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U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D. C. 20207

OFFICE OF THE
GENERAL COUNSEL

November 19, 1992

Justin G. Puerta, Jr., Esq.
Deputy District Attorney
Office of the District Attorney
County of Sacramento
Consumer and Environmental Protection
Division
P.O. Box 749
Sacramento, California 95812-0749

Dear Mr. Puerta:

This is in response to your letter dated September 28, 1992, requesting an advisory opinion about the provisions of the Flammable Fabrics Act (FFA) which preempt certain state and local flammability standards and regulations. Your letter seeks the opinion of this office about the effect, if any, of the preemptive provisions of the FFA on an action for enforcement of state statutes prohibiting unfair methods of competition and false and misleading advertising which involves representations about flammability of children's Halloween costumes.

In your letter, you state that your office has been investigating possible violations of sections 17200 and 17500 of the California Business and Professions Code by manufacturers of children's Halloween costumes. Those sections prohibit, among other things, the making or disseminating in California of any statement concerning personal property which is "untrue or misleading" with the intent to dispose of that property. You state that one manufacturer of children's Halloween costumes markets its products on cardboard hangers bearing the words "FLAME RETARDANT" in large red letters, and the following statement: "Complies with the U.S. Flammable Fabrics Act."

You assert that some of the costumes in question have no flame retardant property but comply with the FFA because they pass the test in the Standard for the Flammability of Clothing Textiles (16 C.F.R. Part 1610), which is applicable to all items of wearing apparel with the exception of children's sleep-

wear. You have expressed the view that the labeling on the hangers of these costumes is misleading because it creates an impression that these costumes afford a higher degree of protection than other costumes or articles of wearing apparel which meet the same flammability standard but are not so labeled.

By letter dated September 15, 1992, you also provided this office with copies of your correspondence with an attorney representing the manufacturer cf the costume& in question. In a letter to that attorney dated June 1, 1992, you stated that your office does not want to create any new flammability standard which would conflict with the standard required by the FFA, but seeks only to prevent the manufacturer from advertising its products "in such a manner as to be false and misleading in California."

The enclosures to your letter of September 15, 1992, also included a copy of a letter from Stephen Lemberg of this office to an attorney for the manufacturer of the costumes which are the subject of your inquiry. In that letter Mr. Lemberg stated this office had reviewed the labeling statement which is the subject cf your proposed enforcement and found it acceptable "so long as the statement is in fact true." Your proposed enforcement action is based on the premise that the statement is false or misleading. This office expresses no opinion as to the merits of your proposed enforcement action.

Section 16(a) of the FFA (15 U.S.C. § 1203(a)) states that except in circumstances which are not applicable to your inquiry, whenever a flammability standard or other regulation for a fabric, related material, or product of wearing apparel or interior furnishing is in effect under the FFA, no state or political subdivisionof a state may establish or continue in effect "a flammability standard or other regulation for such fabric, related material, or product if the standard or other regulation is designed to protect against the same risk of the occurrence of fire" as the Federal standard unless the flammability standard of the state or political subdivision is "identical" to the Federal standard.

Section 4 of the FFA (15 U.S.C. § 1193) authorizes the issuance of a "flammability standard or other regulation, including labeling" for a fabric, related material, or product of wearing apparel or interior furnishing if such a standard or regulation "is needed to adequately protect the public against

the unreasonable risk: of the occurrence of fire leading to death, injury, or signif icant property damage."

Children's Halloween costumes made from textiles are products of wearing apparel which are subject to the Standard for the Flammability of Clothing Textiles (16 C.F.R. Part 1610). Costumes made from plastic film are subject to the Standard for the Flammability of Vinyl Film (15 C.F.R. Part 1611). These standards prohibit the sale of wearing apparel which is dangerously flammable because of rapid and intense burning. Neither standard contains any provision which requires labeling of Halloween costumes.

After considering all of the information set forth in your letter of September 28, 1992, and in other correspondence you have provided, this office concludes that your proposed action for enforcement of sections 17200 and 17500 of the California Business and Professional Code with regard to promotional statements concerning certain children's Halloween costumes is not preempted by provisions of section 16 of the FFA provided:

(1) The proposed enforcement action seeks only to prohibit the manufacturer from making representations about the costumes which your office believes to be deceptive or misleading; and

(2) The proposed enforcement action does not seek to require children's Halloween costumes to meet any flammability requirements other than those in the standards codified at 16 C.F.R. Parts 1610 and 1611, or to impose any requirement fcr labeling of those costumes not required by those standards.

As noted above, this office takes no position on the merits cf your proposed enforcement action.

In reaching the conclusion that your proposed enforcement action is not preempted by section 16 of the FFA, this office has considered the decision of the U.S. Supreme Court in Morales v. Trans World Airlines, 112 S.Ct 2031 (1992). In that case, the Court held that provisions of 49 U.S.C. § 1305(a) (1) prohibiting States from "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . . " preempted State actions for enforcement of fare advertising guidelines of the National Association of Attorneys General brought under provisions of State consumer protection laws. In

that case, the Court held that the words "related to" in 1305(a)(l) had the effect of bringing any State action "having a connection with or reference to airline 'rates, routes, or services'" within the scope of activities preempted by that statute.

Unlike the preemption provision which was the subject cf the Morales decision, section 16 of the FFA prohibits the enactment or enf orcement by a state or a political subdivision of a state of any "flammability standard or other regulation" for a fabric, related material c f product subject to a standard or regulation in effect under the FFA if the state or local standard or regulation is "desicned to protect against the same risk cf the occurrence of fire" as the Federal standard or regulation, unless the state or local standard or regulation is "identical" to the Federal standard or regulation. Because the decision of in the Morales case was based on the specific language of 49 U.S.C. § 1305(a)(1), and because of the difference between that language and the provisions of section 16 of the FFA, this office concludes that the Morales decision is not applicable to your proposed enforcement action.

Please note that this letter sets forth the opinion of the Office of the General Counsel, but has not been reviewed or approved by the Commissioners of the agency. While the opinion set forth in this letter is based on the latest interpretation of the law by this office, it could be changed by the Commission.

I hope this information will be helpful.

Sincerely yours,

Jerry G. Thorn,
General Counsel

Frederick B. Locker, Esq.

OFFICE OF THE
DISTRICT ATTORNEY
SACRAMENTO COUNTY
STEVE WHITE
District Attorney

TIMOTHY M FRAWLEY
Chief Deputy

September 28, 1992

Jerry G. Thorn, General Counsel
Office of General Counsel
U.S. Consumer Product Safety Commission
Washington, D.C. 20207

Re: Advisory Opinion

Dear Mr. Thorn:

Our office has been investigating children's Halloween costume manufacturers over the past year for violations of California's false and misleading advertising and unfair competition statutes, California Business and Professions Code Sections 17200 and 17500. It has become a concern of ours that some costume manufacturers are causing their Halloween costumes to be displayed in a manner which is misleading to the California consumer. California Department Of Consumer Affairs Director, Jim Conran, recently expressed the same concern to your Commissioner, Carol Dawson, in a letter which I have enclosed.

In our investigation, we have focused on costume manufacturers who make specific representations as to the relative flammability of their Garments. One such company, [redacted] labels the cardboard hanger of each costume "FLAME RETARDANT" in large red letters and also "Complies with the U.S. Flammable Fabrics Act." Each of [redacted] Costumes appears to have the same labeling, regardless of the type of fabric and/or other materials with which the costumes are made. For reference, please find enclosed photographs of the costumes.

There are two problems with [redacted] representations. First, it appears that some of these costumes do not have flame retardant properties. Second, even if the costumes do comply with the Flammable Fabrics Act, we believe that the costumes are packaged in a manner which creates in the minds of consumers a misleading impression as to the relative safety of the product. Consequently, we believe that the packaging is a major factor in consumer selection of [redacted] costumes over other costumes and clothing that do not make the same representations.

CONSUMER & ENVIRONMENTAL PROTECTION DIVISION
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Over the past few months we have been in contact with [redacted] counsel. Copies of our correspondence with [redacted] counsel was mailed to Stephen Lemberg on September 15, 1992. [redacted] has asserted that we are pre-empted from bringing an action against them for false and misleading advertising and unfair competition due to the U.S. Flammable Fabrics Act. It is our unequivocal position that we are not pre-empted.

At this point, I would like to request an advisory opinion from the Office of General Counsel for the U.S. Consumer Product Safety Commission as to whether or not you believe that the *Act* pre-empts us from bringing an action against a costume manufacturer for false and misleading advertising and unfair competition due to the representations made by the manufacturer as to the flammabity of their costumes.

Please notify us within two weeks if you plan to issue an advisory opinion and if so, the time-frame for its issuance. Thank you.

Very truly yours,

STEVE WHITE
District Attorney

JUSTIN G. PUERTA, JR.
Deputy District Attorney