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**ENDORSED
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ALAMEDA COUNTY**

APR 05 2011

CLERK OF THE SUPERIOR COURT
By Angela Yamsuan

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
OAKLAND DIVISION

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

GIB, LLC, dba "BRAZILIAN BLOWOUT," and DOES 1-20,

Defendants.

Case No. RG 10-545880

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION;
PROPOSED PRELIMINARY
INJUNCTION LODGED
CONCURRENTLY**

Date: May 2, 2011
Time: 3:00 p.m.
Dept: 25
Judge: The Honorable Steven A. Brick
Trial Date: TBA
Action Filed: November 10, 2010

Reservation No.: 1166834

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INTRODUCTION

Defendant GIB, LLC (“GIB”) advertises its popular “Brazilian Blowout” professional hair smoothing treatment as “safe,” “without harsh chemicals,” and “formaldehyde-free.”¹ GIB consistently denies that the severe breathing difficulties, bloody noses, headaches, burning eyes, and other acute health problems reported by product users are traceable to release of formaldehyde gas from GIB’s Smoothing Solution during salon treatment. The People’s product testing has revealed, however, that the Smoothing Solution contains approximately 8% formaldehyde by weight, which is in the range typical of embalming fluid used by funeral homes.² Formaldehyde exposure poses short- and long-term health risks, because formaldehyde is an irritant, a chemical sensitizer that may trigger allergic responses, and a known carcinogen.

The People’s First Amended Complaint describes violations of at least five separate state laws resulting from: (1) the inclusion of high levels of formaldehyde in GIB’s Smoothing Solution; (2) the failure to warn salon workers that ordinary use of the product exposes them to a chemical known to cause cancer; (3) the failure to report the presence of formaldehyde in the product to the Department of Public Health; (4) the false and deceptive advertising of this product as formaldehyde-free and safe; and (5) the business practices surrounding the vending of this product. To prevent further injury to California salon workers and customers, this Court should issue a preliminary injunction to require GIB to comply with the requirements of Proposition 65, the California Safe Cosmetics Act of 2005, the California Air Resource Board’s consumer product regulations, the False Advertising Law, and the Unfair Competition Law, all of which GIB continues to flout.

¹ These specific representations were made on Brazilian Blowout’s website and product labeling as of the filing date of the People’s original Complaint. The precise representations on the website and label have changed continually during the pendency of this litigation, but they remain false and misleading.

² See Coleman & Kogan, *An Improved Low-Formaldehyde Embalming Fluid to Preserve Cadavers for Anatomy Teaching* (1998) *Journal of Anatomy* 192, at pp. 442-426 (describing use of 0.5% to 40% formaldehyde solutions for embalming), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC1467790/pdf/joa_1923_0443.pdf.

1 **BACKGROUND**

2 GIB is a limited liability company located in North Hollywood, California, licensed to do
3 business under the fictitious name “Brazilian Blowout.” (Declaration of Claudia Polsky, ¶ 2 &
4 Ex. 2.) “Brazilian Blowout” conducts business through a web site (*www.brazilianblowout.com*)
5 and an 800-number phone line, both of which enable stylists “certified” in the Brazilian Blowout
6 method to purchase the company’s professional-use-only products for use on hair salon
7 customers. Although live Brazilian Blowout training is available at a number of California
8 salons, “certification” can alternatively be obtained by watching a ten-minute video and passing a
9 short on-line quiz. (Declaration of Jennifer Goeres-Arce, ¶ 8.)

10 Four Brazilian Blowout professional products are intended to be used in sequence on a
11 salon client’s hair to confer the desired hair smoothing benefits: (1) Brazilian Blowout Anti
12 Residue Shampoo; (2) a Brazilian Blowout-brand Smoothing Solution;³ (3) Brazilian Blowout
13 Deep Conditioning Mask; and (4) Brazilian Blowout Daily Smoothing Serum. (Goeres-Arce
14 Decl., ¶ 9.) The second product (“Smoothing Solution”) is the subject of this enforcement
15 action.⁴

16 A Brazilian Blowout treatment typically retails for three hundred dollars or more (Goeres-
17 Arce Decl., ¶ 24), but costs twenty dollars or less in product for a stylist to perform. (*Ibid.*)
18 Accordingly, GIB direct-markets the treatment to hair stylists as a way of “making a lot more
19 money in a very short period of time.” (Polsky Decl., ¶ 3 & Ex. 2 [advertisement from *American*
20 *Salon* trade magazine].) GIB distributes materials to stylists informing them that the Brazilian
21 Blowout brand hair smoothing process involves “NO HARSH CHEMICALS”; is
22 “FORMALDEHYDE FREE!”; and is “not to be confused with the [competitor brand’s] Brazilian

23 _____
24 ³ This product is sold under two different names: “Brazilian Blowout Smoothing
Solution” and “Brazilian Blowout Acai Professional Smoothing Solution.”

25 ⁴ Since the filing of this lawsuit, GIB has introduced a new smoothing product called
26 “Zero” as an alternative to the original Smoothing Solution(s). The “Zero” product – which GIB
27 markets as a more natural alternative to the Brazilian Blowout – has no relevance here, insofar as
28 GIB continues to sell the “original,” formaldehyde-containing Smoothing Solution. (See
www.brazilianblowout.com/zero-faqs (accessed April 4, 2011) [indicating continued availability
of original Smoothing Solution, based on “ever-increasing demand for the product.”].)

1 STRAIGHTENER treatment, which has 2% to 4% formaldehyde.” (Polsky Decl., ¶ 4 & Ex. 3
2 [brochures].)

3 In July 2010, the People learned through Safe Cosmetics Program staff at the California
4 Department of Public Health that health complaints had been made to the Oregon Health &
5 Sciences University’s (“OHSU”) Toxicology Information Center by hair stylists regarding acute
6 adverse effects from exposure to GIB’s Smoothing Solution. In September and October 2010, the
7 Oregon Occupational Safety and Health Division (“Oregon OSHA”) and the OHSU issued press
8 releases regarding their finding of high levels of formaldehyde (in some cases upwards of 10%
9 by weight) in samples of the Smoothing Solution, and a “Hazard Alert” regarding occupational
10 risks posed by formaldehyde in hair products. (Polsky Decl., ¶ 5 & Ex. 4.)

11 Oregon OSHA and OHSU subsequently published an in-depth, peer-reviewed report
12 (“Keratin-Based” Hair Smoothing Products and the Presence of Formaldehyde, dated Oct. 29,
13 2010, ¶ 6, Ex. 5 to Polsky Decl.), stating that analysis of multiple Smoothing Solution samples
14 using five different test methods uniformly yielded high levels of total formaldehyde. (*Ibid.*) The
15 newest, ostensibly “formaldehyde free” version of the product was found to contain roughly 8.5%
16 total formaldehyde by weight. (*Id.* at p. 1.)⁵

17 Brazilian Blowout publicly challenged Oregon’s testing results and filed a complaint
18 against multiple Oregon state agencies alleging that they had “manipulated testing protocol in an
19 attempt to harm Plaintiff [GIB],” and endeavored to “scare the public and create a false
20 perception that the product was unsafe, dangerous, and unhealthy.” (Polsky Decl., ¶ 7 & Ex. 6.)⁶

21 GIB simultaneously mounted an aggressive public relations counter-offensive to deny
22 charges that salon use of its Smoothing Solution could expose people to dangerous levels of
23 formaldehyde – a disinformation campaign that continues to this day. (See Declaration of Julie
24

25 ⁵ Although reported test results indicate that one or more competitor “keratin” hair
26 straighteners may also violate California law, the formaldehyde content in Brazilian Blowout was
by far the highest of all products tested. (Polsky Decl., ¶ 6 & Ex. 5, at p. 22, Table 1.)

27 ⁶ GIB voluntarily dismissed this case after the Oregon Attorney General indicated that he
28 would move to strike the suit as a Strategic Lawsuit Against Public Participation (SLAPP suit).
(Polsky Decl., ¶ 8 & Ex. 7 [notice of entry of dismissal].)

1 Stevens, ¶ 12 [“Brazilian Blowout immediately began e-mailing us . . . to reassure us that the
2 product was safe, and that the company was suing Oregon OSHA for misinforming the public”];
3 Polsky Decl., ¶ 9 & Ex. 8 [October 2010 GIB news releases touting product safety], and ¶ 10 &
4 Ex. 9 [January 2011 GIB letter to salon workers, stating that allegations of risks from Brazilian
5 Blowout are “misinformation.”].) GIB even went so far as to encourage already-injured salon
6 workers to continue to use the product. (Stevens Decl., ¶ 6 [“As to our stinging eyes, the
7 company rep said there was an alcohol-based preservative . . . and that was what was stinging
8 us.”; “She said . . . ‘It’s totally safe and nothing to worry about.’”].)

9 Because of GIB’s fervent (and ongoing) denials that its product contains high levels of
10 formaldehyde and can release that toxic chemical in quantities injurious to salon workers and
11 clients, the People sought to verify beyond doubt the accuracy of the State of Oregon’s results.
12 The People arranged to obtain and test two of their own Smoothing Solution samples. One
13 sample was procured through a “certified” hair stylist who used the usual Brazilian Blowout
14 product-ordering process, and sent the product directly to the specified testing laboratory.
15 (Polsky Decl., ¶ 11, Ex. 10) The other sample was obtained from California OSHA, which had
16 seized the product directly from a Brazilian Blowout repackaging facility in Southern California,
17 and ultimately sent it (via a federal OSHA lab in Salt Lake City) to the People’s specified testing
18 laboratory in California. (*Id.*, ¶ 12 & Ex. 11.)

19 The People’s sample testing was conducted at two independent laboratories, including one
20 with specialized expertise in formaldehyde chemistry. (Polsky Decl., ¶ 13, Ex. 12 [Exova
21 laboratory]; Declaration of Raja Tannous, ¶¶ 4-5 [describing Berkeley Analytical laboratory’s
22 formaldehyde specialization].) This testing confirmed that the Smoothing Solution contained
23 between 7.87% and 8.4% formaldehyde by weight. (Polsky Decl., ¶ 13 & Ex. 12 [Exova results];
24 Tannous Decl., ¶ 8 & Ex. B at pp. 2-3 [Berkeley Analytical results].)

25 The People additionally retained scientific experts to do the following: (1) determine the
26 emissions of formaldehyde gas from Brazilian Blowout Solution using laboratory air chamber
27 testing with actual product; (2) model the average daily exposure to formaldehyde that a salon
28 worker using this product would experience based on a professional lifetime; and (3) explain the

1 chemical processes whereby formaldehyde would be effective as a texture-changing agent in
2 human hair. (Tannous Decl., ¶ 7 [emissions testing]; Declaration of Francis Offermann, ¶ 8
3 [exposure assessment]; Declaration of Yashavanth Kamath, ¶ 6 [chemistry of hair straightening].)

4 Based on results of the People’s product testing, their expert reports, and their months of
5 conversations with stylists and customers who have endured injuries as a result of exposure to
6 Brazilian Blowout Solution under conditions of normal salon use – injuries described in salon
7 worker and customer declarations filed with this motion – the People urge the Court to issue a
8 preliminary injunction.

9 **SUMMARY OF ARGUMENT**

10 The evidence in support of this motion establishes that GIB has consistently committed, and
11 continues to commit, acts that violate California’s health and safety, environmental, and unfair
12 business practices statutes. These violations warrant injunctive relief, which may be issued upon
13 a showing by the People of a reasonable probability of success on the merits of their claims that a
14 violation of statutory law has been committed. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d
15 63, 72.) The declarations and exhibits filed herewith demonstrate not only the required
16 reasonable probability, but an overwhelming likelihood of the People’s success on the merits.
17 The proposed injunction poses no hardship to any lawful operation conducted by GIB, insofar as
18 the requested relief requires nothing more than that the company conform its conduct to
19 provisions of the law to which it is required to conform.

20 **I. APPLICABLE LAWS**

21 **A. Proposition 65**

22 The Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Saf. Code, §
23 25249.5 et seq.), better known as Proposition 65, requires businesses to provide persons with a
24 “clear and reasonable warning” before exposing them to any chemical “known to the State” to
25 cause cancer or reproductive toxicity. (Health & Saf. Code, § 25249.6.) The list of Proposition
26 65 chemicals is established, and regularly updated, by the Office of Health Hazard Assessment
27 (“OEHHA”). In 1988, OEHHA listed “Formaldehyde (gas)” as a chemical known to the State of
28 California to cause cancer. (Cal. Code Regs., tit. 27, § 27001, subd. (b).) OEHHA has

1 established a No Significant Risk Level (“NSRL”) for formaldehyde of forty (40) micrograms per
2 day,⁷ meaning that a business selling a product that releases formaldehyde gas, or maintaining a
3 premises with formaldehyde gas in the air, must provide a warning before exposing individuals to
4 formaldehyde in excess of this level.⁸

5 For occupational rather than consumer exposures to listed chemicals, Proposition 65
6 provides that the warning requirement must be satisfied by one of the following three methods:

7 (1) a prominent warning label or labeling on the product used in the workplace; (2) a warning that
8 appears on a conspicuously posted sign in the workplace; or (3) a warning directly to the exposed
9 employee that fully complies with “the federal Hazard Communication Standard (29 CFR section
10 1910.1200, as amended on March 7, 1996) [and] the California Hazard Communication Standard
11 (Cal. Code Regs., title 8, section 5194, as amended on July 6, 2004).” (Cal. Code Regs., tit. 27, §
12 25604.1.)

13 The California Hazard Communication Standard requires, among other things, that
14 manufacturers or importers assess “the hazards of substances which they produce or import,”
15 (Cal. Code Regs., tit. 8, § 5194, subd. (b)(1)), and communicate this information to workers
16 through a complete and accurate Material Safety Data Sheet (MSDS) “for each hazardous
17 substance they produce or import.” (Cal. Code Regs., tit. 8, § 5194, subd. (g)(1).) The MSDS
18 must include the chemical and common name(s) and Chemical Abstract Services number for all

21 ⁷ The NSRL is defined by regulation as the level “which is calculated to result in one
22 excess case of cancer in an exposed population of 100,000, assuming lifetime exposure at the
23 level in question” (Cal. Code Regs., tit. 27, section 25703, subd. (b).) This risk level is
24 calculated based on a lifetime of exposure. Thus, if a business causes a person to be exposed to
25 high levels of formaldehyde on some days, and little or none on other days, the exposures are
26 averaged over a lifetime of seventy years. (Cal. Code Regs., tit. 27, § 25721.) For formaldehyde
27 gas, a warning must be given if average lifetime exposure exceeds 40 micrograms per day. (Cal.
28 Code Regs., tit. 27, § 25705 (b)(2).) The lifetime-averaged exposures caused by GIB’s
Smoothing Solution are set forth in the Offermann Declaration, ¶ 10, and Ex. B at p. 8, Table 2.

⁸ GIB’s public relations materials mistakenly refer to Proposition 65 as the “Clean Air and
Water Act,” and erroneously state that the regulatory standard for formaldehyde under
Proposition 65 is “40 parts per million.” (Polsky Decl., ¶ 9 & Ex. 8 [Brazilian Blowout publicity
release, dated Oct. 5, 2010].) Proposition 65 does not establish limits on product or air
concentrations of chemicals (expressed in parts per million), but, rather, establishes warning
requirements for *exposures* to toxic chemicals (expressed as a per-day chemical dose).

1 ingredients that “contribute to these known hazards” or “could present a health hazard to
2 employees.” (Cal. Code Regs., tit. 8, § 5194, subd. (g)(2)(A)(2), (5).)

3 **B. California Safe Cosmetics Act of 2005**

4 The California Safe Cosmetics Act of 2005 (Health & Saf. Code, §§ 111791 - 111820)
5 requires manufacturers of cosmetics sold in California to provide to the state Department of
6 Public Health “a complete and accurate list of its cosmetic products that, as of the date of
7 submission, are sold in the state and that contain any ingredient that is a chemical identified as
8 causing cancer or reproductive toxicity” (Health & Saf. Code, § 111792, subd. (a).) The list
9 of reportable ingredients includes “formaldehyde (gas)” and all other Proposition 65 chemicals, as
10 well as some additional chemicals. (Declaration of Michelle Sommargren, ¶ 4 & Ex. 1.)
11 Cosmetics manufacturers submitting required information must “identify each chemical both by
12 name and Chemical Abstract Service number and shall specify the product or products in which
13 the chemical is contained.” (Health & Saf. Code, § 111792, subd. (a)(2).)

14 The Safe Cosmetics Act takes its definition of “cosmetic” from the Sherman Food, Drug,
15 and Cosmetic Law (Health & Saf. Code, § 109875 et seq.), which defines cosmetics as articles or
16 components “intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or
17 otherwise applied to, the human body, or any part of the human body, for cleansing, beautifying,
18 promoting attractiveness, or altering the appearance.” (Health & Saf. Code, § 109900.)

19 The Safe Cosmetics Act incorporates the broad definition of “ingredient” from the federal
20 Food, Drug and Cosmetic Act: “[A]ny single chemical entity or mixture used as a component in
21 the manufacture of a cosmetic product.” (21 C.F.R. § 700.3(e), incorporated into the Safe
22 Cosmetics Act at Health & Saf. Code § 111791.5(d).) Where an ingredient “has been
23 incorporated into the cosmetic as an ingredient of another cosmetic ingredient” – for example, if
24 formaldehyde was contained in a mixture used by the manufacturer as a product input – the
25 included ingredient must also be disclosed to the Public Health Department unless it has “no
26 technical or functional effect in the cosmetic.” (21 C.F.R. § 701.3(l).)⁹

27 ⁹ A summary of federal provisions incorporated into the Safe Cosmetics Act is provided at
28 Plaintiff’s RJN, Ex. D (California Safe Cosmetics Program Information Sheet – Definitions), also
(continued...)

1 **C. California Air Resources Board Consumer Product Regulations**

2 The California Air Resources Board (“CARB”) is charged with adopting regulations to
3 limit the emissions of volatile organic compounds (“VOCs”) from consumer products. (Health &
4 Saf. Code, § 41712.) VOCs, frequently described as “ozone precursors,” are carbon compounds
5 that mix with nitrogen in the air to form smog (ground-level ozone). The U.S. Environmental
6 Protection Agency describes formaldehyde as “one of the best known VOCs.”

7 (www.epa.gov/iaq/voc.html.) (Plaintiff’s RJN, Ex. C, at p. 1; see also Plaintiff’s RJN, Ex. B, at p.
8 2.)

9 CARB has adopted regulations that address VOC emissions from several consumer product
10 categories. (Cal. Code Regs., tit. 17, §§ 94507-94517.) These regulations specifically limit VOC
11 emissions from hair styling products. (Cal. Code Regs., tit. 17, § 94508, subd. (a)(82) [Definition
12 of “hair styling product”], § 94509, subd. (a) [Table].) CARB’s consumer product regulations
13 allow a maximum of 2% by weight of VOCs in a hair styling product. (Cal. Code Regs., tit. 17, §
14 94509, subd. (a) [Table of Standards].)

15 **D. False Advertising Law**

16 Business and Professions Code section 17500 (commonly known as the False Advertising
17 Law, or “FAL”) provides that it is unlawful for any person “to make or disseminate or cause to be
18 made” any statement concerning personal property or services that “is untrue or misleading.” A
19 violation of the false advertising law is also a violation of the Unfair Competition Law, which
20 defines “unfair competition” to include “unfair, deceptive, untrue or misleading advertising.”
21 (Bus. & Prof. Code, § 17200.)

22 “[T]he primary evidence in a false advertising case is the advertising itself.” (*Brockey v.*
23 *Moore* (2003) 107 Cal.App.4th 86, 100.) Courts judge the falsity of advertising by whether it
24 would be facially deceptive to a “reasonable” consumer, who “may be unwary or trusting” (*Lavie*

25
26 _____
27 (...continued)
28 available at www.cdph.ca.gov/programs/cosmetics/documents/definitions.pdf.

1 v. *Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 506 [internal citation omitted]), and “not .
2 . . . exceptionally acute and sophisticated.” (*Id.* at 509.)

3 **E. Consumer Fraud**

4 Business and Professions Code section 17538, California’s consumer fraud statute, requires
5 on-line vendors to provide notice of their refund and return policies to buyers located in
6 California before accepting any form of payment. “California’s consumer fraud statute is one of
7 the few state statutes to regulate online transactions in goods or services.” (*Specht v. Netscape*
8 *Communications Corp.* (2d Cir. 2002) 306 F.3d 34, fn. 17.)

9 Under section 17538, a vendor conducting business with a buyer in this state through the
10 internet or other electronic means must “[b]efore accepting any payment or processing any debit
11 or credit card or funds transfer . . . disclose to the buyer in writing or by electronic means of
12 communication, such as e-mail or an on-screen notice, the vendor’s return and refund policy,” in
13 addition to providing the company’s business name and address. (Bus. & Prof. Code, § 17538,
14 subd. (d)(1).)

15 **F. Unfair Competition Law**

16 Section 17200 of the Business and Professions Code (the Unfair Competition Law, or
17 “UCL”) defines “unfair competition” as any “unlawful, unfair or fraudulent business act or
18 practice” Under Section 17200, any violation of a law or regulation committed by a
19 commercial enterprise constitutes an “unlawful business act or practice.” (*Saunders v. Superior*
20 *Court* (1994) 27 Cal.App.4th 832, 838-839; *Farmers Ins. Exchange v. Superior Court* (1992) 2
21 Cal.4th 377, 383.)

22 Violations of Proposition 65, the Safe Cosmetics Act, CARB’s consumer product
23 regulations, the FAL, and California’s consumer fraud statute each and all constitute unfair
24 competition within the meaning of the UCL. Remedies available under the UCL are “cumulative
25 to each other and to the remedies or penalties available under all other laws of this state.” (Bus.
26 & Prof. Code, § 17205.)

27 //

28 //

1 **II. STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION IN THIS CASE**

2 Five of the six statutes that GIB has here violated expressly provide for injunctive relief.
3 (See Health & Saf. Code, § 25249.7, subd. (a) [injunction for violations of Proposition 65];
4 Health & Saf. Code, § 111900 [injunction for violation of Safe Cosmetics Act]; Health & Safety
5 Code, § 42453 [injunction to enforce abatement orders concerning violation of CARB air
6 pollution regulations]; Bus. & Prof. Code, § 17535 [injunction for violation of FAL]; Bus. &
7 Prof. Code, § 17203 [injunction for violation of UCL].) Although the People could seek
8 injunctive relief on many independent statutory bases, all of GIB's statutory violations constitute
9 unfair competition that may be enjoined pursuant to the UCL. Section 17203 of the Business and
10 Professions Code provides that "[a]ny person who engages, has engaged, or proposes to engage in
11 unfair competition may be enjoined in any court of competent jurisdiction."

12 Where a party seeks a preliminary injunction predicated on statutory violations, injunctive
13 relief issues pursuant to a relaxed standard, rather than requiring the traditional weighing of the
14 likelihood of plaintiff's success on the merits at trial against the comparative harms to the parties
15 were an injunction to issue. (*IT Corp. v. County of Imperial, supra*, 35 Cal.3d at p. 69.) As the
16 Supreme Court has explained:

17 Where a legislative body has enacted a statutory provision proscribing a certain
18 activity, it has already determined that such activity is contrary to the public interest.
19 Further, where the legislative body has specifically authorized injunctive relief
20 against the violation of such a law, *it has already determined (1) that significant
21 public harm will result from the proscribed activity, and (2) that injunctive relief may
22 be the most appropriate way to protect against that harm.*

23 (*Id.*, 35 Cal.3d at p. 70 [emphasis added].)

24 The Court stated the test for granting preliminary injunctive relief at the request of a public
25 enforcer in such circumstances:

26 Where a governmental entity seeking to enjoin the alleged violation of an ordinance
27 which specifically provides for injunctive relief establishes that it is reasonably
28 probable it will prevail on the merits, a rebuttable presumption arises that the
potential harm to the public outweighs the potential harm to the defendant.

(35 Cal.3d at p. 72.) Only where a defendant can rebut this presumption by showing that it
"would suffer grave or irreparable harm from the issuance of an injunction" need a court examine

1 the comparative harms to the parties. (*Ibid.*) Under this standard, based on the evidence below, a
2 preliminary injunction should now issue.

3 **III. EVIDENCE OF BRAZILIAN BLOWOUT'S UNLAWFUL CONDUCT**

4 **A. Proposition 65**

5 GIB has, through its Smoothing Solution, exposed salon workers to formaldehyde – a
6 chemical known to the State of California to cause cancer – without providing them with a clear
7 and reasonable warning, in violation of Proposition 65 and its implementing regulations. The
8 People's formaldehyde emissions testing of the Smoothing Solution, conducted by a laboratory
9 with specialized expertise in formaldehyde chemistry and air emissions testing (Tannous Decl., ¶
10 4 & Ex. A), revealed that when the product is exposed to air in an ordinary indoor environment
11 such as a beauty salon, formaldehyde gas readily escapes from solution and enters the indoor air.
12 (Tannous Decl., ¶ 8 & Ex. B at p. 7.) This testing corroborated the accounts of injured parties,
13 who have reported smelling the distinctive odor of formaldehyde while the product was in salon
14 use. (Declaration of Cornelia Cotofana, ¶ 3 ["The product gave off a strong odor that I
15 immediately recognized as formaldehyde, due to my background in pharmacy"].)¹⁰

16 The People's emissions testing was highly conservative (*i.e.*, apt to underestimate
17 formaldehyde emissions), employing room-temperature product use scenarios that did not
18 simulate the high heat from the blow drying and 450-degree flat ironing that are integral to the
19 Brazilian Blowout treatment. (Tannous Decl., ¶ 7 ["Application of heat would have increased
20 the emission rate, or amount of formaldehyde gas released from the product per unit of time."];
21 Goeres-Arce Decl., ¶ 15 [describing the "white cloud" of noxious smoke emanating from the
22 Smoothing Solution once heated].) Even with these conservative methods, the levels of
23 formaldehyde emitted by the Smoothing Solution exceed Proposition 65 exposure limits by up to
24 a factor of more than *eight* for salon workers. (Offermann Decl., Ex. B, at pp. 6, 8, Table 2.)

25 ¹⁰ Symptoms reported by Smoothing Solution users are also typical of exposure to
26 formaldehyde. (See, e.g., www.cdph.ca.gov/programs/hesis/Documents/formaldehyde.pdf
27 [California Hazard Evaluation System and Information Service, formaldehyde fact sheet, 2011] at
28 Plaintiff's Request for Judicial Notice ("Plaintiff's RJN"), Ex. A;
www.cpsc.gov/cpscpub/pubs/725.pdf [U.S. Consumer Product Safety Commission, formaldehyde
fact sheet, 1997] at Plaintiff's RJN, Ex. B.)

1 Indeed, even the air monitoring results conducted and publicly reported by GIB indicate a
2 significant exceedance of the No Significant Risk Level for formaldehyde under Proposition 65.
3 (Offermann Decl., ¶ 10(D), Ex. B, at pp. 3-6; Polsky Decl., ¶ 9, Ex. 8 [GIB press release dated
4 Oct. 15, 2010].)

5 GIB has not provided any pre-exposure warning as required by Proposition 65. There is no
6 warning on the product label or labeling. (Cotofana Decl., ¶ 7.) The Material Safety Data Sheet
7 for the product has not been provided to workers with the Smoothing Solution product, and has in
8 many instances been unavailable without an express individual request to GIB. (Goeres-Arce
9 Decl., ¶ 21 [“After I got sick from my Brazilian Blowout . . . I searched up and down the website
10 and could not find an MSDS anywhere on that site.”]; Cotofana Decl., ¶ 8 [MSDS not provided
11 with product].) And even where ultimately provided, the MSDS has not met the most basic
12 requirements of California’s Hazard Communication Standards, insofar as it omits critical
13 information regarding product ingredients, risks, and use precautions. (Cotofana Decl., ¶ 8
14 [MSDS “did not indicate that there was formaldehyde in Brazilian Blowout Smoothing Solution,”
15 said the product was of “low toxicity,” and did not advise use of any protective equipment or
16 ventilation]; *contrast* Exhibit 2 to Goeres-Arce Decl. [MSDS’s for competitor products all clearly
17 revealing presence of formaldehyde].¹¹)

18 **B. Safe Cosmetics Act**

19 GIB’s Smoothing Solution falls squarely with the definition of a “cosmetic” under state
20 law. (Health and Saf. Code, § 109900.) The People’s testing of bulk samples of two different
21 bottles of Smoothing Solution at independent laboratories revealed that the Smoothing Solution
22 contains high levels of formaldehyde as an ingredient. (Polsky Decl., ¶ 13 & Ex. 13 [Exova
23 laboratory results indicating 7.87 % formaldehyde by weight]; Tannous Decl., ¶ 8(A), Ex. B, pp.
24 2-3, Table 1 [Berkeley Analytical laboratory results indicating 8.4% formaldehyde by weight].)

26 ¹¹ As of April 4, 2011, the “Salon Professionals” portion of the Brazilian Blowout website
27 contains an MSDS, but it requires a stylist log-in, and is therefore not accessible to other, non-
28 stylist workers in hair salons. Further, it is false and misleading in numerous particulars,
including its statements regarding Proposition 65. (Polsky Decl., ¶ 15, Ex. 14.)

1 The People’s cosmetic chemistry expert further determined, through both independent
2 chemistry expertise and patent research, that formaldehyde is known to be an effective *functional*
3 ingredient in certain products designed to alter hair texture permanently. (Kamash Decl., ¶ 7 &
4 Ex. B, at pp. 9-10 [explaining formaldehyde’s role as a “cross-linking agent” that reacts strongly
5 with hair protein to create a permanent change in structure].) This makes plain that formaldehyde
6 is an active ingredient rather than a contaminant in the Smoothing Solution, and furthermore, that
7 formaldehyde cannot be exempt from reporting as an “ingredient within an ingredient,” because
8 of its clear functional effect. (See CSCP Information Sheet – Definitions, *supra*, at Plaintiff’s
9 RJN, Ex. D [summarizing the limited reporting exemption for inclusions in ingredients that do
10 not themselves have a functional effect].)

11 GIB has violated the California Safe Cosmetics Act by failing to report to the Department
12 of Public Health that its product contains formaldehyde. (Sommargren Decl., ¶ 9.) This has
13 occurred notwithstanding DPH’s direct notification to GIB that certain cosmetics manufacturers
14 selling product into California are subject to reporting requirements. (Sommargren Decl., ¶¶ 5-8
15 & Ex. 2.) GIB’s failure to report continued even after this personal, actual notice of legal
16 requirements that DPH was under no obligation to provide.

17 **C. CARB Consumer Product Regulations**

18 GIB’s Smoothing Solution is a “hair styling product” within the meaning of CARB’s
19 consumer product VOC regulations. (Cal. Code Regs., tit. 17, § 94508, subd. (a)(82).) These
20 regulations allow a maximum of 2% by weight of VOCs in a hair styling product. (Cal. Code
21 Regs., tit. 17, § 94509, subd. (a) [Table of Standards].) The level of formaldehyde in GIB’s
22 Smoothing Solution, approximately 8% by weight, is four times the maximum amount of this
23 smog-forming VOC allowed in a hair styling product. (Tannous Decl., ¶ 8(A) & Ex. B at pp. 2-
24 3, Table 1 [Berkeley Analytical results of 8.4% formaldehyde]; Polsky Decl., ¶ 13 & Ex. 12
25 [Exova sampling results of 7.87% formaldehyde].)

26 **D. False Advertising**

27 GIB has deceptively represented, on the Brazilian Blowout web site, the Smoothing
28 Solution product container, and in product promotional materials and conversations with stylists,

1 that the product is “formaldehyde free,” “without harsh chemicals,” and “safe.” (Polsky Decl., ¶
2 4 & Ex. 3 [advertisements], ¶ 9 & Ex. 8 [media releases], ¶ 12 & Ex. 11 [product label]; Stevens
3 Decl., ¶ 9 [company’s verbal insistence that American version of product was “reformulated . . .
4 to be formaldehyde free.”].)

5 GIB knew, or in the exercise of reasonable care should have known, that these
6 representations were false and deceptive when made, because of the acute health effects widely
7 known to be associated with exposure to high levels of gaseous formaldehyde. (See People’s
8 Request for Judicial Notice, Ex. A & B [hazards of formaldehyde]; Stevens Decl., ¶ 5 [describing
9 “stinging in our eyes, dizziness, heaviness in the chest, and difficulty breathing for a substantial
10 amount of time after performing the [Brazilian Blowout] treatments”]; Goeres-Arce Decl., ¶¶ 14-
11 19 and ¶ 26 [describing details of “horrible first-hand experience with Brazilian Blowout,” and
12 resulting medical diagnosis of “possible chemical poisoning”]; Kamash Decl., ¶ 7(H) [“[T]he
13 toxicity of formaldehyde is a matter of common knowledge to cosmetics patent holders.”].)

14 Further, GIB had *actual knowledge* that the product was not “safe” and “without harsh
15 chemicals,” because of repeated health complaints made to company representatives, health
16 authorities, and the media by hair stylists and salon customers. (Polsky Decl., ¶ 15, Ex. 14
17 [Notice of Violation from Department of Public Health regarding product misbranding], & ¶ 16,
18 Ex. 15 [Google printout of media stories about health harms traceable to Brazilian Blowout];
19 Stevens Decl., ¶ 5 [when reporting stinging eyes to 800 number, company representative said she
20 “get[s] about a hundred calls a day about this.”].)

21 **E. Consumer Fraud Statute**

22 GIB has failed to provide affirmative notice of its refund and return policies to buyers
23 located in California before accepting payment, in derogation of California’s consumer fraud
24 statute. (Bus. & Prof. Code §17538; Stevens Decl., ¶ 17 [GIB product representative stated,
25 regarding company’s no-refund policy: “It’s not printed on the invoices or website, but if you ask
26 during the ordering, we will verbally tell you our policy.”]; Polsky Decl., ¶ 17, Exh. 16 [stylist
27 seeking refund complained to OHSU that “[t]he company will not give me my money back, they
28 said they have a no return policy.”].)

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F. Unfair Competition Law

Each and every above-described statutory violation is a violation of the UCL, which provides that any “unlawful . . . act or practice” constitutes an act of unfair competition. (Bus. & Prof. Code, § 17200.)

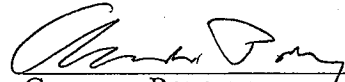
CONCLUSION

The evidence establishes that GIB has consistently committed acts in violation of California’s health and safety, environmental, and unfair business practices laws. The People have made more than the required showing for an injunction, and no grave or irreparable harm to any lawful operations of GIB will result by its issuance. The People respectfully request that the Court now issue a preliminary injunction requiring GIB to comply with these important state laws.

Dated: April 5, 2011

Respectfully Submitted,

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