 [www.cpsc.gov/phth/execsumm.pdf](http://www.cpsc.gov/phth/execsumm.pdf). On December 2, 1998, the Commission issued a press  
4 release announcing the issuance of this risk assessment.

5 36. The Commission also initiated a comprehensive assessment of the health effects  
6 of exposure to phthalates in children's vinyl toys. Over the course of the next four years, the  
7 CPSC convened an expert advisory panel on risks associated with phthalates, commissioned  
8 several studies measuring migration of phthalates from plastic products and estimating the time  
9 children spend mouthing these plastic products, compiled reports of these and other studies for  
10 staff review, and received and considered a staff recommendation against initiating the requested  
11 rulemaking. Based upon these extensive studies and the findings therein, the Commissioners  
12 denied Petition 99-1 seeking a rulemaking to ban the use of PVC in toys and other children's  
13 products and declined to issue the requested national health advisory. A detailed discussion of  
14 each of these steps demonstrates the time and effort the Commission devoted to this informed  
15 and formal decision.

#### 16 *Chronic Hazard Advisory Panel on DINP*

17 37. On December 17, 1998, the Commission voted to convene a Chronic Hazard  
18 Advisory Panel ("CHAP") on DINP. A CHAP is a panel of scientific experts that reviews  
19 scientific data and other relevant information regarding potential risks of health hazards from the  
20 presence of a chemical in consumer products. The CPSC commissioned the CHAP "to estimate  
21 the probable harm to human health that will result from exposure to DINP." Report to the U.S.  
22 Consumer Product Safety Commission by the Chronic Hazard Advisory Panel on Diisononyl  
23 Phthalate (DINP), at 8 (June 2001), *available at*  
24 <http://www.cpsc.gov/LIBRARY/FOIA/Foia01/os/dinp.pdf#search=%22CHAP%20DINP%22>  
25 ("CHAP Report"). The CPSC commissioned the CHAP to study DINP because it is the  
26 phthalate plasticizer most commonly used in soft plastic toys.

27 38. The Consumer Product Safety Act required that the panel be composed of highly  
28 qualified scientists "who have demonstrated the ability to critically assess chronic hazards and

1 risks to human health presented by the exposure of humans to toxic substances or by the  
2 exposure of animals to such substances.” 15 U.S.C § 2077(b)(2). Moreover, the Act required  
3 that the panel members be wholly impartial and “not receive compensation from or have any  
4 interest in any manufacturer, distributor, or retailer of a consumer product.” 15 U.S.C. §  
5 2077(b)(1). The President of the National Academy of the Sciences selected 33 candidates for  
6 the CHAP. From this list, the Commission selected seven members for the panel.

7 39. The seven scientists chosen for the CHAP were:

- 8 • Panel Chairman Kenneth T. Bogen, M.P.H., Dr.P.H., an environmental scientist  
9 in the Health and Economic Assessment Division of the Lawrence Livermore  
10 National Laboratory at the University of California;
- 11 • Panel Vice-Chairman Kim Boekelheide, M.D., Ph.D., Professor of Pathology and  
12 Laboratory Medicine at Brown University;
- 13 • Michael L. Cunningham, Ph.D, DABT of the National Institute of Environmental  
14 Health Sciences at the National Institute of Health;
- 15 • Benjamin A. Jackson, M.S., Ph.D. of Information Ventures, Inc., a  
16 communications service provider for the biomedical and health-related fields;
- 17 • Jeffrey M. Peters, Ph.D., Professor of Environmental Toxicology at Pennsylvania  
18 State University;
- 19 • Janardan K. Reddy, M.S., M.D., Magerstadt Professor and Chair of Pathology at  
20 Northwestern University Medical School; and
- 21 • Lauren Zeise, Ph.D., Chief of Reproductive and Cancer Hazard Assessment at the  
22 California Environmental Protection Agency’s Office of Environmental Health  
23 Hazard Assessment.

24 40. On April 26, 2000, the Commission published a Federal Register notice, *see* 65  
25 Fed. Reg. 24,458, announcing the first meeting of the CHAP. At the first CHAP meeting, the  
26 Commission staff made presentations on the effects of DINP, children’s mouthing behavior, the  
27 migration of DINP from toys, and other national and international activities concerning DINP.  
28 CHAP Report at 4.

1           41.     On May 30, 2000, the Commission published another Federal Register notice, *see*  
2 65 Fed. Reg. 34,446, inviting public comment at the next CHAP meeting and requesting  
3 information on how much DINP is absorbed through the skin, how much is ingested when a  
4 child chews or sucks on a vinyl toy, how the DINP is metabolized in the body, and the potential  
5 for adverse effects to occur.

6           42.     At its June 20-22, 2000 meeting, the CHAP received and considered presentations  
7 from a wide range of public interest groups, industry scientists, and academics, including:

- 8           • Rick Hind, Legislative Director, Toxics Campaign, Greenpeace;
- 9           • Tom Natan, Research Director, National Environmental Trust
- 10          • Rachel Weintraub, Consumer Advocate, U.S. Public Interest Research Group;
- 11          • Raymond M. David, Ph.D., Chairman, Phthalate Esters Panel Toxicology  
12            Research Task Group;
- 13          • Jerry F. Hardisty, D.V.M., President and Pathologist, Experimental Pathology  
14            Laboratories, Inc.;
- 15          • Ruth A. Roberts, Ph.D., Toxicologist, Zeneca Central Toxicology Laboratory;
- 16          • Chris Corton, Toxicologist, Chemical Industry Institute of Toxicology;
- 17          • Rainer Bahnemann, D.V.M., Pathologist, BASF Corporation and member of the  
18            Phthalate Esters Panel Toxicology Research Task Group;
- 19          • James Klaunig, Ph.D., Professor of Pharmacology and Toxicology, Indiana  
20            University School of Medicine;
- 21          • Gary M. Williams, M.D., Professor, Department of Pathology, New York  
22            Medical College; and
- 23          • Richard H. McKee, Ph.D., Toxicologist, ExxonMobil Biomedical Sciences, Inc.  
24            and member of the Phthalate Esters Panel Toxicology Research Task Group.

25     The CHAP spent the remainder of this meeting and the September meeting addressing specific  
26     issues, and drafting and reviewing parts of the report.

27           43.     The CHAP issued its final report to the Commission in June 2001. The CHAP  
28     Report, a comprehensive 160-page document, discusses how DINP works, how much exposure

1 people have to DINP, how much DINP people absorb and metabolize, and what effects, if any,  
2 the absorbed DINP has on the body. The CHAP Report evaluates all potential health effects,  
3 including endocrine (*i.e.*, hormonal) and other organ system effects, reproductive and  
4 developmental effects, genotoxicity, and carcinogenicity.

5 44. The CHAP found that 0.120 mg/kg-d (milligram per kilogram body weight per  
6 day) or less was an Acceptable Daily Intake of DINP for humans. CHAP Report at 3.  
7 Acceptable Daily Intake is an estimate of the amount of chemical a person can be exposed to on  
8 a daily basis over an extended period of time (up to a lifetime) with a negligible risk of suffering  
9 deleterious effects. Based on this daily intake, the CHAP concluded that a young child would  
10 have to routinely mouth DINP-plasticized toys for 75 minutes or more per day in order to pose a  
11 possible DINP exposure risk. *Id.* However, finding no evidence that children mouth such toys  
12 for such extensive periods, the Report concluded that exposure to DINP for toys containing  
13 phthalates poses little or no risk of injury to children. *Id.*

14 ***CPSC Behavioral Observation And Phthalate Migration Studies***

15 45. The CPSC and the CHAP members agreed that the CPSC would benefit from  
16 additional information concerning exposure to phthalates. Prior to 2002, the CPSC and other  
17 product safety organizations relied upon the findings of a 1998 Dutch study to estimate  
18 children's risk of potential exposure to phthalates. *See* Groot, M.E., Lekkerkerk, M.C., &  
19 Steenbekkers, L.P.A., *Mouthing Behavior of Young Children: An Observational Study*  
20 (Wageningen Agricultural Univ., Household and Consumer Studies 1998). In this study, 42 sets  
21 of Dutch parents recorded the time that their children, ages ranging from 3 to 27 months, spent  
22 mouthing teethingers, rattles, and soft plastic toys. The Dutch study found average mouthing times  
23 of 12 minutes per day for children between 3 months and 1 year, and 2 minutes per day for  
24 children between 1 and 2 years of age. Based on these data, the CPSC found it unlikely that  
25 children were at risk from liver or other organ toxicity from the release of phthalates from soft  
26 plastic toys. *See* CHAP Report at 3.

27 46. In order to respond to Petition 99-1, CPSC staff recommended performing more  
28 extensive and reliable studies of the amount of time children mouth products that could contain

1 phthalates. To acquire additional information about exposure, the Commission first conducted  
2 and reviewed a behavioral observation study to determine how much time young children  
3 actually spend mouthing items and what types of objects they mouth. *See* Celestine T. Kiss,  
4 M.A., CPSC Division of Human Factors, "A Mouthing Observation Study of Children Under 6  
5 Years of Age" (June 14, 2002) ("Behavioral Observation Study"); *see also* Michael A. Green,  
6 Ph.D., CPSC Division of Hazard Analysis, "Mouthing Times Among Young Children From  
7 Observational Data" (June 17, 2002).

8       47. The CPSC's Behavioral Observation Study improved upon the Dutch study by  
9 increasing the number and randomness of participants, by using trained observers in addition to  
10 parents, and by limiting the "mouthing time" measured to time the child spends mouthing soft  
11 plastic toys. Teethingers, rattles, and pacifiers manufactured in the United States are not made with  
12 phthalates and therefore were not included among the mouthing items used to estimate phthalates  
13 exposure in the CPSC's Behavioral Observation Study (unlike the Dutch study).

14       48. The Behavioral Observation Study collected data from 169 children observed by  
15 trained personnel. It confirmed that children mouth plastic toys at a very low rate. The data  
16 revealed that for soft plastic toys, average mouthing times were 1.3 minutes per day for children  
17 between 3 months and 1 year, 1.9 minutes per day for children between 1 and 2 years, and 0.8  
18 minutes per day for children between 2 and 3 years of age. These figures fall well below the  
19 threshold 75 minutes per day of mouthing that the CHAP Report concluded could pose a minor  
20 risk of health effects from DINP exposure. Indeed, the 99<sup>th</sup> percentile mouthing time for 12-24  
21 month old children, the group with the highest exposure, is 12.6 minutes per day—six times  
22 lower than the conservative threshold of potential concern recognized by the CHAP Report. The  
23 data confirm and reinforce the CPSC's conclusion that children's exposure to phthalates through  
24 mouthing of soft plastic toys or other articles presents no risk.

25       49. To accurately predict risk of exposure to phthalates, the Commission needed to  
26 know not only the amount of time that children spend mouthing toys containing phthalates but  
27 also the amount of phthalate that migrates from the toy to the child. This factor has two principal  
28 components: (1) the amount of phthalate in the product, and (2) the speed at which the phthalate

1 migrates from the product. In order to determine which toys contained phthalates and to measure  
2 the level of phthalate migration from these toys, the CPSC staff purchased 41 teething toys and other  
3 toys and tested them "for the presence of polyvinyl chloride (PVC) and phthalates." Memo from  
4 Shing-Bong Chen, Chemist, CPSC to Marilyn L. Wind, Ph.D., Deputy Associate Executive  
5 Director, Directorate for Health Sciences, CPSC, "Screening of Toys for PVC and Phthalates  
6 Migration," at 1 (June 20, 2002) ("Migration Study"). The staff broke these toys down into 133  
7 components that could be mouthed by a child. Of the 133 components, 85 specimens were soft  
8 plastic, and only 40 of these specimens—roughly 47% of the sample population—contained the  
9 phthalates DINP (36 specimens) or di (2-ethylhexyl) phthalate ("DEHP") (4 specimens).

10 50. The CPSC also measured the speed at which the phthalates migrate from the  
11 relevant products using an internationally validated testing methodology and confirmed the  
12 extremely low rates of migration outlined in the CHAP Report. *Id.* at 5.

13 51. Based upon the findings outlined in the Behavioral Observation Study and the  
14 Migration Study, the CPSC staff concluded that "at present levels DINP offers little or no risk to  
15 children" and that "additional use of DINP in toys would seem unlikely to pose a hazard,  
16 providing that DINP migration rates from such objects would be at the same level as those tested  
17 in the study." Memo from Michael A. Greene, Ph.D., Mathematical Statistician, Division of  
18 Hazard Analysis, to Marilyn G. Wind, Ph.D., Deputy Associate Executive Director, Directorate  
19 for Health Sciences, CPSC, "Oral Intake of DINP Among Young Children," at 28 (June 18,  
20 2002).

#### 21 *CPSC Risk Assessment*

22 52. Based on its extensive research to date, the CPSC conducted a detailed updated  
23 risk assessment for oral exposure to DINP in toys and other children's products. Like the CHAP,  
24 this updated risk assessment addressed all potential health effects, including endocrine (*i.e.*,  
25 hormonal) and other organ system effects, developmental and reproductive effects, genotoxicity,  
26 and carcinogenicity. This risk assessment is described in a comprehensive 113-page report by  
27 Michael Babich, Ph.D. of CPSC's Directorate for Health Sciences, dated August 26, 2002, and  
28 entitled "Updated Risk Assessment of Oral Exposure to Diisononyl Phthalate (DINP) in



1 Children's Products" ("CPSC Risk Assessment").

2 53. The CPSC Risk Assessment echoed the findings of the CHAP Report, the  
3 Behavioral Observation Study, and the Migration Study. It emphasized that "[b]ased upon the  
4 results of the CPSC observation study which was not complete when the CHAP met, CPSC staff  
5 believes it is very unlikely that children will mouth plastic toys for more than 75 minutes per  
6 day. Exposures were determined by CPSC staff based upon the new observation study and the  
7 new migration data. For a conservative estimate, it was assumed the all soft plastic toys contain  
8 DINP even though only 35% of the samples tested contained DINP." Marilyn L. Wind, Ph.D.,  
9 CPSC Directorate of Health Sciences, "Response to Petition HP 99-1: Request to Ban PVC in  
10 Toys and Other Products Intended for Children Five Years of Age and Under," at 11-12 (Aug.  
11 2002) ("CPSC Briefing Package").

12 54. The CPSC Risk Assessment also included a "worst case" analysis in which it  
13 assumed that pacifiers contained DINP and that DINP migrated out of pacifiers at a rate seen in  
14 soft plastic toys—although in fact pacifiers manufactured in the United States do not contain  
15 DINP or any other phthalates, and assuming the contrary greatly increases assumed exposure  
16 levels because children mouth pacifiers more than other products. Even under this hypothetical  
17 worst case analysis, estimated exposures would not exceed the Acceptable Daily Intake for  
18 DINP. *Id.* at 2.

19 55. Based on the foregoing analysis, the CPSC staff concluded that "oral exposure to  
20 DINP from mouthing soft plastic toys, teethingers, and rattles is not likely to present a health hazard  
21 to children. Since children mouth other children's products less than they do toys, teethingers, and  
22 rattles and since dermal exposure is expected to be minimal, [CPSC] staff does not believe that  
23 other children's products are likely to present a health hazard to children." *Id.* at 10.

24 ***CPSC Denial Of The Petition***

25 56. The CPSC staff compiled these materials—the CHAP Report, the Behavioral  
26 Observation Study, the Migration Study, the CPSC Risk Assessment, and related memoranda—  
27 concerning the health effects of phthalates in plastic toys or child care articles into a briefing  
28 package and presented to the Commission on August 13, 2002. The CPSC staff recommended

1 that the Commission deny Petition 99-1 and decline the request to issue a national health  
2 advisory, based in relevant part on the analysis discussed above and the staff's conclusion that  
3 exposure to DINP from DINP-containing products posed "a minimal to non-existent risk of  
4 injury for the majority of children." CPSC Briefing Package, at 2.

5 57. In its deliberation on Petition 99-1, the Commission considered the  
6 comprehensive staff briefing package, the 488 public comments received on the petition, and  
7 numerous public comments on the staff briefing package.

8 58. On February 21, 2003, the three CPSC Commissioners voted unanimously to  
9 deny Petition 99-1 and petitioners' accompanying request for a national health advisory,  
10 concluding that neither the rulemaking requested in Petition 99-1 nor a national health advisory  
11 was warranted.

12 59. Based upon the documents, comments, and all other information presented to the  
13 Commission, the CPSC staff concluded—and the Commissioners unanimously concurred—that  
14 "there is no demonstrated health risk posed by PVC toys or other products intended for children  
15 5 years of age and under and thus, no justification for either banning PVC use in toys and other  
16 products intended for children five years of age and under or for issuing a national advisory on  
17 the health risks associated with soft plastic toys." Letter from Todd Stevenson, Secretary, CPSC,  
18 to Jeffrey Becker Wise, Policy Director, National Environmental Trust (Feb. 26, 2003).

19 60. In reaching that determination, the CPSC highlighted the CHAP's 2001 finding  
20 that "[f]or the majority of children, the exposure to DINP from DINP-containing toys would be  
21 expected to pose a minimal to non-existent risk of injury." *Id.* (quoting CHAP Report,  
22 Executive Summary item 17). The Commission emphasized that "[t]he new data from the recent  
23 CPSC behavioral observation study reported in the staff briefing package, which was not  
24 available at the time of the CHAP's deliberations, confirm this conclusion and demonstrate that  
25 children are exposed to DINP at even lower levels than the CHAP assumed when they reached  
26 their conclusion. Further, the recent survey of toys mouthed by children under the age of three  
27 also reported in the staff briefing package shows that not all soft plastic toys contain DINP.  
28 Therefore, exposure would be even less than the CHAP predicted because children mouth these

1 toys for less time per day than the CHAP estimated, and the average amount of DINP in toys  
2 mouthed by children under the age of three is less than the CHAP estimated." *Id.*

3 61. In a statement accompanying the CPSC's formal decision not to ban PVC from  
4 children's articles and toys, Commissioner Mary Sheila Gall emphasized that "[t]here is simply  
5 nothing in the record that remotely justifies any finding that PVC products intended for children  
6 constitute a hazardous substance within the meaning of the FHSA." *Id.* Commissioner Gall  
7 further stated that "consumers may have a high level of assurance that soft plastic products pose  
8 no risk to children." *Id.*

9 ***Ordinance No. 120-06***

10 62. In June 2006, the Board of Supervisors of the City and County of San Francisco  
11 passed and the Mayor signed into law Ordinance No. 120-06 (the "Ordinance").<sup>1</sup>

12 63. The Ordinance bans the manufacture, sale, or distribution of toys or child care  
13 articles containing certain concentrations of certain phthalates. The Ordinance amends the San  
14 Francisco Health Code by adding, *inter alia*, Section 34.2, which states in full:

15 "(a) Phthalates are chemicals used to plasticize some food containers,  
16 plastic wrap, toys, shampoos, perfumes, and beauty products.

17 (b) Phthalates have been shown to have hormone-disrupting effects.  
18 However, they are used in many products intended for use by young children,  
19 including, but not limited to, toys, pacifiers, baby bottles, and teethingers.

20 (c) No person or entity shall manufacture, sell, or distribute in commerce  
21 within the City and County of San Francisco any toy or child care article that is  
22 made with or contains di (2-ethylhexyl) phthalate (DEHP), di butyl phthalate  
23 (DBP), or benzyl butyl phthalate (BBP) in concentrations exceeding 0.1 percent.

24 (d) No person or entity shall manufacture, sell, or distribute in commerce  
25 within the City and County of San Francisco any toy or child care article intended  
26 for use by a child under three years of age if that product can be placed in the

27 <sup>1</sup> A true and correct copy of Ordinance No. 120-06 is attached to the complaint as Exhibit A.  
28

1 child's mouth and has been made with or contains diisononyl phthalate (DINP),  
2 diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP) in concentrations  
3 exceeding 0.1 percent."

4 64. The Ordinance defines only two terms: "toy" and "child care article." "Toy"  
5 means "an article designed and made for the amusement of a child or for his or her use in play."  
6 City and County of San Francisco Health Code § 34.1(d)(i). "Child care article" means "all  
7 products designed or intended by the manufacturer to facilitate sleep, relaxation, or the feeding  
8 of children or to help children with sucking or teething." *Id.* § 34.2(d)(ii).

9 65. The Ordinance appears to be modeled on California Assembly Bill No. 319 (AB  
10 319), which was introduced by California Assembly Member Wilma Chan in the California state  
11 legislature on February 10, 2005, and died in committee on January 31, 2006. AB 319 in turn  
12 appears to have been modeled after a similar then-temporary European Union Directive against  
13 use of the six subject phthalates (DEHP, DBP, BBP, DINP, DIDP, DNOP) in toys and child care  
14 articles. This EU Directive, now a permanent ban, is inconsistent with a subsequent EU risk  
15 assessment released in 2003 and finalized in 2006 demonstrating that current uses of DINP do  
16 not pose significant risks to human health or the environment. Specifically, the EU risk  
17 assessment concluded: "The end products containing DINP (clothes, building materials, toys  
18 and baby equipment) and the sources of exposure (car and public transport interiors, food and  
19 food packaging) are unlikely to pose a risk for consumers (adults, infants and newborns)  
20 following inhalation, skin contact and ingestion." European Commission, Joint Research Centre,  
21 *1,2-Benzenedicarboxylic Acid, DI-C8-10-Branched Alkyl Esters, C9-Rich and Di-"Isononyl"*  
22 *Phthalate (DINP), Summary Risk Assessment Report*, at 18 (2003). It further concluded: "For  
23 infants, combined exposure which is mainly related to exposure from toys and via the  
24 environment is not considered of concern." *Id.*

25 66. The Ordinance is not accompanied by any studies, reports, or evidence relating to  
26 health risks from the subject products and substances or to any other issue.

27 67. Plaintiffs, among others, requested that the Board of Supervisors solicit comments  
28 from all affected parties before making a final decision, given the impact that the measure could

1 have on businesses selling and consumers using, *inter alia*, plastic toys, dolls, books, flotation  
2 devices, and crib products. Defendants refused this request and proceeded to vote on the  
3 Ordinance without any prior hearing or opportunity for public comment in a hearing.

4 68. The provisions of the Ordinance will become operative on December 1, 2006.  
5 The City and County of San Francisco has agreed not to enforce the provisions of the Ordinance  
6 pending resolution of the Ex Parte Application for Order to Show Cause Why Plaintiffs'  
7 Application for Preliminary Injunction Should Not Be Granted in *Citrikids Baby News, Inc. v.*  
8 *City and County of San Francisco*, No. CGC-06-457303 (Cal. Super. Ct.).

9 ***Effects Of The Ordinance On Retailers, Manufacturers, And Consumers***

10 69. The Ordinance, once operative, will cause unique and irreparable harms to local  
11 retailers, national manufacturers, and consumers in and around the City and County of San  
12 Francisco. A declaratory judgment that the Ordinance is preempted by federal action and an  
13 order enjoining enforcement of the provisions of the Ordinance concerning phthalates will permit  
14 Plaintiff Ambassador Toys and other local retailers (including stores operated by members of  
15 Plaintiff California Chamber of Commerce); national manufacturers including members of  
16 Plaintiffs California Chamber of Commerce, TIA, and ACC; and local consumers to avoid these  
17 harms.

18 ***Harm To Local Retailers***

19 70. Absent preemption of the Ordinance, local retailers such as Plaintiff Ambassador  
20 Toys will be forced by law to cease distribution or sale of toys or child care articles containing or  
21 made with phthalates in the City or County of San Francisco as proscribed by the Ordinance.

22 71. The CPSC has conducted a comprehensive study of the health effects of vinyl  
23 products on children and has concluded that these products are safe. Local retailers have  
24 purchased and are distributing or selling these products in reliance on the CPSC's comprehensive  
25 assessment and categorical assurance that these products are safe. Months before the Ordinance  
26 passed, retailers ordered many of these products for sale during the holiday season. The  
27 Ordinance, which becomes operative on December 1, 2006, will prohibit distribution or sale of  
28 these safe products.

1           72.     Local retailers of toys and child care articles often do not know which, if any, of  
2 the plastic toys and child care articles that they distribute or sell are made with vinyl and contain  
3 the phthalates proscribed by the Ordinance. Even where it is evident from a label or otherwise  
4 that a product is made with vinyl, the toy retailer typically will not know which phthalates are  
5 contained in the product or at what concentrations the phthalates may be present. As a result,  
6 Plaintiff Ambassador Toys and other local San Francisco retailers have no practical means by  
7 which they can determine which of their products may not be sold or distributed in the area.

8                                   ***Harm To National Manufacturers***

9           73.     Once the Ordinance is operative, national manufacturers of toys and child care  
10 articles made with the subject phthalates, including members of Plaintiffs California Chamber of  
11 Commerce and TIA, will be required to review and comply with the Ordinance in the  
12 manufacture, sale, or distribution into commerce of articles containing or made with the  
13 proscribed concentrations of the subject phthalates.

14           74.     As discussed above, manufacturers of toys and child care products containing the  
15 subject phthalates are producing these products in reliance on the CPSC's comprehensive  
16 assessment and categorical assurance that these products are safe. The Ordinance will prohibit  
17 manufacturers from producing or distributing these safe products in the City and County of San  
18 Francisco, thus restricting the market for these products and/or compelling manufacturers to bear  
19 the cost of seeking alternatives to the subject phthalates and to alter product design and  
20 production processes to accommodate these alternatives.

21           75.     Absent preemption of the Ordinance and any other local ordinances governing the  
22 use of phthalates in children's products, national manufacturers would be required to comply  
23 with a multiplicity of different local requirements concerning these products, notwithstanding the  
24 CPSC's definitive conclusion that they pose no threat.

25           76.     Moreover, the problem of requiring national manufacturers to interpret and apply  
26 myriad local ordinances imposing restrictions on a federally-regulated product is magnified  
27 where, as here, the Ordinance is unduly vague. The Ordinance fails to define "child" or  
28 "children," terms critical to identifying what constitutes a "toy" or "child care article" subject to

1 the Ordinance, and the definitions of "toy" and "child care article" are unclear.

2 77. Finally, by prohibiting downstream sales of products containing the subject  
3 phthalates, the Ordinance will restrict the market for the phthalates themselves, thus irreparably  
4 harming national manufacturers of the subject phthalates, including members of Plaintiff ACC.

5 ***Harm To Local Consumers***

6 78. As a result of the Ordinance, many safe products may no longer be sold within the  
7 limits of the City and County of San Francisco, forcing consumers either to go without these  
8 products or to travel outside municipal limits to purchase them.

9 79. The CPSC has stated that removal of the phthalates targeted by the Ordinance  
10 may make soft plastic toys and child care articles less safe. It acknowledged this concern in a  
11 commissioned study: "If DINP is to be replaced in children's products . . . , the potential risks of  
12 the substitutes must be considered. Weaker or more brittle plastics may break and result in a  
13 choking hazard. Other plasticizers might not be as well studied as DINP." Michael Babich, et  
14 al., *Risk assessment of oral exposure to diisononyl phthalate from children's products*, 40 Regul.  
15 Toxicol. Pharmacol. 151, 165 (2004). The CPSC Chief of Staff echoed this concern in a 2005  
16 letter to the California State Assembly Health Committee opposing an identical statewide  
17 restriction on phthalates in toys: "I also have concerns because what will happen [if phthalates  
18 are replaced] is that there is the potential for substituting [with] chemicals that have been  
19 inadequately studied and might in fact be really toxic and for producing toys that don't have the  
20 strength and flexibility of a PVC toy thus presenting a potential for small parts and increased  
21 choking hazards." Letter from Joseph P. Mohorovic, Chief of Staff, CPSC, to Madhavi  
22 Knickerbocker, Legislative Aide to California State Assembly Health Committee Vice Chair  
23 Greg Agharazian (April 4, 2005).

24 **FIRST CLAIM – FEDERAL PREEMPTION (Against All Defendants)**

25 80. Plaintiffs allege and incorporate herein all preceding paragraphs.

26 81. Article VI, Clause 2 of the United States Constitution, commonly known as the  
27 Supremacy Clause, provides, in relevant part, that "[t]his Constitution, and the Laws of the  
28 United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the

1 Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or  
2 Laws of the State to the Contrary notwithstanding.”

3 82. The stated purpose and effect of the federal Consumer Product Safety Act and the  
4 resultant establishment of the CPSC was, in part, to create and oversee, where necessary,  
5 uniform standards for consumer products. Congress expressly determined that “control by State  
6 and local governments of unreasonable risks of injury associated with consumer products is  
7 inadequate and may be burdensome to manufacturers.” 15 U.S.C. § 2051(a)(4).

8 83. To solve the problems caused by disparate safety standards promulgated by state  
9 and local governments, Congress has authorized the CPSC to develop, where necessary,  
10 “uniform safety standards for consumer products and to minimize conflicting State and local  
11 regulations.” 15 U.S.C. § 2051(b)(3). This mandate does not require the CPSC to create  
12 uniform standards as to all safety concerns regarding *all* consumer products, but when the CPSC  
13 does make a determination as to the safety of a product or set of products, that determination  
14 establishes a preemptive federal standard.

15 84. The FHSA authorizes the CPSC to ban or regulate “hazardous substances” in  
16 interstate commerce, including toys and other articles intended for the use of children that bear or  
17 contain “hazardous substances” as defined under the FHSA. *See* 15 U.S.C. §§ 1261(f) & (q).  
18 Where the CPSC has opted to regulate or ban a hazardous substance or product under the FHSA,  
19 the FHSA expressly preempts non-identical state or local regulation of the relevant substance or  
20 product to address the same risks, except where the state or local government adopts a more  
21 protective regulation of the product *for its own use* or obtains a formal regulatory exemption  
22 from the CPSC. 15 U.S.C. § 1261 note (“Effect upon Federal and State Law”).

23 85. In denying Petition 99-1, the CPSC expressly and formally determined that toys  
24 and other products intended for children five years of age or under that contain PVC or  
25 phthalates should not be banned or regulated because the products present no appreciable health  
26 risk.

27 86. This informed, affirmative, formal determination by the CPSC not to regulate the  
28 relevant products because there is no appreciable risk is tantamount to—and as a matter of law



1 must be treated as the functional equivalent of—a preemptive federal regulation. If the CPSC  
2 had determined that phthalates in children’s toys *do* pose a meaningful risk of harm, and had  
3 adopted concentration limits or other requirements to deal with that risk, any non-identical state  
4 or local requirement intended to address the same risk would be expressly preempted unless the  
5 state or local government both sought an exemption under paragraph (b)(3) of the note to 15  
6 U.S.C. § 1261 outlining the effect of the FHSA on federal and state law and demonstrated that  
7 the requirements would not unduly burden interstate commerce. Congress simply could not have  
8 intended for the CPSC’s careful, well-studied, and formal determination that these products pose  
9 no risk to have any less preemptive effect.

10 87. Ordinance No. 120-06 purports to ban manufacture, sale, and distribution of the  
11 very articles that the CPSC formally decided not to regulate based on its finding that they pose  
12 “no demonstrated health risk.” The Ordinance is, thus, an improper regulation that is preempted  
13 by the CPSC’s denial of Petition 99-1.

14 88. The Ordinance is also federally preempted because it stands as an obstacle both to  
15 the accomplishment of Congress’s purpose in enacting the Consumer Product Safety Act and the  
16 FHSA—by imposing upon manufacturers the burden of complying with differing and conflicting  
17 local regulations—and to the federal policy embodied in the CPSC’s rejection of Petition 99-1—  
18 by contravening the CPSC’s clear decision not to ban or regulate the use of phthalates in  
19 children’s products.

20 WHEREFORE, Plaintiffs respectfully request that this Court issue an Order and  
21 Judgment:

22 (i) Declaring that Ordinance No. 120-06 in its application to the six listed phthalates  
23 is preempted, under the Supremacy Clause of the United States Constitution, by the Federal  
24 Hazardous Substances Act (“FHSA”), 15 U.S.C. §§ 1261-1278, and by the decision of the  
25 Consumer Product Safety Commission to deny Petition 99-1 pursuant to the FHSA, and is  
26 therefore null and void as applied to toys and other child care articles containing these  
27 substances;

28 (ii) Enjoining Defendants from enforcing Ordinance No. 120-06 against Plaintiffs or

1 any other parties to restrict the manufacture, sale, or distribution of toys or child care articles  
2 made with or containing the six listed phthalates; and

3 (iii) Granting such other relief as this Court considers just and proper.  
4

5 Dated: November 16, 2006

LATHAM & WATKINS LLP

Maureen E. Mahoney

William K. Rawson

J. Scott Ballenger

Joel C. Beauvais

By: 

Karl S. Lytz

Attorneys for Plaintiffs Toy Industry  
Association, Inc., Ambassador Toys LLC,  
California Chamber of Commerce, and  
American Chemistry Council

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## **EXHIBIT A**

FILE NO. 060107

ORDINANCE NO.

**120-06**1 [Child product safety.]  
2

3 Ordinance amending the San Francisco Health Code by adding Chapter 34, Sections  
4 34.1 through 34.3, to prohibit the manufacture, sale, or distribution in commerce of any  
5 toy or child care article that is intended for use by a child under three years of age if it  
6 contains bisphenol-A or other specified chemicals, and to require manufacturers to use  
7 the least toxic alternative to those substances, and setting an operative date.

8 Note: Additions are single-underline italics Times New Roman;  
9 deletions are ~~striketrough italics Times New Roman~~.  
10 Board amendment additions are double underlined.  
Board amendment deletions are ~~striketrough normal~~.

11 Be it ordained by the People of the City and County of San Francisco:

12 Section 1. The San Francisco Health Code is hereby amended by adding Chapter 34,  
13 Sections 34.1 through 34.3, to read as follows:

14 **SEC. 34.1. PROHIBITING THE SALE OF TOYS AND CHILD CARE ARTICLES MADE WITH**  
15 **BISPHENOL-A.**

16 (a) Bisphenol-A, an estrogen-mimicking endocrine disrupter chemical, is used in the  
17 production of epoxy resins and poly carbonate plastics and is the main ingredient in hard  
18 polycarbonate plastics. The plastics are used in many food and drink packaging applications, and the  
19 resins are commonly used as lacquers to coat metal products such as food cans, bottle tops, and water  
20 supply pipes.

21 (b) Bisphenol-A has been shown to have hormone-disrupting effects and is used in many  
22 products designed for children, including, but not limited to, toys, pacifiers, baby bottles, and teethingers.

23 (c) No person or entity shall manufacture, sell, or distribute in commerce within the City and  
24 County of San Francisco any toy or child care article intended for use by a child under three years of  
25 age if that product has been made with or contains bisphenol-A.

Supervisor Ma, Sandoval, Daly  
BOARD OF SUPERVISORS

1 (d) For the purposes of this Chapter, the following terms have the following meanings:

2 (i) "Toy" means an article designed and made for the amusement of a child or for his or her use  
3 in play.

4 (ii) "Child care article" means all products designed or intended by the manufacturer to  
5 facilitate sleep, relaxation, or the feeding of children or to help children with sucking or teething.  
6

7 **SEC. 34.2. PROHIBITING THE SALE OF TOYS AND CHILD CARE ARTICLES MADE WITH**  
8 **PHTHALATES.**

9 (a) Phthalates are chemicals used to plasticize some food containers, plastic wrap, toys,  
10 shampoos, perfumes, and beauty products.

11 (b) Phthalates have been shown to have hormone-disrupting effects. However, they are used in  
12 many products intended for use by young children, including, but not limited to, toys, pacifiers, baby  
13 bottles, and teethingers.

14 (c) No person or entity shall manufacture, sell, or distribute in commerce within the City and  
15 County of San Francisco any toy or child care article that is made with or contains di (2-ethylhexyl)  
16 phthalate (DEHP), di butyl phthalate (DBP), or benzyl butyl phthalate (BBP) in concentrations  
17 exceeding 0.1 percent.

18 (d) No person or entity shall manufacture, sell, or distribute in commerce within the City and  
19 County of San Francisco any toy or child care article intended for use by a child under three years of  
20 age if that product can be placed in the child's mouth and has been made with or contains diisononyl  
21 phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP) in concentrations  
22 exceeding 0.1 percent.  
23

1 SEC. 34.3. LEAST-TOXIC ALTERNATIVES.

2 (u) Manufacturers within the City and County of San Francisco shall use the least toxic  
3 alternative when replacing bisphenol-A and phthalates in accordance with this Chapter.


4 (b) Manufacturers shall not replace bisphenol-A and phthalates pursuant to this Chapter with  
5 carcinogens rated by the United States Environmental Protection Agency as A, B, or C carcinogens, or  
6 substances listed as known or likely carcinogens, known to be human carcinogens, likely to be human  
7 carcinogens, as described in the "List of Chemicals Evaluated for Carcinogenic Potential," or known to  
8 the State of California to cause cancer as listed in the California Safe Drinking Water Act (Chapter 4  
9 (commencing with Section 116270) of Part 12 of the California Health and Safety Code).

10 (c) Manufacturers shall not replace bisphenol-A and phthalates pursuant to this Chapter with  
11 reproductive toxicants that cause birth defects, reproductive harm, or developmental harm as identified  
12 by the United States Environmental Protection Agency or listed in the California Safe Drinking Water  
13 Act (Chapter 4 (commencing with Section 116270) of Part 12 of the California Health and Safety  
14 Code).

15  
16 Section 2. The provisions of this ordinance shall become operative on December 1,  
17 2006, following the close of the 2005-2006 regular session of the California Legislature. This  
18 ordinance shall be suspended by operation of law upon the operative date of any substantially  
19 similar legislation enacted by the State of California.

20  
21 APPROVED AS TO FORM:  
22 DENNIS J. HERRERA, City Attorney

23 By:

24   
THOMAS J. OWEN  
Deputy City Attorney

25  
Supervisor Ma  
BOARD OF SUPERVISORS



## City and County of San Francisco

## Tails

## Ordinance

City Hall  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689

File Number: 060107

Date Passed:

Ordinance amending the San Francisco Health Code by adding Chapter 34. Sections 34.1 through 34.3, to prohibit the manufacture, sale, or distribution in commerce of any toy or child care article that is intended for use by a child under three years of age if it contains bisphenol-A or other specified chemicals, and to require manufacturers to use the least toxic alternative to those substances, and setting an operative date.

May 9, 2006 Board of Supervisors — CALLED FROM COMMITTEE

May 23, 2006 Board of Supervisors — PASSED ON FIRST READING

Ayes: 10 - Alioto-Pier, Ammiano, Daly, Dufty, Elsbernd, Ma, Maxwell,  
McGoldrick, Mirkarimi, Peskin

Absent: 1 - Sandoval

June 6, 2006 Board of Supervisors — FINALLY PASSED

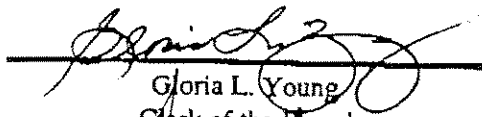
Ayes: 11 - Alioto-Pier, Ammiano, Daly, Dufty, Elsbernd, Ma, Maxwell,  
McGoldrick, Mirkarimi, Peskin, Sandoval

File No. 060107

I hereby certify that the foregoing Ordinance  
was **FINALLY PASSED** on June 6, 2006 by  
the Board of Supervisors of the City and  
County of San Francisco.

06-15-06

Date Approved

  
Gloria L. Young  
Clerk of the Board

  
Mayor Gavin Newsom

File No. 060107

City and County of San Francisco  
Tails Report



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**CERTIFICATE OF SERVICE**

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 505 Montgomery Street, Suite 2000, San Francisco, CA 94111-2562.

On November 16, 2006, I served the following document described as: **COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF** by serving a true copy of the above-described document in the following manner:

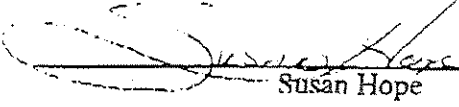
**BY HAND DELIVERY**

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for hand delivery by a messenger courier service or a registered process server. Under that practice, documents are deposited to the Latham & Watkins LLP personnel responsible for dispatching a messenger courier service or registered process server for the delivery of documents by hand in accordance with the instructions provided to the messenger courier service or registered process server; such documents are delivered to a messenger courier service or registered process server on that same day in the ordinary course of business. I caused a sealed envelope or package containing the above-described documents and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for hand delivery by a messenger courier service or a registered process server.

(See attached Service List)

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 16, 2006, at San Francisco, California.

  
Susan Hope

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SERVICE LIST

Maria Gonzalez  
1 Dr. Carlton B. Goodlett Pl., Room 200  
San Francisco, CA 94102

Authorized agent for the City and County of  
San Francisco

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