AMERICAN MOCK TRIAL ASSOCIATION

2010-11 CIVIL CASE

DAVIS

v.

HAPPYLAND TOY COMPANY*

by Erin Coltrera
Washington & Lee University

Revised by the AMTA Civil Case Committee:
Toby Heytens (Chair), Dan Haughey, David Cross, Gonzalo Freixes,
Jim Wagoner, Justin Bernstein, Mike Walsh, Neal Schuett, and William Warihay

* This case is a work of fiction. Although the original concept for this case was inspired by an actual lawsuit, the people, companies, and actions described in these materials are not based on real people, companies, or events and any similarity to real people, companies, or events is purely coincidental.

AVAILABLE WITNESSES

(See Special Instructions for selection rules and procedures)

1. **Quinn Brown**, toy designer for HappyLand Toy Co.
2. **Andy Davis**, parent of Joey Davis (Plaintiff only)
3. **Tristan Frost**, journalist and former HappyLand employee
4. **Reese Gardner**, pharmacologist (Defense priority)
5. **Blake Lexington**, founder of HappyLand (Defense priority)
6. **Brett Miller**, babysitter for Davis family
7. **Kendall Oxman**, child psychologist
8. **Chase Tuchmont**, toxicologist (Plaintiff priority)
9. **Emerson Zimmer**, former Commissioner, Midlands Department of Health (Plaintiff only)

LEGAL DOCUMENTS

1. **Statutes and Regulations**
2. **Available Case Law**
3. **Complaint**
4. **Answer**
5. **Stipulations**
6. **Order DENYING Defendant's Motion for Summary Judgment on Count 1 and GRANTING Defendant's Motion for Summary Judgment on Count 2.** *(Only may be used or referenced if plaintiff chooses to pursue strict liability claim, see Special Instruction 2(A)).*
7. **Order GRANTING Defendant's Motion for Summary Judgment on Count 1 and DENYING Defendant's Motion for Summary Judgment on Count 2.** *(Only may be used or referenced if plaintiff chooses to pursue negligence per se claim, see Special Instruction 2(A)).*

AVAILABLE EXHIBITS

1. Exhibit A to the Complaint
2. Exhibit B to the Complaint
3. Curriculum Vitae of Reese Gardner
4. Curriculum Vitae of Kendall Oxman
5. Curriculum Vitae of Chase Tuchmont
6. Curriculum Vitae of Emerson Zimmer
7. Memorandum from Alison Burton Cornell to Blake Lexington, dated May 15, 2009
8. Email from Lexington to all employees, dated March 9, 2009
9. Email from Lexington to Rodriguez and Brown, dated April 13, 2009
10. Email from Rodriguez to Lexington, Brown, and Swift, dated April 15, 2009
11. Email from Lexington to Rodriguez, Brown, and Swift, dated April 15, 2009
12. Email from Brown to Lexington, dated May 16, 2009
13. Email from Lexington to Swift and Brown, dated May 16, 2009
14. Email from Swift to Lexington, dated May 16, 2009
15. Email from Lexington to Brown, dated May 16, 2009
16. Email from Brown to Lexington, dated May 16, 2009
17. Email from Lexington to all employees, dated August 14, 2009
18. Mouthing Behavior article by Kendall Oxman
19. Expert Report of Kendall Oxman, dated August 15, 2010
20. Material Safety Data Sheet for 1,4 butanediol
21. Material Safety Data Sheet for 1,5 pentanediol
22. *GHB: Separating Myth from Truth*, by Freeland and Hartsfield
23. Autopsy of Joey Davis
24. Record of Outpatient Visit, dated October 5, 2008
25. Deposition transcript of Erin Swift
26. Confidentiality Agreement of "Alex Johnson"
27. Handwritten note in possession of Tristan Frost
28. Labels for packaging of Princess Beads
29. Beads (*not included in case packet; see Special Instructions 18–23)*
    (a) beads swallowed by Joey Davis
    (b) beads owned by Hillary Davis
    (c) beads owned by Dr. Tuchmont's family
    (d) a generic set of Princess Beads
30. Photograph of Joey Davis *(not provided in case packet; see Special Instruction 24)*

SPECIAL INSTRUCTIONS

1. **Witness Availability:**
   A. Davis and Zimmer may only be called by the plaintiff.
   B. All other witnesses may be called by either party. However, some witnesses (Tuchmont, Gardner, and Lexington) are subject to priority constraints (*see* Special Instruction 2(B)(i)).

2. **Captains' Meeting Procedures.** Witness selection and liability theory selection shall be made using the Captains' Meeting Form. Captains must proceed sequentially down the form. As explained below, first, the plaintiff will announce its theory of liability (strict liability or negligence *per se*), which affects whether the plaintiff will call Zimmer. Next, the parties will announce whether they exercise priority over certain witnesses associated with each party (Tuchmont, Gardner, Lexington). Finally, the parties draft witnesses—i.e., alternate selection of remaining witnesses until each party has three witnesses.
   A. Step #1: Plaintiff selects its theory of liability.
      i. The plaintiff shall indicate which theory of liability it is pursuing—strict liability or negligence *per se*. The plaintiff may not pursue both theories.
      ii. If the plaintiff announces that it is pursuing a strict liability theory:
         a. Legal Document #6 governs the trial. The negligence *per se* claim is dismissed and the case proceeds only on the strict liability claim.
         b. Legal Document #7 (Order Granting Defendant's Motion for Summary Judgment on Count 1 and Denying Defendant's Motion for Summary Judgment on Count 2) is not part of the case packet for that round and may not be referenced by either side for any purpose.
         c. Neither party may call Zimmer.
      iii. If the plaintiff announces that it is pursuing a negligence *per se* theory:
         a. Legal Document #7 governs the trial. The strict liability claim is dismissed and the case proceeds only on the negligence *per se* claim.
         b. Legal Document #6 (Order Denying Defendant's Motion for Summary Judgment on Count 1 and Granting Defendant's Motion for Summary Judgment on Count 2) is not part of the case packet for that round and may not be referenced by either side for any purpose.
         c. The plaintiff automatically and instantly selects Zimmer. In other words, if the plaintiff chooses to pursue a negligence *per se* theory, it must call Zimmer.
   B. Steps #2–4: The parties announce whether they will exercise priority over certain witnesses.
      i. Plaintiff has priority over Tuchmont. Defense has priority over Lexington and Gardner.
      ii. If a party exercises its priority over a particular witness, the exercise of priority acts as an immediate selection of the witness.
      iii. If a party elects not to exercise its priority over a given witness, that witness may be selected by either party during the witness draft (Step #5 on the Captains' Meeting Form).
   C. Step #5: The parties draft witnesses until each party has three.
      i. The call order is DPDPDP.
      ii. If a party has selected any witnesses before the draft—either by choosing a negligence *per se* theory (and thereby selecting Zimmer) or by exercising priority (over Tuchmont, Gardner, or Lexington)—those pre-draft selections do not affect the DPDPDP order in which the parties select remaining witnesses.
      iii. Once one party selects its third witness, the other party selects its remaining witnesses.
   D. Examples:
      i. Following the steps in the Captain's Meeting Form, in Step #1, plaintiff chooses a negligence *per se* theory, which automatically selects Zimmer as a plaintiff witness. In Step #2, plaintiff exercises priority over Tuchmont, which means plaintiff has now selected two of its three witnesses. In Steps #3 and 4, defendant declines to exercise priority over Gardner or Lexington.

In Step #5, the parties alternate selection of witnesses. The defendant goes first and selects Brown. The plaintiff goes second (even though the plaintiff selected two witnesses before the draft and defendant selected none) and selects Miller. At that point, plaintiff has chosen all of its witnesses (Zimmer, Tuchmont, and Miller) and defendant has selected only one, meaning that defendant has the next two picks. The defendant selects Oxman and Gardner.

ii. Following the steps in the Captains' Meeting Form, in Step #1, plaintiff chooses a strict liability theory. This means neither party may call Zimmer. In Step #2, plaintiff declines to exercise priority over Tuchmont. In Steps #3 and 4, defendant exercises priority over Gardner and Lexington. In Step #5, the parties alternate selection of witnesses. Defendant goes first (even though defendant has already selected two witnesses and plaintiff has selected none) and selects Miller. At that point, defendant has selected all three of its witness (Gardner, Lexington, Miller) and plaintiff has selected none, meaning that plaintiff has the next three picks. Plaintiff selects Frost, Brown and Davis.

Determining Applicable Lexington Affidavit:

3. If the plaintiff calls Lexington, then Lexington's defense-side affidavit is not part of the case packet for purposes of that round and may not be referenced by either side for any purpose. In all other rounds, Lexington's plaintiff-side affidavit is not part of the case packet for purposes of that round and may not be referenced by either side for any purpose.

Rules Governing Trial Procedures:

4. *Non-attorneys at counsel table*. The only non-attorneys who may sit at counsel table are Andy Davis (for the plaintiff) and Blake Lexington (for the defense). A member of the plaintiff team's roster may sit at counsel table as Davis regardless of whether the plaintiff calls Davis as a witness. A member of the defense team's roster may sit at counsel table as Lexington as long as the plaintiff is not calling Lexington as a witness in that round.

5. *Reading of Exhibits*. Should a team wish to read aloud for the jury an exhibit (or part of any exhibit) or stipulation, any such reading must be deducted from the team's time to present arguments and evidence. The time spent reading the exhibit aloud shall be deducted from that team's total 5 minutes for opening statement, 25 minutes for direct examination, 25 minutes for cross examination, or 9 minutes for closing argument, depending on whether the reading occurs before the conclusion of the second opening statement, after opening statements but before the plaintiff has rested, after the plaintiff has rested but before the defense has rested, or during the reading team's closing argument. This Special Instruction addresses only issues of timing, not issues of evidence or admissibility.

6. *Application of Thomas v. Davis.* No team may amend its pleadings before or during trial or object to testimony or evidence as irrelevant because that team is no longer asserting an argument that it asserted at the pleading stage.
   A. This Special Instruction precludes both teams from conceding elements or issues that they have previously contested for the purpose of excluding otherwise relevant evidence. It also precludes the defense from conceding either of the affirmative defenses (comparative fault or "excuse") that it raised in its Answer.
   B. For example, the defense may not attempt to stipulate to the element of causation or concede that the Princess Beads killed Joey Davis, and then object to plaintiff evidence regarding causation as irrelevant because the issue of causation is no longer in dispute. This is because the defense's Answer denies the Complaint's causation allegations. As another example, even if the defense chooses not to pursue its affirmative defense regarding comparative fault at trial, it may not object to plaintiff evidence rebutting that affirmative defense as irrelevant.

C. This Special Instruction does not preclude teams from choosing *not* to raise certain arguments at trial that they raised in their Complaint and Answer. For example, the defense need not affirmatively contest causation during its statements and examinations—that is, a defense may focus exclusively on other elements so long as it does not attempt to preclude the plaintiff from offering evidence on the issue(s) that the defense is no longer contesting.

Rules Governing Case Materials:

7. Each document with a signature block has been signed. No attorney or witness may assert that a document with a signature block has not been signed by the individual who is purported to have signed the document in the case materials. This does not relieve the party offering the document from its obligation to establish authenticity.

8. Other than Erin Swift, no witnesses were deposed. Instead, witnesses who provided affidavits were instructed that their affidavits should contain all information known to them that may be relevant to their testimony and that they were required to update their affidavits if anything new occurred to them until the moment before the trial began. None of the affidavits has been updated since the date above its signature block. Witnesses are required to acknowledge the information contained in this paragraph if asked.

9. No affidavit or portion thereof may be admitted into evidence regardless of whether the person who gave the affidavit is called as a witness at trial. For example, the plaintiff may not offer into evidence the affidavit of Blake Lexington as an admission by party opponent, regardless of whether such affidavit would otherwise be admissible. This Special Instruction, however, does not bar a testifying witness who has given or read an affidavit from drawing conclusions based on that affidavit, testifying to the contents of that affidavit, or being cross-examined on information or statements contained in that affidavit—subject, as always, to the rules of evidence. Nor does this Special Instruction affect the use of affidavits for impeachment purposes.

10. All of the exhibits contained in this case packet (including, but not limited to, CVs and expert reports) constitute the final or most recent version of the document in question. No attorney or witness may assert anything to the contrary, but witnesses who are unfamiliar with a particular document may testify that they do not know.

11. No attorney may object under Midlands Rule of Evidence 1002 (i.e., raise a "best evidence" objection) if the "original writing, recording, or photograph" in question is not among the Available Exhibits in this case packet.

12. No witness may deny the authenticity of any materials provided in the case packet, but witnesses who are unfamiliar with particular materials may testify that they do not know. A witness whose affidavit or report mentions a particular document or other materials must acknowledge, if asked, that the version of that document or other materials provided in the case packet is the same as the version mentioned in the witness's affidavit. Nonetheless, proper foundation must still be laid before an exhibit may be admitted and all other applicable rules of evidence must be met, subject to a ruling of the trial judge. Thus, nothing in this rule prevents an attorney from objecting on the basis of "lack of foundation for authenticity."

13. The only judicial decisions that competitors may mention, or judges may rely upon, as the basis for admitting or excluding evidence are those set forth in the "Available Case Law." The portions of the statutes and regulations included in the case materials represent all of the relevant portions of the Midlands statutes and regulations on the issues in dispute in this case.

Use of Exhibit #29:

14. Teams may use the Princess Beads packaging labels in only two ways. First, a team may use the labels themselves (or an enlargement thereof) as an exhibit, subject to the rules of evidence. Second, a team may affix the labels to a box and then introduce that box as an actual box that contains Princess Beads, subject to the rules of evidence. Teams may use the packaging labels for either or both of these purposes.

15. If teams affix the labels to a box, the box must meet the following dimensions: 7.75" tall x 5.375" wide x 2.25" deep. Many boxes of Wheat Thins are this size. To ensure proper dimensions when printing, make sure to check your printer setting and set Page Scaling to "None" (the default on many PDF programs is Shrink or Fit to Printable Area).

16. Teams may represent the box to be any box of Princess Beads, including the box belonging to Hillary Davis. If a team represents the box to be Hillary Davis's box of Princess Beads, the box must be open and entirely empty. Any witness familiar with Hillary Davis's box according to his or her affidavit must acknowledge that the box is identical in every way to Hillary Davis's box. Any box must be in good condition and the labeling must not be damaged or altered in any way. If both teams wish to use their box as the box belonging to Hillary Davis, and both teams present boxes in acceptable condition, the plaintiff team's box will be used.

17. If a team represents the box to be a box of Princess Beads not belonging to Hillary Davis, the box may be open or closed. However, if the box is open, it must be empty. If it is closed, it may not be opened during trial.

Use of Beads Or Candy As A Physical Exhibit:

18. Teams may purchase and use during trial the beads identified on the AMTA website as the authorized beads for this case. No other beads may be used.

19. During the captains' meeting, teams must show the other party any and all beads they intend to use during trial. The beads must be in a plastic bag or bags when shown during captains' meeting and the composition and contents of those bags may not change before or during the trial. The beads must also be in the same condition as provided by AMTA, *i.e.* undamaged.

20. No attorney or witness may deny that any beads that satisfy the standards set forth above and have been properly shown to the opposing team during the captains' meeting constitute Princess Beads or assert that they are something other than Princess Beads. A witness whose affidavit indicates that the witness has never seen Princess Beads may say so.

21. Teams may represent any properly used beads to be (a) beads swallowed by Joey Davis, (b) beads owned by Hillary Davis, (c) beads owned by Dr. Tuchmont's family, or (d) a generic set of Princess Beads. Teams may also divide the beads into separate exhibits that may be used to represent one or more of the aforementioned items. When both teams wish to offer beads representing any of the four aforementioned items, these rules govern whose beads will be used:
    A. If both teams wish to introduce the beads swallowed by Joey Davis, the beads swallowed by Joey Davis will be those of the plaintiff team as long as they conform to the requirements of Special Instruction 22. If the plaintiff team's beads do not conform to the requirements of Special Instruction 22, the beads swallowed by Joey Davis will be those of the defense team as long as they conform to the requirements of Special Instruction 22. If neither team has beads that meet the requirements of Special Instruction 22, neither team may introduce the beads swallowed by Joey Davis.

B. If both teams wish to introduce the beads owned by Hillary Davis, the beads owned by Hillary Davis will be those of the team that calls Andy Davis as a witness. If Andy Davis is not called, the beads owned by Hillary Davis will be those of the team that calls Dr. Tuchmont as a witness. If neither Andy Davis nor Dr. Tuchmont is called as a witness, the beads owned by Hillary Davis will be those of the team that calls Brett Miller. If none of those three is called as a witness, no team may introduce the beads owned by Hillary Davis.
C. If both teams wish to introduce the beads owned by Dr. Tuchmont's family, the beads owned by Dr. Tuchmont's family will be those of the team that calls Dr. Tuchmont as a witness. If Dr. Tuchmont is not called as a witness, neither team may introduce the beads owned by Dr. Tuchmont's family.
D. Each team may introduce its own generic set or sets of Princess Beads.

22. The beads swallowed by Joey Davis must conform to the following rules: the bag in which they are placed must contain at least 10 but no more than 25 beads; all of the beads must be "ring"-sized (*i.e.*, none may be "pearl"-sized); it may not contain anything other than beads (including substances purported to be Joey Davis's stomach contents); the bag must contain rings of at least ten different colors; and it may not contain more than three rings of any particular color. No team may object to or otherwise dispute the admissibility, authenticity, or relevance of the beads purported to be the beads that Joey Davis swallowed on the grounds that the beads are clean and do not include Joey Davis's stomach contents.

23. Under no circumstances may a participant remove any beads from their plastic bag during trial or ask another participant to do so. Putting a bead in one's mouth or asking another participant to do the same (or asking another participant if he or she is willing to do the same, etc.) shall constitute egregious misconduct and may constitute grounds for a tab room intervention.

24. Teams may not use candy as actual or demonstrative evidence during trial.

Photograph of Joey Davis:

25. The plaintiff team may supply and use during trial a single photograph of Joey Davis (and only Joey Davis). The photo must be shown to the defense during the Captains' Meeting and failure to do so shall constitute an absolute bar to using a photo in any way during the trial. The photo may neither include beads of any kind nor include any other extraneous material that could reasonably be viewed as seeking to advance the merits of plaintiff's case or undermine the defendant's case. The person in the photo must reasonably comport with the information provided about Joey Davis in the case materials, *e.g.*, age. Upon a proper challenge by the defense lodged at the captains' meeting, the AMTA representative may bar the plaintiff from using any photo that does not comply with this Special Instruction.

Authenticity of Emails:

26. If a witness whose affidavit says the witness is familiar with an email is presented with that email, he or she must make every effort to authenticate and identify the email as correspondence among or between the stated sender and recipient(s) at the stated time and date.
    A. A witness whose affidavit says the witness is familiar with an email must acknowledge that the sender, recipient(s), and email addresses represent the people they appear to represent. For example, if a witness whose affidavit says the witness is familiar with an email purportedly sent by Quinn Brown from quinn.brown@happylandtoys.com, the witness must identify the sender as Quinn Brown.
    B. All emails have the header indicating they are from Blake Lexington's inbox. No witness who was a sender or recipient of those emails may claim that he or she is unfamiliar with the emails because they came from Lexington's inbox rather than the witness's inbox.

Revision Dates:

27. The Revision Dates located in the upper right corner of some documents indicate the date on which AMTA revised the document. The Revision Dates are present only to ensure that teams are using the most current copy of every document. The Revisions Dates do not indicate that, or when, a witness has revised his or her affidavit or report.

Appreciation and Attribution:

28. The Case Committee thanks everyone who helped proofread the case: Dr. John Vile, Dr. Don Racheter, Melissa Currivan, Thomas Parker, Michael J. Gelfand, and Josh Leckrone. The Committee and Ms. Coltrera also thank everyone who provided scientific and technical guidance: Dr. Matt Tuchler and Dr. Harry Plotnick.

29. Ms. Coltrera and the American Mock Trial Association wish to credit the authors, scientists and other researchers whose work has been extremely helpful in constructing the technical components of this case. While competitors may not cite during competition the names or contents of the following works and must instead restrict themselves to the materials included in this case problem, AMTA encourages students to review the following works for their educational benefit: Turgeon-Obrien H, *Nutritive and nonnutritive sucking habits: a review*, J. Dent Child 1996; Groot ME, Lekkerkerk MC, Steenbekkers, LPA, *Mouthing Behaviour of Young Children: An Observational Study*, Wageningen: Agricultural University, Household and Consumer Studies 1998; Zartarian VG, Ferguson AC, Leckie JO, *Quantified mouthing activity data from a four-child pilot field study*, J. Exp Analg Environ Epidemiol, 1998; Juberg, Alfano, Coughlin, and Thompson, *An Observational Study of Object Mouthing Behavior by Young Children*, Pediatrics 2001; Moya, Bearer and Etzel, *Children's Behavior and Physiology and How It Affects Exposure to Environmental Contaminants*, Pediatrics 2004; AuYeung; Canales; Beamer; Ferguson; Leckie, *Young Children's Mouthing Behavior: An Observational Study via Videotaping in a Primarily Outdoor Residential Setting*, Journal of Children's Health, 2004; Norris, *Research into the mouthing behaviour of children up to 5 years old*, Consumer and Competition Policy Directorate, July 2002; various articles published by the *New York Times*; websites, articles and other publications by Dr. Dean Ward; information provided by the Cognitive Enhancement Research Institute; Kerrigan, *GHB and Precursors: Use, Effects, Pharmacology*, Clinical and Forensic Toxicology News, March 2001; Kerrigan, *GHB and Precursors: Management and Analysis*, Clinical and Forensic Toxicology News, June 2001; F. Couper, Marinetti, *γ-Hydroxybutyrate (GHB): Effects on Human Performance and Behavior*, 2002; Mason, Kerns II, MD, *Gamma Hydroxybutyric Acid (GHB) Intoxication*, 2001.

Revised 12.7.2010

CAPTAINS' MEETING FORM

Before receiving ballots, teams must turn in one completed copy of this form to the AMTA representative running the captains' meeting. Teams may not view (or attempt to view) the Captains' Meeting Forms for the trials in which they do not compete.

1. Which claim will Plaintiff pursue—strict liability or negligence per se? Circle exactly one.

   Strict Liability Negligence Per Se

2. Does the Plaintiff wish to exercise its right of first priority and call Chase Tuchmont? Circle one.

   Yes No

3. Does the Defense wish to exercise its right of first priority and call Reese Gardner? Circle one.

   Yes No

4. Does the Defense wish to exercise its right of first priority and call Blake Lexington? Circle one.

   Yes No

5. The parties select remaining witnesses according to Special Instruction Rules 2(C). Record the witness names in the order they are selected. Thus, witnesses should be recorded in the following order: first, any witnesses required as a result of a plaintiff's theory selection (*i.e.*, Zimmer); then, any witnesses selected through the exercise of priority (*e.g.*, Gardner); and, finally, any remaining witnesses selected according to Special Instruction Rules 2(C).

	Plaintiff Witness Lineup	Defense Witness Lineup
1		
2		
3		

6. Before the end of the Captains' Meeting, each party must disclose to the other party the order in which it will call its witnesses to the stand and the gender of each witness.

LEGAL DOCUMENTS

STATUTES AND REGULATIONS

Midlands Civil Code (selected provisions)

318. Claims for Negligence.
To prevail on a negligence cause of action, a plaintiff must prove that:
(1) plaintiff was owed a duty of care by defendant;
(2) defendant breached that duty by failing to exercise due care;
(3) defendant's breach of duty directly and proximately caused injury to plaintiff; and
(4) plaintiff suffered damages as a result of the foregoing.

319. Claims for Negligence Based on Statutory Violation ("Negligence Per Se").
A defendant is liable for negligence based on his unexcused violation of a statute or regulation if the plaintiff establishes that:
(1) the defendant violated a particular statute or regulation;
(2) the plaintiff suffered harm;
(3) the plaintiff's harm was a direct and proximate result of the defendant's violation of the statute or regulation;
(4) the statute or regulation was designed to protect against the type of harm caused by the defendant's conduct; and
(5) the plaintiff is within the class of persons that the statute or regulation is designed to protect.

662. Claims for Strict Liability
A plaintiff alleging strict liability must prove that:
(1) the defendant manufactured or sold a defective product;
(2) the plaintiff suffered harm; and
(3) the defect in the product was the direct and proximate cause of the plaintiff's injury.

Code of Midlands Regulations (selected provisions)

TITLE XXIX

1910.1200. Hazard Communication

[(a)-(f) omitted]

(g) Material safety data sheets.

Chemical manufacturers and importers shall obtain or develop a material safety data sheet ("MSDS") for each chemical they produce or import, which shall contain information regarding the chemical's properties and hazards, as well as instructions for safe handling, storage, and use.

Midlands Criminal Code (selected provisions)

TITLE XII. DRUG ABUSE, PREVENTION, AND CONTROL

Chapter 80. General Rules

80.01 Restrictions on Sale of Controlled Substances
Except as expressly authorized by this chapter (Chapter 80), it shall be unlawful for any person with the requisite intent to manufacture, distribute, or otherwise dispense any product that includes a significant quantity of any Schedule I Substance, as defined by Rule 80.04 and 80.05 of this Chapter.

80.02 Definitions
For the purposes of Rule 80.01, these definitions apply.
(a) "Person" includes any natural person, corporation, or other legal or business entity.
(b) "Requisite intent" means with knowledge, purpose, or recklessness.
(c) A "significant quantity" includes any quantity capable of causing an injury to any person that consists of a physical condition that creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ. This definition is to be construed against the person who manufactures, distributes, or otherwise dispenses the product containing the Schedule I Substance.

80.03 Schedule I Standards
Any substance classified as a Schedule I Substance under Chapter 80 has been designated as follows:
(a) The substance has no currently accepted medical use in treatment in the State of Midlands;
(b) The substance is generally unfit for human consumption;
(c) The substance has a high potential for abuse; and
(d) There is a lack of accepted safety for use of the substance under medical supervision.

80.04 Schedule I Substances
The following qualify as Schedule I Substances under Chapter 80 of the Midlands Criminal Code:
[(a) – (j) Omitted]
(k) Gamma-Hydroxybutyric Acid. Unless specified or otherwise listed as an exception to this rule in another schedule, any material, compound, mixture, or preparation that contains any quantity of gamma-hydroxybutyric acid, including any of its salts, isomers, optical isomers, salts of their isomers, and salts of these optical isomers whenever the existence of such isomers and salts is possible within the specific chemical designation is a Schedule I Substance.

80.05 Related Substances
Unless specified or listed in another schedule, any material, compound, mixture or preparation that contains any quantity of any analogue, precursor or other chemical form of a substance herein identified in Section 80.04 also constitutes a Schedule I substance.

AVAILABLE CASE LAW

NOTE: All cases are from the Midlands Supreme Court, which is the highest court in the State of Midlands.

STRICT LIABILITY

Wiley v. Young (1965)
A product can be defective for purposes of a strict liability claim in three ways: (1) defects in manufacturing; (2) design defects; or (3) defects in instructions or warnings. A plaintiff may properly plead and prove more than one theory of defect in a single lawsuit, even with respect to the same injury caused by the same product.

Kate v. Drago Manufacturing (1993)
A product has a manufacturing defect when it is created or sold in a way that deviates from its intended design. For example, a product missing a particular part called for by the manufacturing specifications has a manufacturing defect, as does a product where an unintended part has been used in place of an intended one.

Zemler v. Wiik (1980)
A product is defectively designed when: (a) the product as designed is not reasonably safe; or (b) the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design.

Bower v. Romano (1989)
A product has an "instructions or warnings defect" when: (a) the omission of certain instructions or warnings renders the product not reasonably safe; and (b) the foreseeable risks of harm posed by the product could have been reduced or avoided by providing reasonable instructions or warnings.

Lehnhoff v. Hunter Agricultural Supply (2007)
The presence of some instructions or warnings does not necessarily defeat a strict liability claim and the absence of any instructions or warnings does not necessarily render a product defective based on a failure-to-instruct-or-warn theory. The threshold question in every case is whether the product as manufactured or sold—which includes the instructions or warnings that were or were not provided—was reasonably safe.

Taylor v. Teske Boating International (2006)
Although the three types of product defect claims described in *Wiley v. Young* are distinct, a defendant's satisfaction of one duty may be relevant in assessing whether it has satisfied another duty. The safer a product is designed, the fewer instructions or warnings may be necessary. In contrast, clear, conspicuous, and thorough instructions or warnings may, to some extent, reduce the risks posed by design hazards, and may in appropriate circumstances preclude liability on a defective design theory.

Leighton v. Westwick (1972)
The determination of whether a product is reasonably safe requires weighing the foreseeable risk of harms posed by the product as manufactured or sold against the product's utility.

Wade v. John Dean Co. (2005)
In strict liability cases where risk/utility is at issue, the jury should consider the following factors: (1) the usefulness and desirability of the product to the user and to the public as a whole; (2) the likelihood that the product will cause injury, and the probable seriousness of the injury; (3) the availability of a substitute product which would meet the same need and render the product safe; (4) the defendant's ability to eliminate the unsafe character of the product without unreasonably impairing its usefulness or making it too expensive; (5) the user's

ability to avoid danger by the exercise of care; (6) the user's anticipated awareness of the dangers inherent in the product and the avoidability of those dangers.

Murray v. Goranin Toy Co. (2000)
The knowledge and expectations of a reasonable consumer must be considered in deciding whether a product is reasonably safe. For example, a reasonable consumer understands that knives are used to cut things, that alcohol produces intoxication, and that heavy objects may cause injury if bashed against a person's skull. A product is not unsafe when it poses dangers that would be obvious to a reasonable consumer and can be avoided through the exercise of reasonable prudence.

Vitan v. Goddard (1971)
In deciding if a product is reasonably safe, a defendant should be held liable only for foreseeable risks, which entails consideration of both the product's intended users and its intended use. A defendant cannot be held responsible if a small child attempts to use a kitchen knife to pry the lid off a jar because the child is not the intended user of the knife and knives are not intended to be used in that manner.

Ramsden v. Heikkila (2002)
In a strict products liability action, whether a particular user or use is intended does not depend simply on the defendant's subjective desires or unexplained directives. Instead, at least absent clear and reasonably specific warnings, a defendant also may be held responsible for the consequences of use by reasonably foreseeable users and reasonably obvious misuse. For example, a defendant whose dining room chair collapses when a 90-pound child stands on it cannot escape liability simply by declaring that the chairs are for use only by those over the age of 12 or that they are not designed to be stood upon.

Renden v. Munson (1996)
The question in a strict liability action involves an objective assessment of the safety of the product as actually produced and sold, rather than the defendant's carefulness or subjective intent. Thus, one sued on a strict liability theory may not escape liability simply by showing that she was not negligent or lacked intent to cause harm. Nonetheless, such evidence may be admissible for other purposes. For example, evidence that a defendant was or was not aware of a particular type of risk is relevant to assessing the extent to which that risk was foreseeable and the defendant's consideration or failure to consider alternative designs (and the safety of those designs) may bear on the extent to which such an alternative would have been reasonable.

Hunter v. Ma-Ma (2001)
In a strict product liability case, a plaintiff may not rely on the defendant's failure to comply with a statute as a basis for proving that the product was defective under Midlands Civil Code § 662.

NEGLIGENCE PER SE

Mamma Plassaras v. Howard's Supply of Batah (1995)
Traditional negligence actions are brought under Section 318 of the Civil Code. To prove the defendant was negligent, the plaintiff must show a duty owed by the defendant to the plaintiff and a breach of that duty by the defendant (plaintiff must also show causation and damages). Negligence *per se* claims (*i.e.*, statutory negligence), brought under Section 319, substitute the defendant's statutory violation for proof of duty and breach. Where a defendant violates a statute that is designed to protect a person such as the plaintiff from harm such as the plaintiff suffered, the defendant is presumed negligent as a matter of law.

Sheridan v. IPX, Inc. (1998)
"Excuse" is an affirmative defense to a negligence *per se* claim. A defendant's violation of a statute is excused and thus does not constitute negligence *per se* under Midlands Civil Code § 319 if the defendant demonstrates that

(a) it neither knew nor should have known of the factual circumstances that rendered the statute applicable, or (b) the defendant's violation of the statute was due to the confusing way in which the requirements of the statute were presented to the public. Ignorance of the law, however, is not itself a defense to a negligence *per se* claim.

Hamilton v. Dr. Fu's Home Gym Co. (1999)
The focus in a negligence *per se* action is narrowly confined to whether the defendant violated a duty imposed by statute or regulation and whether that violation was the direct and proximate cause of the sort of harm that the statute or regulation was designed to protect against. As a result, a great deal of evidence that would be entirely admissible in a traditional action based on negligence, recklessness, or strict liability is simply inadmissible in an action based on negligence per se, including evidence about a defendant's subjective awareness of the risks posed by a particular product or course of action, its reasons (or lack thereof) for proceeding in the way it did, and its consideration (or failure to consider) alternatives. Trial judges must be particularly vigilant in enforcing these requirements, for the wrongful admission of such evidence in a negligence *per se* action will generally constitute reversible error.

James v. Sarah's Patients, Inc. (2007)
Under Criminal Code Rules 80.01 and 80.02, "requisite intent" applies only to a person's intent to "manufacture, distribute, or otherwise dispense." It does not apply to the "significant quantity" or "Schedule I Substance" components of the statute, for which there is no intent or knowledge requirement. For example, cocaine (or any of its precursors) is a Schedule I substance. Accordingly, a defendant who knowingly sells a product that in fact contains a significant quantity of cocaine or any of its precursors has violated the statute, regardless of whether the defendant knew (1) that the product contained cocaine or a precursor of cocaine, (2) that cocaine and its precursors are a Schedule I substance, or (3) that the amount of cocaine or its precursor in contained in the product constituted a "significant quantity" under the statute. However, a defendant's lack of awareness of the items mentioned in the previous sentence may, under appropriate circumstances, be relevant in assessing whether the defendant's violation of the statute was "excused" under the standards set forth in *Sheridan v. IPX, Inc.* (1998).

CAUSATION, HARM, AND AFFIRMATIVE DEFENSES

Yanka v. Edwards Industries (1961)
Causation has two components: cause in fact (or direct cause) and proximate cause. To show cause in fact, the plaintiff must establish either that she would not have been harmed "but-for" the defendant's conduct or that the defendant's conduct was a substantial factor in bringing the harm about. Proximate cause requires showing that the particular harm suffered by the plaintiff was both a foreseeable result of the defendant's wrongful or unlawful conduct and is of a type that could reasonably have been anticipated. In performing this analysis, the factfinder must first identify the particular risks that made the defendant's actions culpable and then determine whether the injury suffered is among those risks. The classic example involves a parent who hands a small child a loaded gun, which the child then drops on the plaintiff's foot. Although it was of course negligent for the parent to give the child a loaded gun, the risk that made the parent's actions culpable was that the gun may discharge and injure someone and the harm that the plaintiff actually suffered could equally have occurred had the gun been a toy or unloaded.

Flounder v. Minnesota Refining, Handling, And Metal Manufacturing (2000)
Unlike some other jurisdictions, Midlands law expressly recognizes and permits a defendant to raise an affirmative defense of comparative fault in both strict liability and negligence *per se* actions. Moreover, our decisions in *Hamilton v. Dr. Fu's Home Gym Co.* (1999) and *Renden v. Munson* (1996) are not intended to exclude evidence offered to prove or rebut affirmative defenses, including comparative fault.

Kramer v. Puro (1984)
Plaintiffs (as well as caregivers, parents, guardians, and others who owe duties of care to the plaintiff, as well as agents of such persons) have a duty to exercise due care with respect to their own safety (or the safety of the person to whom they owe a duty). Midlands has abandoned a "pure" contributory negligence regime (in which any negligence by the plaintiff precluded liability on either a negligence, negligence *per se*, or a strict liability theory) in favor of a "modified" comparative fault regime in which the responsibility of all relevant parties is considered. If the defendant establishes that the plaintiff or an agent of the plaintiff bears some responsibility for the plaintiff's injury, the question then becomes the degree of relative culpability. If the defendant establishes that the combined responsibility of the plaintiff and the plaintiff's agents equals or exceeds that of the defendant, the defendant is not liable. In contrast, if the plaintiff's responsibility is less than that of the defendant, the defendant is liable but any damages recovered by the plaintiff shall be reduced by the extent of the plaintiff's relative fault.

Laskey v. Hecht (2001)
Because the negligence standard is based on the conduct that can be expected of a reasonable adult, a child under the age of five years is incapable as a matter of law of being negligent. The ability of older children to be negligent involves a fact-intensive assessment of the nature of the conduct in question and the reasonableness of expecting a child of a particular age to conform his or her conduct to that of a reasonable adult.

Rusk v. Stock (1987)
Parents and other caregivers (including babysitters) have a duty to exercise reasonable care in supervising minor children, and, consistent with *Kramer v. Puro* (1984), any violation of that duty is attributable to the child in any action between the child and a third party. It is critical, however, that courts and juries not hold caregivers to an impossible or unrealistic standard. Caregivers cannot be standing at a child's elbow 24 hours a day, and even the smallest children can have a remarkable knack for finding ingenious ways for getting themselves into trouble at a moment's notice.

Maroons v. Mel's Diner (1985)
When a defendant raises the affirmative defense of comparative fault, the negligence of the plaintiff and the plaintiff's agents is weighed against whatever culpable conduct of the defendant has been alleged by the plaintiff. For example, in a case in which the plaintiff's sole claim is negligence *per se*, the plaintiff's negligence is to be weighed against the defendant's fault in violating the applicable statute. The allegation of comparative fault does not permit either party to introduce evidence of the *defendant's* conduct that would not otherwise be admissible, such as evidence that the defendant did or did not act negligently. Although this may appear to be comparing apples to oranges, juries commonly determine comparative fault by applying different standards to different parties.

GENERAL EVIDENTIARY ISSUES AND CASE PROCEDURES

Actions brought on behalf of another

Stacey v. Waffles, Inc. (2009)
A parent or guardian of a minor child may bring an action on behalf of and in the name of that child. The plaintiff in such an action is the child himself or herself, with the parent or guardian acting as the child's agent for the limited purposes of bringing and prosecuting the action. For evidentiary purposes, however, both the parent/guardian agent and the child are still treated as a plaintiff and party to the lawsuit.

Authentication

Filteau v. Wanek (1992)
The application of various rules of evidence in a particular situation will sometimes turn on the identity of the person making a statement. Because Midlands law contains a strong preference for jury determinations of important questions, courts must be careful not to usurp the jury's role in this context. As long as the proponent of

the statement produces evidence that would permit a reasonable jury to find, by a preponderance of the evidence, that a given person made a particular statement, the court must assume the statement was made by that person for purposes of assessing its admissibility.

Riley v. Jones (2005)
Consistent with the holding of *Filteau v. Wanek*, the fact that an email or printout of an email is listed as coming from an address that is either known or purports to belong to a particular person is sufficient to lay foundation that the email was sent by the person in order to determine its admissibility, at least absent particularized reason to believe that the email may have been sent by someone else. This ruling does not foreclose challenges to the admissibility of an email on other grounds.

Burdens of proof
Jeff v. Wario's Toolkit (1974)
Absent some special rule to the contrary, a plaintiff in a civil case must establish all the elements of her claim by a preponderance of the evidence (*i.e.*, establish that all elements are *more likely than not* true). Likewise, an affirmative defense must be proven by the defendant by a preponderance of evidence.

Depositions
Crigler v. Dudley (1981)
The only objections that need or may be made during a deposition are those to the form of the question or to assert a privilege. All other objections are preserved for trial and may be raised when an opposing party seeks to admit the entire deposition or portions thereof. A trial judge has discretion to admit a deposition in whole, admit it in part, or exclude it altogether.

Experts
Davis v. Adams (1993)
Under the Midlands Rules of Evidence, trial judges must ensure that any scientific testimony or evidence admitted is not only relevant but reliable. In determining whether expert testimony is sufficiently reliable, judges should consider only the methods employed and the data relied upon, not the conclusions themselves.

Richards v. Mississippi BBQ (1997)
Midlands Rule of Evidence 703 does not afford an expert unlimited license to testify or present a chart in a manner that simply summarizes the testimony of others without first relating that testimony to some specialized knowledge on the expert's part, as required under Midlands Rule of Evidence 702. The court must distinguish experts relying on hearsay to form scientific conclusions from conduits who merely repeat what they are told. The testimony of the former is admissible; that of the latter is not.

Tarot Readers Association of Midlands v. Merrell Dow (1994)
In assessing reliability under *Davis v. Adams*, judges should consider, among other factors, whether the theory or technique has been or can be tested, whether it has been subjected to peer review and publication, whether it has a known error rate, and whether it has gained widespread acceptance within the field. These factors, while relevant, are not necessarily dispositive. For example, lack of publication does not automatically foreclose admission; sometimes well-grounded but innovative theories will not have been published. Indeed, there is no definitive checklist in making a preliminary assessment of whether reasoning or methodology underlying expert testimony is scientifically reliable. Judges must make such assessments based on the totality of the circumstances, and the proponent of such expert testimony must meet the threshold proof requirement of a preponderance of the evidence.

Diamond Design Productions v. Fountain (2002)
Notwithstanding Midlands Rule of Evidence 704, witnesses may not offer legal conclusions or legal interpretations. The determination of whether a person or entity has violated the law is the exclusive province of

the factfinder—either the judge in a bench trial or the jury in a jury trial—and hearing a witness's views about the law will not "assist the trier of fact to understand the evidence or to determine a fact in issue" within the meaning of Midlands Rule of Evidence 702. For example, in a murder trial, an expert witness (with the appropriate credentials and foundation) may testify to whether the defendant fired a gun or whether the gunshot was the medical cause of a victim's death. Regardless of credentials and foundation, however, that same expert may not testify to whether the defendant committed "murder" or whether the gunshot was the "proximate cause" of the victim's death. Note, however, that this decision does not forbid an expert with sufficient credentials from testifying to the manner in which a law is promulgated, publicized, or otherwise made available to the public in the context of a negligence *per se* action in which the defendant has raised "excuse" as an affirmative defense.

Framing the Issues for Trial

Thomas v. Davis (2001)

The purpose of the pleadings is to frame the issues for trial and to permit the parties to frame their presentations accordingly. This latter function is especially important because Midlands, unlike most jurisdictions, does not permit the plaintiff to call rebuttal witnesses or the defendant to alter its decision about which witnesses to call after hearing the plaintiff's evidence. Accordingly, it is highly inappropriate for a party that has alleged or denied something in its complaint or answer to seek to prevent its adversary from presenting otherwise admissible evidence that relates to that thing by asserting that it is no longer interested in alleging or contesting that particular thing. Parties may, of course, choose which evidence they wish to present and which arguments they wish to emphasize at trial, but the time for amending one's pleadings is well before the court convenes for purposes of trial.

Karan v. Baboons, Inc. (1994)

Even in cases in which the liability and damages phases have been bifurcated, a plaintiff still must establish "harm" in order to establish the defendant's liability on either a strict liability or negligence *per se* theory. At the same time, however, because the purpose of a threshold liability-only phase is to establish only the existence, rather than the extent, of the defendant's potential liability, trial judges should be especially vigilant in applying MRE 401 and 403 with respect to evidence that either does not or only marginally relates to questions at issue during such a phase.

Ordes v. Ethel A. Candy Co. (2005)

Although they are closely related, in Midlands a cause of action for negligence is legally distinct from a cause of action for negligence *per se*. Accordingly, a plaintiff who pleads only a claim for negligence may not pursue a negligence *per se* claim at trial and a plaintiff who pleads only a claim of negligence *per se* may not attempt to establish liability based on a theory of simple negligence at trial. Although this result may seem harsh, it is necessary because the two types of claims have different elements and require different proof, and defendants have the right to know which (if either) theory they must be prepared to face at trial.

STATE OF MIDLANDS : CIRCUIT COURT : BRECKINRIDGE COUNTY

Andy Davis, as parent and natural guardian of Joseph Davis, a minor,	:	Case No. 10-CV-1017 ECC
Plaintiff,	:	
- versus –	:	COMPLAINT
HappyLand Toy Co.,	:	JURY TRIAL REQUESTED
Defendant.	:	

COMES NOW Andy Davis, as parent and natural guardian of Plaintiff Joey Davis, a minor, alleges as follows:

PARTIES

1. Plaintiff Joseph Davis (hereinafter "Joey") was a minor male child born on October 2, 2006.

2. Andy Davis (hereinafter "Andy") is the parent of the above-named minor plaintiff and resided with Plaintiff Joey within the State of Midlands ("Midlands") and was the only Legal Guardian of Plaintiff Joey during all times relevant to this action.

3. Defendant HappyLand Toy Co. (hereinafter "Defendant") is a toy designer and manufacturer organized, incorporated, and with a principal place of business in the State of Midlands.

JURISDICTION AND VENUE

4. Plaintiff brings this suit under the Midlands Civil Code, thus giving this court subject matter jurisdiction.

5. The Court has specific personal jurisdiction over Defendant because the acts from which this lawsuit arises occurred within Midlands and general personal jurisdiction over Defendant as it conducted continuous, systematic, and routine business practices within Midlands.

6. Venue is proper in this Court.

ALLEGATIONS OF FACT

7. Princess Beads Jewelry Set ("Princess Beads") is a product manufactured and sold by Defendant. Princess Beads consists of individual beads that become sticky when sprayed with water. Users can make their own jewelry using Princess Beads.

8. Defendant used significant quantities of 1,4-butanediol in the manufacturing of Princess Beads.

9. On or about August 8, 2009, Joey swallowed beads from the Princess Beads at approximately noon.

10. When 1,4-butenadiol is swallowed, it is metabolized into gamma-hydroxybutyric acid ("GHB").

11. After ingesting the Princess Beads, Joey became disoriented and sick. He was transported to Polk County General Hospital ("Polk General").

12. Upon arriving at Polk General at approximately 12:30 p.m., Joey vomited, seized, and entered a comatose state. At approximately 2:00 p.m., Joey died from respiratory arrest.

13. The documents attached as Exhibits A and B to this Complaint are fair, accurate and complete copies of the medical records created during Joey's admission to Polk General on August 8, 2009 and the subsequent analyses performed by his treatment team. They are authentic copies and were made for the purposes of medical diagnosis and treatment.

14. Joey's condition, as detailed in Exhibit A, is consistent with the signs and symptoms of a GHB overdose. His levels of GHB, as shown in Exhibit B, far exceed any naturally occurring amount.

15. The Princess Beads caused Joey's elevated levels of GHB, which caused his fatal respiratory arrest.

COUNT 1: STRICT LIABILITY (Civil Code Section 662)

16. Plaintiff incorporates Paragraphs 1 through 15 by reference and makes the same a part hereof.

17. Defendant's Princess Beads are a defective product because such beads were defectively designed.

18. On or about August 8, 2009, Joey suffered harm that included pain, sickness, and death.

19. Joey suffered said harm as a direct and proximate result of the defects present in the Princess Beads.

20. Joey suffered damages as a result of Defendant's actions and the defects present in Princess Beads.

COUNT 2: NEGLIGENCE *PER SE* (Civil Code Section 319)

21. Plaintiff incorporates Paragraphs 1 through 15 by reference and makes the same a part hereof.

22. Defendant violated the Midlands Drug Abuse Prevention and Control Act ("DAPC Act"), codified as Chapter 80 of the Midlands Criminal Code, by using 1,4-butanediol in its Princess Beads.

23. On or about August 8, 2009, Joey suffered harm that included pain, sickness, and death.

24. Joey suffered said harm as a direct and proximate result of the Defendant's statutory violation.

25. Joey was among the class of persons for which DAPC Act was enacted.

26. Joey's harm was among the types of harm the DAPC Act was designed to prevent.

27. Joey suffered damages as a result of Defendant's actions and the defects present in Princess Beads.

Claim for Relief

WHEREFORE, Plaintiff respectfully requests judgment against Defendant as follows:

a. For Plaintiff Joey Davis, in an amount equal to all hospital and medical bills incurred as a result of this incident;

b. For Plaintiff Joey Davis, in an amount appropriate for physical pain and mental anguish suffered as a result of defendant's actions;

c. For Plaintiff Joey Davis, in an amount appropriate to compensate for his loss of life;

d. For Plaintiff Joey Davis, in an amount appropriate to deter dangerous and unreasonable action by the industry; and

e. For such other and further relief as the Court may deem just, proper and equitable.

Respectfully submitted on this day, August 15, 2009,

_____

Attorney for the Plaintiff

STATE OF MIDLANDS : CIRCUIT COURT : BRECKINRIDGE COUNTY

---:

Andy Davis, as parent and natural guardian of Joseph Davis, a minor,	:	Case No. 10-CV-1017 ECC
Plaintiff,	:	
- versus –	:	ANSWER
HappyLand Toy Co.,	:	
	:	JURY TRIAL REQUESTED
Defendant.	:	

---:

COMES NOW Defendant HappyLand Toy Co. ("HappyLand") and answers as follows:

PARTIES

1. Admitted.

2. Admitted.

3. Admitted.

JURISDICTION AND VENUE

4. Admitted.

5. Admitted.

6. Admitted.

ALLEGATIONS OF FACT

7. Admitted.

8. Denied.

9. HappyLand lacks sufficient information to form a belief as to the truth of this allegation and therefore denies it.

10. HappyLand admits only that 1,4-butanediol can, depending on many factors, metabolize into GHB under certain circumstances and otherwise denies the remaining allegations contained in paragraph 10 of the Complaint.

11. HappyLand lacks sufficient information to form a belief as to the truth of this allegation and therefore denies it.

12. HappyLand lacks sufficient information to form a belief as to the truth of this allegation and therefore denies it.

13. Admitted.

14. Denied.

15. Denied.

COUNT 1: STRICT LIABILITY (Civil Code Section 662)

16. HappyLand repeats and reasserts its responses to the foregoing paragraphs as fully set forth herein.

17. Denied.

18. HappyLand lacks sufficient information to form a belief as to the truth of this allegation and therefore denies it.

19. Denied.

20. Denied.

COUNT 2: NEGLIGENCE *PER SE* (Civil Code Section 319)

21. HappyLand repeats and reasserts its responses to the foregoing paragraphs as fully set forth herein.

22. Denied.

23. HappyLand lacks information to form a belief as to the truth of this allegation and therefore denies it.

24. Denied.

25. Denied.

26. Denied.

27. Denied.

AFFIRMATIVE DEFENSES

A. Plaintiff's claims are barred by the doctrine of comparative fault, specifically the negligence, lack of due care, and/or recklessness of Andy Davis and Brett Miller.

B. Any statutory violation by HappyLand in this case was "excused" under *Sheridan v. IPX, Inc.*

Respectfully submitted on this day, September 1, 2009,

_____

Attorney for HappyLand

Revised 12.7.2010

STATE OF MIDLANDS : CIRCUIT COURT : BRECKINRIDGE COUNTY

---:

Andy Davis, as parent and natural guardian of Joseph Davis, a minor,	:	Case No. 10-CV-1017 ECC
Plaintiff,	:	
- versus –	:	STIPULATIONS
HappyLand Toy Co.,	:	
Defendant.	:	

---:

The parties in the above-entitled action hereby stipulate as follows:

1. This trial has been bifurcated. The initial phase shall deal only with liability. All questions relating to the amount of any damages shall be deferred until a second phase, which shall occur only if the jury finds liability at the first stage.
2. Princess Beads was a craft kit that allowed children to create various multi-dimensional designs using small colored beads. The beads fused together when sprayed with water.
3. Both parties waive any and all objections to the admissibility of the hospital records of Joey Davis (Exhibit A and Exhibit B to the Complaint), the Autopsy of Joey Davis, and Record of Outpatient Visit recorded by Julie Brockman on October 5, 2008. No further foundation is needed and these documents may be received at any time.
4. Through no fault of either party, Dr. Casey French is unavailable to testify at trial. Dr. French's testimony is not necessary to resolve any issue in dispute in this trial.
5. Erin Swift died of natural causes on December 28, 2009. Exhibit # 14 (email sent from Erin Swift to Blake Lexington on May 16, 2009, 4:59 PM) is the exhibit identified in Erin Swift's deposition.
6. During pretrial discovery, each witness testifying at trial produced to counsel for both parties all of the following (but only the following) documents and exhibits: tangible items expressly referenced in that witness's affidavit.
7. Both parties waive any and all objections arising under the Constitution of the United States and its Amendments.
8. On August 8, 2009, Brett Miller was acting as an agent of Andy Davis.
9. If Tristan Frost testifies as a witness, Frost's alleged breach of the "Confidentiality Agreement of 'Alex Johnson'" shall not, by itself, provide a basis for excluding Frost's testimony in its entirety or any of the documents referenced in Frost's affidavit. Parties may, on other grounds, challenge and/or object to Frost's testimony or the admissibility of documents referenced in Frost's affidavit.

_____ _____

Attorney for Plaintiff Attorney for HappyLand

STATE OF MIDLANDS : CIRCUIT COURT : BRECKINRIDGE COUNTY

---:

Andy Davis, as parent and natural guardian of Joseph Davis, a minor, : Case No. 10-CV-1017 ECC

Plaintiff,

- versus –

HappyLand Toys Co.,

Defendant.

---:

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON COUNT 1 AND GRANTING DEFENDANT'S MOTON FOR SUMMARY JUDGMENT ON COUNT 2.

1. Defendant has moved for summary judgment on Count 1 of the complaint (strict liability), arguing that it is entitled to judgment as a matter of law because Joey Davis was not an intended user of the Princess Beads jewelry set and because swallowing the product was not an intended use. That motion is DENIED. See *Ramsden v. Heikkila*.
2. Defendant also has moved for summary judgment on Count 2 (negligence *per se*), arguing that, as a matter of law, the harm allegedly suffered by the victim in this case is not the type of harm against which the relevant statutes were designed to protect. *See* Midlands Civil Code § 319. That motion is GRANTED. Accordingly, Defendant's second affirmative defense (which relates only to the negligence *per se* claim) is MOOT and is thus DISMISSED as well.
3. Accordingly, this case will proceed to trial solely on Count 1.

On this day, August 16, 2010, it is so ordered.

_____

The Honorable Caleb Rogers

STATE OF MIDLANDS : CIRCUIT COURT : BRECKINRIDGE COUNTY

---:

Andy Davis, as parent and natural guardian of Joseph Davis, a minor, : Case No. 10-CV-1017 ECC

Plaintiff,

- versus –

HappyLand Toy Co.,

Defendant.

---:

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON COUNT 1 AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON COUNT 2.

1. Defendant has moved for summary judgment on Count 1 of the complaint (strict liability), arguing that it is entitled to judgment as a matter of law because Joey Davis was not an intended user of the Princess Beads jewelry set and because swallowing the product was not an intended use. That motion is GRANTED. See *Vitan v. Goddard.*
2. Defendant has also moved for summary judgment on Count 2 (negligence per se). Defendant's motion is DENIED. The court finds as a matter of law that (a) the "product" in question is a box of Princess Beads rather than a single bead or some other smaller quantity; (b) Joey Davis was within the class of persons that Sections 80.01 through 80.05 of the Midlands Criminal Code were designed to protect, and (c) the type of harm Joey Davis is alleged to have suffered is the sort of harm that the aforementioned statutes were designed to prevent. As to the remaining elements of the negligence *per se* claim, as well Defendant's affirmative defenses of comparative fault and "excuse" under *Sheridan v. IPX, Inc.* (1998), the Court finds that there are disputed issues of material fact and leaves resolution of such issues to a jury.
3. Accordingly, this case will proceed to trial solely on Count 2.

On this day, August 16, 2010, it is so ordered.

_____

The Honorable Caleb Rogers

EXHIBITS

Revised 12.7.2010

EXHIBIT A

POLK COUNTY GENERAL HOSPITAL
EMERGENCY ROOM REPORT

PATIENT : JOSEPH JAMES DAVIS PATIENT NUMBER: 08171955 BIRTHDATE: 10/02/2006
ARRIVAL: 1228 HRS 08/08/2009 TREATING: DR. FRENCH ASSISTING: DR. TUCHMONT

Height 33 in	Age range 2 - 3
Weight 33 lbs	Age range 2 - 3
Pulse 58 bpm	Age range 80-100
Respirations/min 14	Age range 22-34
BP 90/50	Age range 77-119/39-71

INITIAL PATIENT PRESENTATION

patient ("Pt") experiencing bradypnea, weakening pulse, bradyarrhythmia; altered level of consciousness; Glasgow Coma Scale 11

PATIENT HX

Onset of signs and symptoms	Approx 1200 hrs
No hx of trauma Caregiver reports hx of respiratory problems Pt has recently eaten No allergies No medications	

INITIAL EXAMINATION AT 1231HRS

No airway obstruction; no signs of trauma	(1231 hrs)
Pt touches stomach after inquiry re: source of trouble	(1232 hrs)
Pt seizes	(1233 hrs)
Pt vomits; contains numerous non-food objects, including plastic beads	(1235 hrs)
Pt unconscious	(1300 hrs)
Respiratory arrest	(1400 hrs)
Pt expires	(1402 hrs)

TREATMENT SUMMARY

Blood drawn and sent for tox. screen	(1237 hrs)
Efforts to revive pt (unsuccessful)	(1300 hrs)

Revised 9.6.2010

EXHIBIT B

POLK COUNTY GENERAL HOSPITAL
EMERGENCY ROOM REPORT

ORDERED BY DR. TUCHMONT 1237 HOURS 08/08/2009
TEST PERFORMED: 1912 HOURS 08/08/2009

PATIENT: JOSEPH JAMES DAVIS PATIENT NUMBER: 08171955

TEST NAME

PARTIAL CBC SERUM
*Units are the same as indicated in "NORMAL RANGE" unless highlighted.

TEST	VALUE	NORMAL RANGE
WHITE BLOOD CELL COUNT	8.6	3.8-10.8 Thousand/uL
RED BLOOD CELL COUNT	4.82	3.80-5.10 Million/uL
HEMOGLOBIN	13.4	11.7-15.5 g/dL
HEMATOCRIT	32	30% - 40%
ALT	28	10-35 u/L
BUN SERUM	13	5-18 mg/dL
CREATININE	0.78	0.50-1.00 mg/dL
FREE TRIIODOTHYRONINE	0.4	0.1-0.6 ng/dL
THYRONINE	1.4	0.8-2.0 ng/dL
PLATELET COUNT	258	150-450 Thousand/uL
SODIUM	137	135-146 mmol/L
POTASSIUM	4.1	3.5-5.3 mmol/L
CHLORIDE	103	98-110 mmol/L
CARBON DIOXIDE	34	21-33 mmol/L
CALCIUM	9.7	8.6-10.2 mg/dL
PROTEIN (TOTAL)	7.1	6.2-8.3 g/dL

BLOOD ANALYSIS

Test	INDICATION		LEVEL	CUTOFF FOR POSITIVE INDICATOR
Barbiturates	Negative		0.0µg/mL	<0.3µg/mL
Benzodiazepines	Negative		0.0µg/mL	<0.3µg/mL
Codeine	Negative		0.0µg/mL	<2.0µg/mL
Ethyl Sulfate	Negative		0.0ng/mL	<25 ng/mL
Gamma-hydroxybutyric acid (GHB)		**Positive**	**148 mg/L**	**<10µg/mL**
Marijuana Metabolites	Negative		0.0ng/mL	15ng/mL

These specimens were tested at the listed cutoffs and confirmed by a second independent method.
This analysis was performed for medical purposes only. This analysis was performed according to nationally practiced and acceptable standards and procedure. All analysis was performed under the direction of Dr. Tuchmont.

Signed: Dr. Cal Rodgers, Lab Director
Signed: Dr. Anatoly Hommel, Technician

Revised 9.6.2010

Reese Gardner, M.D.

5226 San Joaquin Hills Road • Beverly Hills, CA • gardner@toxdefense.com

EDUCATION

Harvard Medical School, *magna cum laude*
M.D. with an emphasis in Pharmacology 1981

Amherst College
B.S. in Biology 1975

PROFESSIONAL EXPERIENCE

Gardner Consulting, Inc., Beverly Hills, CA 1999—present
Chief Consultant
- Testify in civil and criminal cases regarding issues of medicine, pharmacology, and toxicology.
- Representative cases include: murder, rape, medical malpractice, negligence, product liability, and DUI-manslaughter.
- Recognized as expert in more than 10 jurisdictions, including California, Midlands, Texas, Ohio, and New York.

Johns Hopkins Medical School, Baltimore, MD 1990—1999
Dr. Hannah Anson Professor of Pharmacology
- Taught academic and clinical classes on the study of pharmacology and its intersection with other disciplines.

Saint Sebastian Hospital, Los Angeles, CA 1981—1990
Director of Pharmacology (1987-1990)
- Treated patients suffering from poisonings, genetic disorders, infections, and other pharmacological conditions.
- Treated patients in emergency room, including patients suffering from non-pharmacological conditions.

LICENSES & HONORS

- Currently licensed to practice medicine in California, Texas, Ohio, Midlands, and New York
- ACLU Expert of the Year 2007
- Commitment Award, The Organization for Representation of Indigent Defendants 2005

PUBLICATIONS

- Authored more than 50 published articles on issues of pharmacology, toxicology, medicine and treatment.
- List of publications available upon request.

PROFESSIONAL AFFILIATIONS (complete list; all current)

- American Medical Association
- American Civil Liberties Union
- The Organization for the Representation of Indigent Defendants (TORID)
- Society of Professional Pharmacologists (President, 2002-03)
- National Association for Criminal Defense Lawyers
- Midlands Association of Civil Defense Attorneys
- California Criminal Defense Lawyers Association
- New York Society of Civil Defense Attorneys
- American Association of Corporations

Kendall M. Oxman, Ph.D.

1124 Corella Street • Honolulu, HI • 808-427-5246 • kmoxman@uhawaii.edu

EXPERIENCE

Grundy Professor of Child Psychology and Chair, Department of Psychology and Social Behavior,
University of Hawaii, Honolulu, HI 1990—present

- Teach classes, perform original research and chair department.

President, Oxman Consulting, LLC, Honolulu, HI 2002—present

- Advise product designers and manufacturer about how to minimize health risks posed to children. Clients number in the dozens and range from upstart toy companies to national, brand name companies.
- Testify in cases involving product liability, child custody, child abuse and neglect, psychological damages, and other legal issues related to children. Clients include government, plaintiffs, and both civil and criminal defendants.

Manager of Hazard Assessment Department, Fun Things, Inc. 1978—1992

- Advised product design department and provided counsel regarding appropriate warnings for international toy company.

EDUCATION

University of California, Irvine
Psychology and Social Behavior – M.A. (1975), Ph.D (1978)

University of Virginia, College of Arts and Sciences, *with high honors*
Psychology – B.S. (1972); Dance – B.A. (1972)

PUBLICATIONS (recent representative research)

- Co-Author, *Mouthing Behavior of Children*, International Journal for Child Psychology and Social Behavior, Spring 2007.
- Author, *How Toy Designers Can Use Child Psychology to Make Safer Toys*, American Pediatric Journal, 2007.
- Author, *Locations That Pose the Greatest Risk to Children*, A Child's Mind, March 2005.
- Co-Author, *Fancy Footwork: How Mobility Makes Children Safer While Also Exposing Them to Risk*, Pediatrics, 2002.

HONORS

- Finalist, Acevedo Award for Contributions to Psychology (2008)
- Caspar Award Winner for Child Psychology (1999)
- Students' Choice Award, University of Hawaii (1996, 2006)

PROFESSIONAL AFFILIATIONS

- American Society of Psychologists
- American Psychologists' Association
- National Association of Child Psychologists, Past President
- International Association of Toymakers
- American Association for Child Safety, Chair of Children's Products Committee

Revised 9.6.2010

Chase Tuchmont, M.D.

610 Newport Center Drive, Suite 1700
Midlands City, Midlands
director@MPC.gov

EDUCATION

University of Georgia School of Medicine
Medical Doctorate, emphasis in toxicology (1997)

Arizona State University
B.S. in Chemistry (1993)

PROFESSIONAL

Midlands Department of Poison Control
Director (1997-present)

- Oversee state organization responsible for providing treatment and advice to those facing exposure, or possible exposure, to toxic or poisonous substances.
- Oversee statewide efforts to prevent exposure or outbreak of toxicological threats.
- Manage annual budget exceeding $4 million, three branches, and staff of six doctors and three nurses.

Polk County General Hospital, Midlands City, Midlands
Treating Physician (2000—present)

- Treat patients facing emergency conditions, particularly those with potential toxicological conditions.
- Advise other physicians on cases and patients involving toxicological or poison-related issues.

LICENSES & HONORS

- Midlands Medical License
- Governor's Medical Medal of Honor (2004)

PUBLICATIONS (representative list)

- Full bibliography of eight total publications available upon request.
- Author, *I Agree With Britney*: *Why "Toxic" Substances "Should Wear A Warning,"* UTAH JOURNAL OF TOXICOLOGY (2004)
- Author, *Pins and Needles: The Advantages to a Calm Approach to Poison Control*, MIDLANDS JOURNAL OF MEDICINE (2006)
- Author, *I Also Agree With Beyonce: Why, For "Poison," "The Cure is Often Found in You,"* AMA REVIEW (2010)

PROFESSIONAL AFFILIATIONS (complete list; all current)

- American Medical Association
- American Toxicology Institute
- American Society of Professional Toxicologists

Emerson Zimmer, M.D., M.P.H.

3149 Rancho Sierra Bend • Midlands Hills, Midlands • 484-883-1017 • EZimmer@freemail.com

EDUCATION

Emory University, *cum laude*
Masters in Public Health, Health Policy Management 1991
Medical Doctorate, emphasis in Health Policy and Pharmacology 1991

Elon University, *magna cum laude*
B.S. in Political Science, *Minor* in Human Services 1987

PROFESSIONAL EXPERIENCE

Susan Ewing Junior High School, State Center, Midlands 2009—present
Biology Teacher

University of Midlands 2006—2009
Graduate Professor of Health Policy, Health Policy Management Department
- Taught evening classes and performed original research.

Midlands Department of Health 1999—2009
Commissioner
- Oversaw Intergovernmental Affairs, Communications, Policy and Planning, Finance, Information Technology, Human Resources, and Facilities among other functions.
- Spearheaded legislative efforts for priorities identified by the Health Department and provided information to the Midlands Legislature, when appropriate, for health care and chemical substance legislation.
- Investigated and disciplined individuals and companies in violation of Midlands health regulations.

Center for Disease Control and Prevention, Atlanta, GA 1991—1999
Associate Director for Policy
- Addressed public policy and management challenges in government agencies and nonprofit research organizations.

PUBLICATIONS (recent representative research)

- Author, *How Legislatures Can Make the World a Safer Place*, American Journal of Health 1999.
- Author, *Chemical Substances: Where are the Highest Risks?*, International Journal of Health & Politics, March 1997.
- Co-Author, *The Debate Over GHB: To Legalize or Criminalize?*, Journal of American Health Policies 1993.

HONORS

- Morrissey Award Winner for Contributions to Health Care 2003
- Baldwin Award Winner for Excellence in Chemical Safety 1999
- University of Midlands ~ Faculty of the Year 2007

PROFESSIONAL AFFILIATIONS

- American Society of Healthcare Politicians
- Organization for Health and Public Policy
- American Medical Association
- Everyday Safety
- Center for Global Health
- American Association for Toxic Substances and Disease Control

To: **Blake Lexington**

From: **Alison Burton Cornell**
Chair, Board of Directors

Subject: **New Products**

Date: **May 15, 2009**

During the Board's April 17, 2009 meeting, you spoke of a jewelry set ("Princess Beads") in final development. Since then, the Board has reviewed the company's financial statements for 2008 and preliminary statements for the first quarter of 2009.

Having done so, I have been asked to convey that it is of utmost importance that this new toy be released on budget and with plenty of time before the 2009 winter holiday season. Gross receipts fell sharply in 2008, and the net operating loss for that year, though small in absolute terms, was the first in company history. It is clear that last year's disappointing results are attributable to the company's failure to release any new products during 2008 and that our financial situation will continue to deteriorate unless new, commercially successful, and, most importantly, profitable products are brought to market in the near future. Although you assured us that several other products currently are in development, you acknowledged that only the jewelry set has a realistic chance of being released before August 2009.

The Board remains grateful for your vision in founding the company. The Board also is aware of the difficult economic climate in which the company is operating, and it recognizes that last year's losses likely would have been far higher without your wise stewardship. That said, the Board's paramount obligation is to the financial well-being of the company's shareholders and it seems highly unlikely that the shareholders as a group would be willing to tolerate another losing year without demanding major changes.

Blake Lexington

To: All Employees <allemployees@happylandtoys.com>
From: Blake Lexington <blake.lexington@happylandtoys.com>
Date: March 9, 2009 06:55 PM
Re: Our Next Huge Hit!

Colleagues,

Our resident mad scientist Quinn Brown has come up with an amazing idea for a new product (a make-your-own-jewelry set called “Princess Beads”), and I’m thrilled to have just given it the green light. Now it’s all of your jobs to find a way to make this work ASAP. I know things have been a little rough recently, but someone once told me that it’s always darkest right before dawn. This is all of our chance to get HappyLand Toy back where it belongs -- on top.

Blake

Blake Lexington
Founder and CEO
HappyLand Toy Company

The Person Who Says It Can't Be Done Is Usually Interrupted By The Person Who Is Doing It

Blake Lexington

To: Colin Rodriguez <colin.rodriguez@happylandtoys.com>
CC: Quinn Brown <quinn.brown@happylandtoys.com>
From: Blake Lexington <blake.lexington@happylandtoys.com>
Date: April 13, 2009 7:55 AM
Re: Status of Princess Beads Jewelry Set -- URGENT

Colin,

At our monthly product-status meeting two weeks ago, you mentioned some continuing problems with executing Quinn's idea for the make-your-own jewelry set. I know we're not scheduled to have another formal meeting until May 1, but I'm going to need a report on our most current status by close of business this Thursday. I'm counting on you and your geniuses in the lab to have some sort of breakthrough by then.

Blake

Blake Lexington
Founder and CEO
HappyLand Toy Company

The Person Who Says It Can't Be Done Is Usually Interrupted By The Person Who Is Doing It

Blake Lexington

To: Blake Lexington <blake.lexington@happylandtoys.com>
CC: Quinn Brown <quinn.brown@happylandtoys.com>;
Erin Swift <erin.swift@happylandtoys.com>
From: Colin Rodriguez <colin.rodriguez@happylandtoys.com>
Date: April 15, 2009 11:55 PM
Re: Jackpot!

Blake

I think we've solved the riddle of how to make the Princess Beads jewelry set work. I won't bore you with the details, but the short answer is that we've identified a chemical called 1,5-pentanediol that will make the pieces stick together without creating a huge mess. We'll have to find a supplier and price it out, and Erin's folks will need to run a risk assessment but, once those things are done, we should be ready to roll.

Colin

Colin Rodriguez
Head Chemist
HappyLand Toy Company

Blake Lexington

To: Colin Rodriguez <colin.rodriguez@happylandtoys.com>
CC: Quinn Brown <quinn.brown@happylandtoys.com>;
Erin Swift <erin.swift@happylandtoys.com>
From: Blake Lexington <blake.lexington@happylandtoys.com>
Date: April 15, 2009 11:56 PM
Re: Re: Jackpot!

Fantastic! You're a lifesaver, Colin.

Blake Lexington
Founder and CEO
HappyLand Toy Company

The Person Who Says It Can't Be Done Is Usually Interrupted By The Person Who Is Doing It

Sent from a mobile device.

---------- Original Message ----------

Blake Lexington

To: Blake Lexington <blake.lexington@happylandtoys.com>
CC: Quinn Brown <quinn.brown@happylandtoys.com>;
Erin Swift <erin.swift@happylandtoys.com>
From: Colin Rodriguez <colin.rodriguez@happylandtoys.com>
Date: April 15, 2009 11:55 PM
Re: Jackpot!

Blake

I think we've solved the riddle of how to make the Princess Beads jewelry set work. I won't bore you with the details, but the short answer is that we've identified a chemical called 1,5-pentanediol that will make the pieces stick together without creating a huge mess. We'll have to find a supplier and price it out, and Erin's folks will need to run a risk assessment but, once those things are done, we should be ready to roll.

Colin

Colin Rodriguez
Head Chemist
HappyLand Toy Company

Blake Lexington

To: Blake Lexington <blake.lexington@happylandtoys.com>
From: Quinn Brown <quinn.brown@happylandtoys.com>
Sent: May 16, 2009, 8:22AM
Re: Princess Beads Jewelry Set Update

Blake,

I cut out early yesterday to meet some folks for dinner and just got your message. Here's the deal: we've got a problem with the manufacturing. The chemical sizing agent (or whatever it's called) is taking WAY too long during the manufacturing process. Colin says his team can do it, but there's no way we'll make the deadline. The other problem is that the current agent also apparently causes the product to swell up when it gets wet, which means that Erin will probably tell us that we have to use a bigger choking warning and put it on the front of the box. And did I mention that the costs are through the roof? The current stuff has turned out to be far more expensive than we thought.

All that said, there's one possible piece of good news. The chem folks mentioned there's another sizing agent we could use called 1,4 butanediol. It's way cheaper and it won't cause the product to swell either. The 1,4-butanediol would be used on the rings (the smaller beads) and pearls (the larger beads). I know it's late in the day to be making changes but I also know how much pressure you're under to get this done in time and under budget, so I thought I'd mention it. Let me know.

Quinn

Quinn Brown
Design Team Leader
HappyLand Toy Company

Blake Lexington

To: Erin Swift <erin.swift@happylandtoys.com>
CC: Quinn Brown <quinn.brown@happylandtoys.com>
From: Blake Lexington <blake.lexington@happylandtoys.com>
Sent: May 16, 2009, 8:24AM
Re: Urgent

Erin,

The Princess Beads team just e-mailed me. They want approval to use a different chemical sizing agent in the manufacturing process -- something called “1,4-butanediol”. Can you give me some guidance by 5 p.m. today re: whether and if so what additional risks may be associated with using this particular chemical and what steps we could take to minimize it? I know this is a quick turnaround during the weekend and I’m sorry for that. But we’re under a lot of pressure here and using this new chemical might be the only way to make this product work.

Blake

Blake Lexington
Founder and CEO
HappyLand Toy Company

The Person Who Says It Can´t Be Done Is Usually Interrupted By The Person Who Is Doing It

Blake Lexington

To: Blake Lexington <blake.lexington@happylandtoys.com>
From: Erin Swift <erin.swift@happylandtoys.com>
Sent: May 16, 2009, 4:59 PM
Re: Your question re: the jewelry set

Blake,

Here's what I've been able to dig up so far from home:

- I searched for legal restrictions on 1,4-butanediol. That chemical is not mentioned in any Midlands laws, statutes, or regulations. Thus, it's not legally prohibited.
- The Material Safety Data Sheets that we have for 1,4-butanediol don't mention major toxicological concerns. Someone would have to consume A LOT of this for it to be dangerous. We're talking about more than their body weight.
- I haven't had a chance to see if 1,4-butanediol has any known metabolic effects (i.e., whether it metabolizes into another chemical), but I figure if it had such properties, the MSDS would have said so. Let me know in your reply whether you want more research on this issue.
- To be safe, the 1,4-butanediol should not be used in any item that is intended for consumption by humans and should not be used in any product that might foreseeably be eaten.

Based on my understanding of the product, it is not intended to be eaten and its likely audience is the 7-10 age group. To minimize the risk of exposure, however, I recommend, in addition to the standard warning about choking, reasonably prominent warnings regarding supervision and non-consumption, I also recommend, in addition to the standard appropriate-age recommendation, an additional warning that the product should not be used by kids under the age of 3.

Erin Swift
Chief Risk Assessment Officer

Blake Lexington

To: Quinn Brown <quinn.brown@happylandtoys.com>
From: Blake Lexington <blake.lexington@happylandtoys.com>
Sent: May 16, 2009, 5:00 PM
Re: FW: Your question re: the jewelry set

Quinn,

See below. If you folks decide you need to use this new chemical to make it work, Erin says we should be fine. It's not like a 7-year-old is going to eat this stuff, right? Just do whatever it takes to bring this thing in on time and on budget. I'm counting on you.

Blake

Blake Lexington
Founder and CEO
HappyLand Toy Company

The Person Who Says It Can't Be Done Is Usually Interrupted By The Person Who Is Doing It

---------- Original Message ----------
To: Blake Lexington <blake.lexington@happylandtoys.com>
From: Erin Swift <erin.swift@happylandtoys.com>
Sent: May 16, 2009, 4:59 PM
Re: Your question re: the jewelry set

Blake,

Here's what I've been able to dig up so far from home:

- I searched for legal restrictions on 1,4-butanediol. That chemical is not mentioned in any Midlands laws, statutes, or regulations. Thus, it's not legally prohibited.
- The Material Safety Data Sheets that we have for 1,4-butanediol don't mention major toxicological concerns. Someone would have to consume A LOT of this for it to be dangerous. We're talking about more than their body weight.
- To be safe, the 1,4-butanediol should not be used in any item that is intended for consumption by humans and should not be used in any product that might foreseeably be eaten.

Based on my understanding of the product, it is not intended to be eaten and its likely audience is the 7-10 age group. To minimize the risk of exposure, however, I recommend, in addition to the standard warning about choking, reasonably prominent warnings regarding supervision and non-consumption, I also recommend, in addition to the standard appropriate-age recommendation, an additional warning that the product should not be used by kids under the age of 3.

Erin Swift
Chief Risk Assessment Officer
---------- End of previous message ----------

Blake Lexington

To: Blake Lexington <blake.lexington@happylandtoys.com>
From: Quinn Brown <quinn.brown@happylandtoys.com>
Date: May 16, 2009 5:02 PM
Re: FW: Your question re: the jewelry set

Blake,

Got it. We'll roll with the 1,4-butanediol then. I think we're going to say the product is for kids 9 and up, and it's not like they randomly eat things at that age. Plus, I don't actually know if the chemical would affect anyone in this format, so it might not matter. If this changes, let me know asap, we're rolling production when the new chemical comes in first thing Monday.

You'll also be happy to learn just how much cheaper 1,4-butanediol is than 1,5-pentanediol. We've decided to get the 1,4-butanediol from Coltrera Chemicals, the same company from which we had planned to get the 1,5-pentanediol. Check out the price difference:

Binding agent	$/kilogram	$/bead (ring or pearl)	$/box of Princess Beads
1,4-butanediol	$15	$0.0008	$0.53
1,5-pentanediol	$112	$0.0056	$3.92

That's a huge savings. My team tells me that if we use 1,4-butenadiol, the total cost per box of Princess Beads (beads, packaging, spray bottle, etc.) will be $2.11. If we had used 1,5-pentanediol, it would have $5.50. Obviously, safety comes first – but the extra profit is a good incentive, too!

Quinn

Quinn Brown
Design Team Leader
HappyLand Toy Company

Blake Lexington

To: All Employees <allemployees@happylandtoys.com>
From: Blake Lexington <blake.lexington@happylandtoys.com>
Date: August 14, 2009 08:00 PM
Re: Stop Shipment Order for Princess Beads Jewelry Set

Colleagues,

As many of you likely have heard, we have been contacted by the Midlands Department of Health about the Princess Beads Jewelry Set. Although I stand behind the product and remain personally convinced that it is safe, I have ordered an immediate halt to all future sales, and it is possible that we may conclude that it is necessary to issue a recall order as well.

In the meantime, it is imperative that the company stay strong and speak with one voice on this matter. Unless authorized to do so, employees must not speak to anyone (publicly or privately) about the creation, design, or production of the Princess Beads Jewelry Set. All inquiries should be referred to my office and to our director of public relations.

Blake

Blake Lexington
Founder and CEO
HappyLand Toy Co.

MOUTHING BEHAVIOR OF CHILDREN[1]

Kendall M. Oxman, Ph.D.[2]
&
Nancy N. Duke, Ph.D.[3]

Overview

This study attempts to build on the outstanding work done by other researchers who have tackled the important issue of children's mouthing behavior. We focused on the frequency and duration of mouthing. Frequency measured the percentage of days that children mouthed at least once. To constitute "mouthing," a child had to put an object, not including her fingers or other body parts, inside her mouth. Merely touching an object to one's lips does not constitute mouthing. Duration measured the number of minutes per day each child mouthed. We subdivided these parameters by age group (ages 0–2, 2–4, and 4–6) and type of object mouthed. The study included 672 subjects: 0–2 (number = 230), 2–4 (n = 223), and 4–6 (n = 219). Data was drawn from videotape and parent observation.

Data

Table 1, below, compares mouthing frequency and duration by age group and object mouthed.

Table 1

Age Group and Object		**Probability of a child mouthing on a given day**	**Average mouthing time per child per day (minutes)**
Ages 0–2	Pacifiers	45%	102
	Non-pacifiers	70%	31
	With any object	78%	133
Ages 2–4	Pacifiers	27%	135
	Non-pacifiers	27%	8
	With any object	40%	143
Ages 4–6	Pacifiers	0% (exact figure = 0.3%)	0 (exact figure = 0.18 min)
	Non-pacifiers	2%	1
	With any object	2%	1

In Table 1, "all objects" includes mouthing with either pacifier or non-pacifier, and thus includes all mouthing events.

Table 2, below, identifies the twenty items mouthed most frequently by subjects in the study and the hazards most commonly associated with the items listed in Table 2.

Table 2

Category	**Object**	**Most Common Associated Hazards**
Objects designed for mouthing	Pacifiers	N/A
	Teethers (e.g., teething ring)	N/A
	Toys designed for mouthing	N/A
Toys	Toy animals	Choking, foreign body
	Toy blocks	Choking, foreign body
	Toy cars/trucks	Choking, foreign body
	Toy food	Choking, foreign body
	Toy figures/dolls (e.g., Barbie)	Choking, foreign body
	Toy phone	Choking
	Tub toys	Choking, foreign body
Other objects	Beads	Choking, foreign body

[1] Originally Published in the *International Journal for Child Psychology and Social Behavior*, Spring 2007.
[2] Grundy Professor of Child Psychology at the University of Hawaii.
[3] Professor Guy A. Shanmuganatha Professor of Child Psychology and Human Studies at Arizona State University.

	Blankets	Suffocation
	Coins	Choking
	Cords	Strangulation
	Crayons	Choking, foreign body
	Jewelry	Choking, foreign body
	Keys	Choking, foreign body, cut
	Paper	Choking
	Pen/pencil/marker	Choking, foreign body, puncture
	Toiletries (brush, comb)	Cut

Note that the three items designed to be mouthed (pacifiers, teethers, and toys designed to be mouthed) do not have any listed hazards because they pose negligible health and safety risks to children. The risk termed "foreign body" refers to the threat that a child may swallow an object which will cause injury to the child's internal systems because it blocks vital passageways, proves toxic, or has another injurious effect.

Table 3, below, illustrates the correlation between certain attributes possessed by mouthed objects and the frequency of mouthing.

Table 3	
Attribute	**Correlation to Mouthing Frequency**
Size (among objects small enough to put in one's mouth)	-0.02
Brightness of Color	0.31
Smoothness	0.03
Taste	0.35

Among objects small enough to put in one's mouth, there was a slightly negative and ***not*** statistically significant relationship between size and mouthing frequency. Surprisingly, the relationship between texture and mouthing frequency was ***not*** statistically significant—that is, children were no more likely to mouth smooth objects (as opposed to rough objects). The relationships between mouthing and both color and taste were statistically significant to a 99% confidence level. Children were more likely to mouth brightly colored objects than dull colored objects. Children were also more likely to mouth objects with a pleasant taste or, more commonly, no taste. They were less likely to mouth objects with an unpleasant taste, especially a metallic or bitter taste. The correlation between taste and mouthing was higher among older children, probably because children younger than two years have less developed senses of taste.

Table 4, below, identifies the six materials most commonly mouthed and how often each is mouthed. For example, 21% of all items mouthed by children are composed of fabric. The miscellaneous category includes all materials other than the six listed.

Table 4							
Material	Fabric	Glass	Metal	Plastic	Rubber	Wood	Miscellaneous
Percentage of Items Mouthed	21%	3%	8%	50%	4%	5%	9%

Conclusions

Our results are consistent with prior research. Mouthing is an important and necessary part of child development. But mouthed items can pose health and safety risks to children. Parents, educators, legislators and product designers should consider the benefits and hazards of mouthing and act accordingly.

No two children showed identical mouthing behaviors, but general conclusions can be stated. As seen in Table 1, the frequency and duration of mouthing tends to decrease as children age. The highest incidence of mouthing—by

frequency and duration—generally occurs during a child's first two years of life and decreases thereafter. During the ages two through four, however, children still showed substantial mouthing activity.

As seen in Tables 1 and 2, children's mouthing is not limited to objects that are designed for mouthing, such as pacifiers and teething toys. This is a good lesson for all involved with children's toys. Parents should understand that children may mouth on objects not designed for mouthing and such mouthing may bring health risks, such as choking or toxicity. Toy designers should understand that just because a toy is not designed for mouthing does not mean it will not be mouthed; this understanding requires that toymakers design even their non-mouthing toys in a manner that minimizes hazards of mouthing.

Video review of the subjects reveals that mouthing behavior is heavily dependent on supervision. Excluding the use of pacifiers and other objects designed for mouthing, children mouth most frequently and for the longest duration when they are alone. Excluding the use of pacifiers and other objects designed for mouthing, children mouth least frequently and for the shortest duration when they are supervised, especially when supervised by one or more of their parents. There is an inverse correlation between mouthing of non-pacifiers and supervision by someone viewed by the child as an authority figure. Parents can reduce the hazards of non-sanctioned mouthing by ensuring frequent supervision by clear authority figures (sanctioned mouthing—for example, pacifier use—should be encouraged). With some children, supervision can decrease non-sanctioned mouthing by as much as 40%.

Our video data reveal that mouthing also depends on environment. Children tend to mouth 20% more frequently and for a 30% greater duration when indoors, as opposed to outdoors. The most significant environmental factor (that we found) is access to mouthing objects. Obviously, a child in an empty crib cannot mouth as easily as a child on the floor with dozens of small toys within reach. Just as obviously, children with greater mobility[4]—generally older children—can obtain objects that would be inaccessible for children with less mobility. Parents should heed this lesson, as well.

Tables 3 and 4 provide valuable information not just for toymakers, but for any manufacturers concerned with the safety of children. Regarding product hazards, our study confirmed the results reached by many other researchers. The objects that pose the greatest mouthing risk to children carry the following characteristics: (1) small enough to be placed entirely in a child's mouth; (2) includes parts or pieces of a product designed for adults or older children; (3) bright in color; (4) tasteless or possessing a pleasant taste; (5) odorless or possessing a pleasant odor; and (6) composed of plastic. Manufacturers can reduce the risks their products pose to children by designing products that have an unpleasant taste, are less brightly colored, and are not made of plastic. Manufacturers can also use this information to generate appropriate warning labels—not only for toys, but also for products not aimed at young children. Parents, too, can use this information by being especially wary of all products—not just toys—that are brightly colored, small, and tasteless.

We acknowledge certain limitations of this study. First, it is not known whether the presence of a video camera affected children's mouthing tendencies. It is hardly inconceivable to think if a child were aware of a camera, she might behave differently. Second, young children can be difficult to capture on video because they are relentlessly on the move and we could not place cameras in every part of the home. Third, while, parents have the capacity to observe mouthing from more mobile children, they tend to miss mouthing events of short duration.[5] Fourth, we sought to observe children in their natural environments. Thus, our data depends on the representativeness of these environments. For example, while we found that 78% of children younger than two mouthed on a given day, that number might be very different if the supervision, access to toys and other environmental factors were different. Fifth, environmental factors, while important, were far from a full predictor of a particular child's mouthing behavior. Every child is different. While product manufacturers should consider the spectrum of children and their composite behavior, parents should consider the information in this study alongside their knowledge of their individual child.

[4] Mobility here refers only to physical mobility, such as the ability to crawl, walk or run.
[5] One fact that nonetheless lends confidence to the reliance on videotape and parental observation is that while each has its limitations, each source led to similar results.

Expert Report of Dr. Kendall Oxman

Date Hired: June 4, 2010
Date of Report: August 14, 2010

I. INTRODUCTION

I was asked to assess the safety of the product in the *Davis v. HappyLand Toy Company* litigation: the HappyLand Toy Company's (hereafter "HappyLand") Princess Beads Jewelry Set (hereafter "Princess Beads" or "the Toy"). Specifically, I was asked to make three categories of assessments: (1) safety of the Toy's design; (2) adequacy of the warning labels for the Toy; and (3) carefulness of the supervision of Joey Davis ("Joey"), the child Plaintiff. My conclusions draw upon my expertise in the area of child psychology and behavior, as well as my experience with child safety issues. I understand there are allegations that the Toy contained a dangerous chemical. I note that I have no background in chemistry or biology. I also note that I have no legal training and draw no legal conclusions.

All of my conclusions are drawn to the standard degree of certainty within my field. I had sufficient facts and information to draw each of my conclusions. All of my conclusions are based on the type of information that is typically relied upon in my field.

II. SOURCE DATA

I examined an unopened package of the Toy and the Toy itself. I also read the affidavits of the following individuals: Quinn Brown, Andy Davis, Brett Miller, and Chase Tuchmont. The only significant fact I learned from Dr. Tuchmont's affidavit was the fact that Joey swallowed 25 "rings" (see Section III below) from the Toy on August 8, 2009. I did not consider any of Dr. Tuchmont's medical statements or conclusions, nor am I qualified to evaluate them.

III. APPEARANCE OF THE TOY

There are two types of beads in a Princess Beads set. For clarity, I will refer to the smaller, ring-shaped beads as "rings" and the larger, spherical-shaped beads as "pearls." By "beads," "Beads," or "Princess Beads," I am referring to the Toy as a whole—both the rings and the pearls. The rings and pearls share several common traits. Both the rings and pearls appear to be plastic, have no discernable odor, and have a bitter taste that I found unpleasant.

The rings are approximately 0.5 cm in diameter and 0.3 cm in thickness. They have a hole in the middle that is approximately 0.2 cm in diameter. The rings come in eleven colors: white, ivory (off-white), yellow, orange, green, dark blue, light blue, red, black, purple, and pink. The rings appear identical to one another in all respects except color.

The pearls are approximately 0.8 cm in diameter. They are sphere-shaped, with one small hole through the middle. They come in five colors: white, yellow, blue, pink, and purple. The pearls appear identical to one another in all respects except color.

The Toy comes in a rectangular paper box. The bottom of the box includes a warning that says, "Choking hazard. Not for consumption. May be toxic if swallowed." The box has two age labels. It has a symbol that says, "9+," which is a common manufacturer denotation that a product is aimed at individuals aged 9 and older. The box also has a circle with a line through it, encircling the notation "0 – 3." This commonly means a product is not for children younger than 3 years of age. According to the box, it contains items other than beads, but I do not remark on those in this report as they appear irrelevant to the events of this lawsuit.

IV. ANALYSIS

A. Safety of Toy Design

There are two threats posed by the Toy. The first threat is the possibility that a child will choke on the Toy. This is a threat posed by any small object. It would be easy for a child to choke on the pearls; they are large enough to block a young child's breathing passages. It would be very difficult, but not impossible, for a child to choke on the rings because they are so tiny: not only is such a small object less likely to block breathing passages, but the rings are less likely to be ingested in the first place since young children will more often lack the fine motor skills necessary to pick up such a small object.

The second threat is the foreign object threat: the possibility that the chemicals in the Toy will injure a child once the Beads are ingested. I understand from Quinn Brown's account that the rings and pearls each have equal amounts of the active chemical (1,4-butanediol). While I lack the toxicological background to assess that threat entirely, I think it is safe to say a child faces some health risk by ingesting the Princess Beads. From what I gather, the Princess Beads only pose a toxicological threat if ingested; there is no danger from touching or handling the Beads. Thus, both threats depend entirely on whether the Princess Beads are ingested.

Therefore, the Princess Beads are only as dangerous as they are likely to be swallowed. From the perspective of physical possibility—the question of whether a child is physically capable of swallowing the Princess Beads—there is nothing disqualifying. In other words, any child older than 12 months could pick up, mouth, and swallow either the rings or pearls. The Beads are small enough to grasp, but not too small. They are light enough that children can pick them up. The Beads are small enough to swallow.

The real issue is how likely a child is to ***want*** to swallow the Princess Beads. The size, color, material, and shape of the Beads make them fairly attractive to young children. Of course, they could have been even brighter—for example, had fluorescent colors been used exclusively—which would have made them even more attractive to young children. On the other hand, HappyLand could have used duller colors—for example, shades of black, gray, brown—which would have made the Beads less attractive to young children. The brightest colors tend to sell best with toys aimed at children aged 10 or younger, so here HappyLand took a middle-of-the-road approach. To young children, the rings are certainly more attractive than the pearls. The rings come in more colors and more closely resemble several popular candy lines. Given that Joey swallowed beads, I would expect Joey to swallow mostly rings, though I am somewhat surprised that Joey swallowed ***only*** rings.

Two other factors make the Princess Beads attractive to children of Joey's age. The first is the name. Perhaps more than any other age group, children younger than age 6 are interested in being princesses. This is far truer of young girls than young boys, who often show minimal interest in princesses and the like. The last factor that makes the Princess Beads attractive to children of Joey's age is the target audience for the toy: children between the ages of 9 and 14. Children usually try to emulate those who are slightly older. The youngest children admire elementary and junior high children; junior high children admire high school students; and high school students admire college students. It is textbook child psychology that Joey was so fascinated by a toy that captured his older sister's attention.

Finally, two other factors make the Princess Beads unattractive to children such as Joey. First, the box features two young women who appear to be of high school or college age. As explained above, this makes the toy less attractive to a child of Joey's age. Second, and more significantly, HappyLand coated the Princess Beads with a denatonium flavor. I've seen many products that employ denatonium to prevent ingestion. It is one of the most standard, reliable methods for preventing child ingestion because kids almost universally dislike bitter flavors. Denatonium carries no toxic effects, particularly in the quantities used by HappyLand. HappyLand's use of denatonium would discourage most children from swallowing a Princess Bead and discourage almost all children from swallowing multiple beads. I understand from Dr. Tuchmont's affidavit that

Joey swallowed 25 Princess Beads, all of which were rings. This is surprising. Children rarely swallow more than one bead of neutral taste. Given the foul taste, I would not have predicted that any child older than age one (when taste buds are relatively developed) would ingest more than one Princess Bead. Joey had a slight cold on the day that he died. Sickness tends to dull one's sense of taste. That, coupled with the fact that children of Joey's age tend to have less-acute senses of taste, helps explain the fact that Joey ate so many beads.

B. Adequacy of Warning Label

The age restrictions are very clear. HappyLand told purchasers that the toy was intended for users of age 9 and older. This was prominently placed. The age restriction was reinforced by the symbol that says children younger than 3 years old should not possess the Beads. That label is less conspicuous and clear.

The box warns against consumption, identifying that the Beads are "small parts," which puts parents on further notice that the Beads could pose a risk to young children. The box also warns that the product may be toxic. While a ubiquitous and thus somewhat diluted warning, this still puts parents on notice of the potential chemical danger. These warnings, however, are not prominently placed.

C. Carefulness of Joey Davis's Supervision

The accounts of Davis and Miller differ in several important respects. Not surprisingly, Davis's account makes Davis appear to be a much more attentive and careful parent than does Miller's account. This could be an instance of both Miller and Davis seeking to avoid blame for inattentiveness.

Still, Miller and Davis paint a largely consistent picture of what transpired. I commend Davis and Miller for observing Joey's interest in the Princess Beads and for taking steps to discipline Joey when he approached, handled, or mouthed the Beads. I am convinced that both Davis and Miller repeatedly told Joey not to play with the Beads.

It is also my conclusion that Miller and particularly Davis did not do enough to curb Joey's use of the Princess Beads. The Beads were repeatedly left in the same location—the coffee table in the living room—that was physically accessible for a child of Joey's height and reach. Both Miller and Davis observed repeated instances when Joey showed an interest in the Toy. They also observed that Joey's interest was more than visual; they saw that he wanted to touch and mouth the Toy, particularly the rings. Given the accessibility of and Joey's interest in the Toy, Miller and especially Davis should have taken much greater efforts to keep Joey from mouthing the Toy. Their carelessness is, in my view, inexcusable. If one accepts Miller's account, Davis also should have been more vigilant in reading the warnings labels on the Princess Beads box.

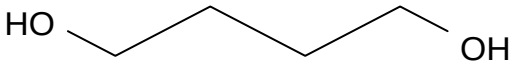
V. CONCLUSION

The Toy was designed in a way that made it attractive and reasonably likely to be swallowed by children of Joey's age and family situation (specifically, a child with an older sister within 10 years of his age). Joey's gender and the swallowing of so many beads make this particular scenario unlikely. The rings are more visually appealing to young children but the pearls are easier to grasp. The warning labels on the Princess Beads box adequately identified the age restrictions and the type of behavior to be avoided. Finally, given that Brett Miller and Andy Davis saw the warning signs, they should have done more to prevent Joey from swallowing the Princess Beads.

In many respects, and assuming that Joey's death was caused by ingesting the Toy, Joey's death was avoidable.

Material Safety Data Sheet

1,4-Butanediol



Section 1 – Substance Identity and Company Contact Information

Name	1,4-Butanediol	**Synonym**	Tetramethylene glycol
Company Identification	Coltrera Chemicals, 2700 Westown Parkway, State Center, ML 55555, USA, 555-715-1993		

Section 2 – Chemical Composition and Data on Components

Chemical Name	1,4-Butanediol	**CAS#**	110-63-4
Hazard Symbols	None	**Risk Phrases**	None

Section 3 – Hazards Identification

Potential Health Effects Avoid eye contact (irritant), and ingestion. Ingestion may cause nausea, vomiting and unconsciousness. Effects of chronic overexposure may include renal or liver damage.

Section 4 – First Aid Measures

Eye Contact	Flush eyes with water for at least 15 minutes. Seek medical attention if irritation develops.
Skin Contact	Wash affected area with soap/water for 15 min. Seek medical attention if irritation develops.
Inhalation	Move exposed person to fresh air if large amounts are inhaled.
If Swallowed	Seek medical attention. If conscious, rinse mouth and drink large amounts of water.

Section 5 – Accidental Release Measures

Dilute with water and mop up or absorb with inert dry material. Dispose in appropriate waste container. Clean surface with water according to local and regional authorities. Wear suitable protective clothing.

Section 6 – Handling and Storage

Store in a dry, cool place away from heat, sparks and flame. Evaporate residue from empty containers under a fume hood.

Section 7 – Exposure Controls and Personal Protection

Work area should include ventilation and eyewash station. Goggles, lab coat, gloves, may be used for personal protection. In cases of large spills, a full suit and self-contained breathing apparatus should be used.

Section 8 – Physical and Chemical Properties

Physical State	Liquid, oily	**Color**	Colorless
Melting Point	18º C	**Boiling Point**	230º C

Section 9 – Toxicological Information

Acute toxicity

No Federally-recognized cancer risks.
Minimal toxicity
LD-50 (oral, rat): 1,525 mg / kg
LD-50 (oral, mouse): 2,062 mg / kg
LD-50 (oral, rabbit): 2,531 mg / kg

Section 10 – Ecological Information

Easily eliminated from water. No problems anticipated when introduced to treatment plants in appropriate concentrations.

Section 11 – Disposal Considerations

Dispose according to local and regional regulations. This substance is not specially regulated with respect to disposal.

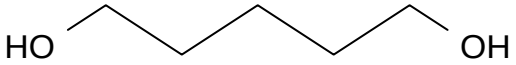
Section 12 – Other Information

Revision Date: March 13, 2008

Revised 12.7.2010

Material Safety Data Sheet

1,5-Pentanediol



Section 1 – Substance Identity and Company Contact Information

Name	1,5-Pentanediol	**Synonym**	Pentamethylene glycol
Company Identification	Coltrera Chemicals, 2700 Westown Parkway, State Center, ML 55555, USA, 555-715-2006		

Section 2 – Chemical Composition and Data on Components

Chemical Name	1,5-Pentanediol	**CAS#**	111-29-5
Hazard Symbols	None	**Risk Phrases**	None

Section 3 – Hazards Identification

Potential Health Effects Avoid skin contact, eye contact, ingestion, inhalation. There are no known medical conditions that are recognized as being aggravated by prolonged exposure to this product.

Section 4 – First Aid Measures

Eye Contact Flush eyes with water for at least 15 minutes. Seek medical attention if irritation develops.

Skin Contact Wash affected area with soap/water for 15 min. Seek medical attention if irritation develops.

If Swallowed Do not induce vomiting if victim is unconscious or having seizures. Rinse mouth and drink 2-4 cups water or milk. Seek immediate medical attention.

Section 5 – Accidental Release Measures

Dilute with water and mop up or absorb with inert dry material. Dispose in appropriate waste container. Clean surface with water according to local and regional authorities.

Section 6 – Handling and Storage

Store in a dry, cool place away from heat. Evaporate residue from empty containers under a fume hood.

Section 7 – Exposure Controls and Personal Protection

Work area should include ventilation and eyewash station. Goggles, lab coat, gloves, and respirator may be used for personal protection. In cases of large spills, a full suit and self-contained breathing apparatus should be used.

Section 8 – Physical and Chemical Properties

Physical State	Liquid, oily	**Color**	Colorless
Melting Point	-16º C	**Boiling Point**	240º C

Section 9 – Toxicological Information

Acute Toxicity **Slightly toxic in case of skin contact, ingestion, or inhalation.**
LD-50 (oral, mouse): 6,300 mg/kg
LD-50 (oral, rabbit): 6,100 mg / kg
LD-50 (skin, rabbit): > 20,000 mg / kg

Section 11 – Ecological Information

Easily eliminated from water. No problems anticipated when introduced to treatment plants in appropriate concentrations.

Section 12 – Disposal Considerations

Dispose according to local and regional regulations. This substance is not specially regulated with respect to disposal.

Section 14 – Other Information

Revision Date: June 12, 2009

American Toxicology Journal July 2007

GHB: Separating Myth from Truth

By W. Freeland, M.D., Midland University & J. Hartsfield, M.D., Midland University

In 2006, the nation was engrossed with the saga of Bailey Reynolds, the teenager kidnapped and held for ransom. After her parents' good friend Tyler Perry was convicted of her kidnapping—largely on the basis of police testimony that chloroandromine was found in Perry's car—it was determined that chloroandromine was not actually the substance with which Bailey was intoxicated. Rather, the child's babysitter had used gamma-Hydroxybutyric acid (more commonly known as GHB) to incapacitate her victim. Ever since, the public has heard a lot about GHB—some of it true, some of it not. This article sets the record straight on GHB.

What is GHB?

GHB, the abbreviation for gamma-Hydroxybutyric acid, has other scientific names, including 4-hydroxybutanoic acid and sodium oxybate. GHB is a chemical compound whose chemical is $C_4H_8O_3$. It is odorless and colorless. GHB can take powder (crystalline) or liquid form.

Where does GHB come from?

GHB comes from four sources (one endogenous and three exogenous). First, most animals, including all humans, produce GHB endogenously (internally). A healthy human body only produces trace amounts of GHB (except after death, when GHB levels spike). The second source of GHB is the laboratory. GHB can be synthesized in labs but since the substance is regulated in many jurisdictions, those labs are usually clandestine. The third source of GHB is metabolism. Several other compounds—referred to as metabolic precursors—are metabolized into GHB. These precursors include 1,4-butanediol (an organic compound used as a solvent for the manufacture of plastics and polyurethanes) and gamma-Butyrolactone ("GBL," a solvent and reagent used industrially and recreationally). Studies show that 98% of GBL and 99% of 1,4-butanediol (eventually) will be metabolized into GHB once they enter the human body. Finally, GHB comes from fermentation: beer and wine have small, but detectable amounts of GHB.

Does GHB have any medical uses?

Since 1960, GHB has been used as an anesthetic in many nations, including the US. It has also been used fairly universally to treat insomnia and narcolepsy. Some doctors have prescribed GHB to treat depression, alcoholism, and cataplexy. One American company has done substantial research showing the potential value of GHB in the treatment of Fibromyalgia. GHB's side effects are mentioned later in this article.

Does GHB have any non-medical uses?

Beginning in the 1970s, GHB has been used as a recreational drug. Like many drugs, GHB-based drugs would follow a typical pattern: chemists would create a drug that would be metabolized to GHB; the government would ban that particular drug; and the drug chemists

would create a new drug whose compounds would metabolize into GHB. The Federal Analogue Act now bans all substances substantially similar to illegal drugs if made for consumption. Nonetheless, GHB-based drugs persist, particularly in clubs. GHB-based drugs have various street names, including Liquid Ecstasy, Fantasy, Cherry Meth and Grievous Bodily Harm. Most recreational users consume GHB in 1 tablespoon doses (approximately 2.5 grams).

GHB is known as a "date rape drug." An attacker will sneak GHB in powder form into a victim's drink, often beer or liquor to mask GHB's salty taste. The drug will incapacitate the victim, impair the victim's memory, and prove hard to detect more than 24 hours after ingestion.

GHB is also a component of many industrial products. It is used in paint thinners, nail polish remover, plastics, wood cleaners, and drilling oils, among other products.

Some athletes, particularly bodybuilders, use GHB-related products to improve performance. Limited research shows GHB can increase production of human growth hormone, a hormone that has clinical benefits but has been used by athletes in violation of their sports' regulations.

What effect does GHB have on humans?

The effects of GHB on animals (other than humans) are well known. Its effects on humans, however, are less documented because it is not considered safe to test GHB on humans. Moreover, GHB's effects on non-human animals tell us little about its effects on humans because many chemicals affect humans differently than other animal species—in fact, sometimes they affect humans more harshly. Thus, most useful research regarding the effects of GHB on humans (discussed below) comes from recreational use and unintended use (e.g., poisoning from industrial products, as the victim of an attempted date rape).

GHB can produce effects similar to that of alcohol or ecstasy, including euphoria, enhanced sensuality, and sociability. These effects motivate the recreational use of GHB. Adverse effects of GHB can include agitation, amnesia, blurry vision, coma, common cold, confusion, dizziness, drowsiness, hallucinations, headache, hypoesthesia, incontinence, increased consumption of alcohol, memory loss, muscle cramps, nausea, respiratory arrest, shortness of breath, somnolence, tremor, unconsciousness, vertigo, and vomiting.

GHB affects the human body within one to two minutes after it enters the system, and symptoms are apparent within 15 to 30 minutes. Peak plasma concentrations appear within 20 to 45 minutes of administration of GHB. GBL metabolizes about 20% faster and 1,4-butanediol metabolizes about 20% slower. The duration of GHB's effects can vary. Usually the effects last one to three hours. In other circumstances, GHB can have long-term or even permanent effects including: burns to the stomach, throat or mouth; or even death. When GHB does cause death, it is most often by causing respiratory arrest, although cardiac arrest, bradycardia (dangerous slowing of heart rate), and hypoventilation (respiratory depression or inadequate ventilation) are also common ways for GHB to prove fatal. Reports indicate that, for the past five years, there have been approximately 5,000 GHB related emergency room visits per year in the United States. More than 90% of those visits were attributed to recreational use.

GHB can be addictive, though it requires sustained and consistent use. Using GHB once or twice cannot result in addiction or physical dependence. Those who seek to end dependence on GHB often experience withdrawal, which itself can be life-threatening.

How does GHB cause these effects?

GHB affects the human body only if it is introduced internally by ingestion, injection, or some other method (mere touching, for example, produces no discernible effects on humans). While there is a still much unknown about the method by which GHB affects the human body, toxicology has deduced that GHB is rapidly absorbed into the body after introduction and it affects the brain and body in several ways. GHB is a naturally occurring neurotransmitter of the central nervous system. GHB acts as a depressant, inducing a sleep-like state by acting on two separate neural receptors in the brain—GABA-B receptors and GHB receptors. These two receptors, found in the cortex and some subcortical regions of the brain (hippocampus, amygdala, septum, basal ganglia and substantia nigra), regulate the brain's production of dopamine and glutamate.

Once it enters the digestive tract, GHB is absorbed into the blood vessels and carried to the brain. GHB can also be administered intravenously. When GHB is introduced to the body at low doses, it binds almost exclusively to the GHB receptors in the cortex, stimulating the release of glutamate. If levels of GHB increase, it begins to bind to the GABA-B receptors, inhibiting the secretion of dopamine and inducing GHB's sedative and hypnotic effects. In particularly high doses, GHB can bind to a selective GHB receptor agonist (a subtype of the GHB receptor), causing seizures.

1,4-butanediol is a liquid precursor for GHB. When ingested, 1,4-butanediol enters the blood stream through the digestive tract and is carried to the liver. In the liver, two enzymes— alcohol dehydrogenase and aldehyde dehydrogenase—convert 1,4-butanediol into GHB. The enzymes that act on 1,4-butanediol are the same enzymes that metabolize alcohol. First, alcohol dehydrogenase converts 1,4-butanediol into intermediate aldehyde gamma-hydroxybutyraldehyde, then aldehyde dehydrogenase then oxidizes it into GHB. The process of conversion from 1,4-butanediol to GHB appears to take approximately five minutes.

Does GHB affect everyone in the same fashion?

No. GHB can have a range of effects on humans. Those effects depend on a number of factors, including: the size, age, health, medical history, and genetic makeup of the person; the dosage of GHB; and whether the GHB is introduced into the system with any other substances that affect the central nervous system, such as alcohol. Generally, GHB has a greater effect in large doses; it affects women more sharply than men; it affects children more harshly and quickly than adults; it affects smaller, lighter people more easily than it affects larger, heavier people; it affects someone more quickly if administered by injection rather than orally.

The factor that most greatly determines the extent to which someone will be affected by GHB is the dosage. While the same dose may affect different people differently, generalities can be stated. Negligible or trace amounts of GHB—for example, the amounts produced naturally by a

normal human body or the amounts fermented in beer or wine—do not have any discernible effects on humans. More precise results can be obtained, however, by introducing the weight of the subject. That is because dosage is best measured in terms of the weight ratio of GHB to the person taking the GHB. For example, one gram of GHB will generally affect a 100 pound person in the same way that two grams will affect a 200 pound person. The average adult male weighs 195 pounds (88 kg) and the average adult woman weighs 165 pounds (75 kg). Here are the typical effects of GHB by dosage:

Table 1

Oral Dosage (mg GHB/ kg body weight)	**Effect**	**Resulting GHB concentration in the bloodstream (mg GHB / L blood)**
10	Amnesia, temporary hypotonia (muscle weakness)	20
25	Dizziness, somnolence (state of near sleep), drowsiness	55
50	Loss of consciousness	90
65	Coma, unarousable loss of consciousness	120
150*	Death	300

Because the figures in Table 1 are measured as a fraction of a person's body weight and the number of liters of blood in their body, they are independent of size. In other words, the figures in Table 1 apply equally to adults and children; they apply equally to small persons and large persons. The figures in Table 1 assume a single dose of GHB. If someone takes the same total amount of GHB in multiple doses (i.e., less GHB per dose), the effects will be less severe. The figures in Table 1 also assume that the subject is not a recreational user who has developed a tolerance for GHB. The reason that the fatal dose—150 mg/kg—has an asterisk in Table 1 is that no experiments have ever been conducted on human subjects that involved fatal doses. The figure of 150 mg/kg is derived from a backwards calculation. Toxicologists know the concentration of GHB normally found in those killed from GHB overdoses (300 mg/L); they also know the relationship between dosage and resulting bloodstream concentration (approximately 0.5 L/kg); and from those figures, toxicologists have approximated that 150 mg/kg is a lethal dose. This is consistent with anecdotal evidence from emergency room patients.

Table 2, below, illustrates the corresponding dosages of GHB that cause the effects listed in Table 1. Note that Table 2 is not the result of additional research beyond that provided in Table 1. Rather, it is a straight mathematical computation of the figures supplied in Table 1. Because the effects of GHB on humans are best predicted by the dosage of GHB consumed, and because the dosage is best expressed as a ratio of GHB to body weight, the figures in Table 2 illustrate the dosages that will cause the listed effects for persons weighing 33 pounds, 71 pounds, 165 pounds, and 195 pounds (the average weights for a three-year-old, ten-year-old, adult female and adult male in the United States). Note also that while the figures in Tables 1 and 2 relate to

dosages of GHB, they also represent the dosages of GBL and 1,4-butanediol that will cause the listed effects (as 98% of GBL and 99% of 1,4-butanediol metabolizes into GHB upon ingestion).

Table 2

Oral Dosage (mg GHB/ kg body weight)	**Effect**	**Corresponding Dosages of GHB That Cause Such Effects for Persons of Various Weights (measured in mg GHB)**			
		15 kg (33lbs) (weight of average 3 year old)	32 kg (71 lbs) (weight of average 10 year old)	75 kg (165 lbs) (weight of average adult female)	88 kg (195 lbs) (weight of average adult male)
10	Amnesia, temporary hypotonia (muscle weakness)	150	320	750	880
25	Dizziness, somnolence (state of near sleep), drowsiness	375	800	1,875 (1.875 grams)	2,200 (2.2 grams)
50	Loss of consciousness	750	1,600 (1.6 grams)	3,750 (3.75 grams)	4,400 (4.4 grams)
65	Coma, unarousable loss of consciousness	975	2,080 (2.08 grams)	4,875 (4.85 grams)	5,720 (5.72 grams)
150*	Death	2,250 (2.25 grams)	4,800 (4.8 grams)	11,250 (11.25 grams)	13,200 (13.2 grams)

How can GHB overdoses or poisonings be treated?

While there is no universally accepted GHB antidote, an antidote is rarely necessary. Most people intoxicated by GHB recover naturally within three hours and without long-term effects. Doctors treating those suffering from GHB overdose should observe and maintain the subject's vital signs, ensure open airways, and consider the use of physostigmine to counteract GHB's sedative effects. Doctors should be careful when deciding whether to administer medication to someone suffering from GHB, since GHB is most potent when combined with other drugs.

MIDLANDS CITY AUTOPSY REPORT

Case No.:	19-2-163-GM	Date of Autopsy:	August 9, 2009
Decedent:	Joseph James Davis	Sex:	Male
Age:	02	Date of birth:	October 2, 2006
Performed by:	Cynthia Tuminelli, M.D.	Assisting:	Chase Tuchmont, M.D.

GENERAL EXAMINATION

The body appears to be that of a well developed, well nourished, male child. The body is 33 inches tall, weighs approximately 33 lbs (15 kg), and appears compatible with the stated age.

The deceased was presented in a standard issue Polk Hospital gown and is now nude. Personal effects accompanying the body include a green and yellow jersey bearing the number twelve, jeans, underwear, white socks, and black Spiderman light up athletic shoes.

The body is identified by parent, Andy Davis, as Joey Davis. Identification was confirmed by treating physicians, medical records, and dental records.

EXTERNAL EXAMINATION

Rigor mortis is fully developed in extremities, jaw, and neck. Liver mortis is fixed and present in the posterior dependent portions of the body. The deceased has dark brown scalp hair averaging 2 ¼ inches in length. The eyes are closed, conjunctivae are free of petechiae, corneae are clear, and irises are brown. Ear canals and nostrils are unremarkable. Teeth are natural and in good repair.

The neck is straight. The chest and abdomen are symmetrical and flat. The genitalia are those of a circumcised male child. Testes are descended bilaterally, and the anus is atraumatic. Legs are straight and symmetrical.

The body presents with no bruising and, other than evidence of medical therapy, the external examination is unremarkable. There is no evidence of external injury.

EVIDENCE OF MEDICAL THEREAPY

An endotracheal tube is present in the mouth. Puncture wounds are recent in both antecubital fossa.

INTERNAL EXAMINATION

HEAD and NECK: The brain weighs 1143 grams. The cerebral hemispheres, midbrain, and pons are symmetrical. Cross-section reveals no contusions, hemorrhages, infarctions, or tumors. Some cerebral edema is present. Neck shows no abnormalities or signs of infection. Larynx present with abrasions in the musculature. The cartilaginous and bony structures are intact, and the thyroid is unremarkable.

BODY CAVITIES: The body is opened with a Y-shaped incision. The organs are present in their usual positions and relationships. There are no adhesions or abnormal fluid collections.

CARDIOVASCULAR SYSTEM**:** The heart weighs 60.2 grams and has a normal shape. The epicardial and endocardial surfaces are smooth and glistening. The coronary arteries follow the

distribution of right dominance, and are free of atherosclerosis. The myocardium is reddish-brown and firm with dark red central discoloration of the left ventricle and septum consistent with hypoxic injury. Pulmonary arteries present with hypoxic vasoconstriction at the precapillary level.

RESPIRATORY SYSTEM: The right and left lungs weigh 89 and 77 grams respectively. The pleural surfaces are smooth, glistening and have red-purple coloring. Cross-section reveals the parenchyma to be congested and moderately edematous. There are no pulmonary emboli. Some aspirated food remains in the airways, and there is evidence of a bronchospasm.

LIVER AND BILIARY SYSTEM: The liver weighs 418 grams. The hepatic capsule is smooth, glistening and intact. The parenchyma and gall bladder are unremarkable.

GASTRO-INTESTINAL TRACT: The stomach and intestine are unremarkable. The esophagus contains partially digested food. The esophagus also displays abrasions and inflammation. Abrasions may be from vomiting, insertion of the tracheal tube, and/or choking on a foreign object.

RETICULOENDOTHELIAL SYSTEM: The spleen weighs 37 grams and has a smooth intact dark red-purple capsule covering a red-purple moderately firm parenchyma.

URINARY SYSTEM: The right and left kidneys have a normal shape and weigh 47grams and 46 grams respectively. The capsules strip with ease revealing smooth cortical surfaces. The collecting systems, ureters, and bladder are unremarkable. The urinary bladder contains 84 cc's of urine.

MICROSCOPIC EXAMINATION:

Heart: Sections of the heart are ischemic and reveal contraction band necrosis secondary to hypoxia. There is no acute or chronic inflammation. No significant fibrosis is present. No evidence of tumor or previous infarction.

Lungs: Sections show marked capillary congestion and moderate pulmonary edema, especially on the alveoli. Focal amorphous material consistent with aspirated gastric contents is present.

Kidneys: No significant or acute chronic inflammation.

OPINION

Medical evidence, confirmed by visual observation of ER staff, places death at 1402 hours on August 8, 2009. Medical records indicate the deceased aspirated and went into respiratory arrest. The respiratory arrest triggered hypoxia, cardiac arrest, and ultimately death.

The toxicology report, performed under the direction of Dr. Tuchmont, indicates 148 mg/L of gamma-Hydroxybutyric acid in the deceased's blood approximately one hour before death. The condition of the body, particularly the lungs, is consistent with drug overdose. While the GHB could have triggered respiratory arrest, that determination cannot be made by autopsy alone.

_____

Cynthia Tuminelli
Chief Medical Examiner

RECORD OF OUTPATIENT VISIT

Date of visit: October 5, 2008

Patient name: Joseph James Davis (minor; accompanied by parent Andy Davis)

Patient DOB: October 2, 2006

Insurance: ☐ Yes ☑ No

Physician: Julie Brockman, M.D.

Physician's remarks:

Parent brought child to the emergency room after he appeared to be having trouble breathing. I observed symptoms consistent with asthma but was unable to make a formal diagnosis.

Because the condition did not appear to be immediately life-threatening, I discharged patient but advised parent to see a respiratory specialist as soon as possible and recommended Dr. Bo Rello.

Breckenridge County General Hospital

2600 Catlin Ave • State Center, MD • (715) 555-3116

STATE OF MIDLANDS : CIRCUIT COURT : BRECKINRIDGE COUNTY

---:

Andy Davis, as parent and natural parent of :
Joseph Davis, a minor, : Case No. 10-CV-1017 ECC
:
Plaintiff, :
:
- versus – :
:
HappyLand Toy Co., :
:
Defendant. :

---:

The deposition of Erin Swift, taken pursuant to the provisions of the Code of Civil Procedure of Midlands pertaining to the taking of depositions, taken before AMY ARONSON, a Notary Public within and for the State of Midlands taken this 20th day of November 2009.

ERIN SWIFT, called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY PLAINTIFF'S COUNSEL

Q: My name is Marcus Neiman and I represent Andy Davis. HappyLand Toy Company is represented by counsel and I would ask him to identify himself for the record.

A: My name is Matt E. Reesey and I represent HappyLand Toy.

Q: Ms. Aronson is a notary public and I am going to ask her to swear you in.

ARONSON: Erin Swift, please raise your right hand. Do you solemnly affirm that the testimony you give today will be the truth, the whole truth and nothing but the truth.

A: I do so swear.

Q: Erin would please state your name for the record, spelling your last name.

A: My name is Erin Swift. My last name is spelled S-W-I-F-T.

Q: Erin, please describe your background before joining HappyLand.

A: I went to Curtin University in Perth, Australia. I earned a bachelor's in Management. After that, I worked for tech start-up companies in the Seattle area as a business and risk advisor. I then moved east and worked for a couple of larger firms, also as a business and risk advisor.

Q: Tell me about your work for HappyLand.

A: In 2005, I joined the company as the Risk Assessment Officer. My primary duty is to evaluate the potential hazards that HappyLand products pose. At all of the design and prototype phases of product development, I identify as many potential hazards as possible. I use a multi-step risk assessment profile. On the profile, I list all the potential hazards and then I make

recommendations as to how each risk I identify can be minimized. With children's toys, there is always some inherent risk. Kids being kids, you just never know what they will do.

Q: Is it fair to say that HappyLand is in the business of manufacturing children's toys?

REESEY: Objection to the form of the question and I also object that the question calls for an answer outside the scope of her expertise and knowledge. You may answer.

A: Yes. Board games, toys that allow children to be creative, those sorts of things.

Q: What sorts of risks do board games pose?

A: None, depending on who is playing them. Every toy or game is different. Board games, for instance, where small pieces are used to designate the players, pose very little risk to a middle school kid. A kid that age is not likely to use the piece for something other than what it is designed for, though as I said before, kids will be kids. But that same piece poses a greater risk to a toddler, who might place it into his ear or nose or God-knows-where.

Q: What else do you do in order to assess the risks HappyLand products might create.

REESEY: Objection! Are you deaf?!? Swift just said that not all products create risk once the target audience is identified. Stop mischaracterizing the testimony.

NEIMAN: No, I am not deaf, I hear just fine, meaning there is no reason for you to yell your objections. I did not get my law license out of a Cracker-Jack box. And because I assume you didn't either, I shouldn't have to remind you to confine your objections to just stating the basis therefore. You know speaking objections are inappropriate and I will not tolerate another.

REESEY: Listen bud, I don't know who you think you are talking to, but I will state my objections in any manner I choose. If you don't like it, we can call the Judge right now and get a ruling. Just ask your questions and leave my objections to me.

Q: Erin, where you have identified a risk posed by a particular product, is there anything else you do beyond listing it on the risk profile and identifying the likely audience?

A: Yes. I send the risk profile, the initial and revised target audiences and whatever else I have compiled about the product to our outside counsel's office. After outside counsel gets back to me, I then communicate what they have to say to people in the company that I think should know this kind of information.

Q: Thank you. I want to switch gears now and talk about the Princess Beads project. Did you perform a risk assessment profile on Princess Beads?

A: Yes.

Q: What risks did you identify, if any?

A: I noted that the beads swelled-up when they were sprayed with water. I was concerned that, when swelled, the beads might be a choking hazard.

Q: Would placing the beads in your mouth get the beads wet enough to swell?

REESEY: Objection – this question is ridiculous – unless a child had saliva glands that worked like a car wash, where would the spray effect come from?

Q You may find the question ridiculous, but the witness may answer.

A: Yes, so I told Quinn Brown, the designer of Princess Beads. Quinn seemed concerned.

Q: Why is a potential choking hazard an issue for a company like HappyLand?

A: Choking hazards are a liability nightmare. Having specialized in toy-related risk management for the last ten years, I can definitively say that when a company is required to place a choking hazard warning label on a toy's box, it reduces the overall number of units sold, regardless of the intended audience. From a safety, as well as a business standpoint, a toy is much better off if that label is not on the box.

Q: What happened after you told Quinn Brown about the potential choking hazard?

A: Quinn told me that the team would work on a feasible alternative. I was surprised by Quinn's answer. I figured the potential choking hazard would kill the project. I knew Princess Beads had budget problems as it was, given the projected sales for a toy without a warning label. I figured that the project would never be profitable if we stuck the choking hazard label on it. Anyway, the next thing that happened as far as I was concerned was that Blake Lexington, our CEO, contacted me on Saturday, May 16, 2009

Q: What did you and Blake Lexington discuss?

A: Blake sent me an email about Princess Beads. Blake told me that with one fix, Princess Beads could be saved. Blake wanted to substitute one chemical for another. Blake proposed using 1,4-butanediol instead of 1,5-pentanediol. Not only did the 1,5-pentanediol cause the beads to swell, it was also prohibitively expensive. Switching to 1,4-bute would be cheaper and using it wouldn't cause the beads to swell.

Q: When you heard that proposal, what did you do?

A: I did a risk assessment of 1,4-bute. I sent Blake an email saying that while 1,4-butanediol was potentially dangerous, as long as we took the proper precautions and gave adequate warnings, we could get away with using it.

Q: I'm showing the witness an email from Blake Lexington's Outlook program. The email says it was sent May 16, 2009 at 4:59 PM. The subject line of the email reads, "Re: Your question re: the jewelry set." Do you recognize this email?

A: Yes. This is the email I sent to Blake Lexington about the 1,4-butanediol.

Q: Please read the second paragraph.

A: "Based on my understanding of the product, it is not intended to be eaten and its likely audience is the 7-10 age group. To minimize the risk of exposure, however, I recommend, in addition to the standard warning about choking, reasonably prominent warnings regarding supervision and non-consumption. I also recommend, in addition to the standard appropriate-age recommendation, an additional warning that the product should not be used by kids under the age of 3."

Q: No further questions.

EXAMINATION BY DEFENDANT'S COUNSEL (REESEY)

Q: Let's talk some more about 1,4-butanediol. What else do you know about its use in non-consumable manufactured products?

A: Well, 1,4-bute is used in a variety of household products. I also learned that Midlands does not have a statute or regulation that requires a manufacturer to disclose that the product contains 1,4-bute.

Q: Did you identify any risks associated with using 1,4-bute in Princess Beads?

A: Not really, no. The way HappyLand was going to use 1,4-bute in this product alleviated my concerns. Hazards associated with using 1,4-bute arise from the fear that an unintended user would try to separate the 1,4-bute from the rest of the product and then consume it. Here, given that the target audience was kids at least old enough to attend elementary school, it was unlikely that any kids would separate the 1,4-bute from the beads.

Q: How did you reach that determination?

A: I exhaustively reviewed literature in the field on the uses of 1,4 bute in manufacturing. I found no articles or other information stating that consuming products coated with 1,4-bute would cause the chemical to separate from the glue compound in which it would be mixed.

Q: What did you do next?

A: I informed our outside counsel of the switch.

Q: What did outside counsel tell you?

NEIMAN: Objection – actually, I don't really have an objection, but I want to note that you are asking your own witness to waive attorney-client privilege and that once you waive it for these purposes, I intend to explore the remarks of outside counsel and any writing in which they may have made reference to 1,4-bute as relates to Princess Beads. Ms. Swift, you can answer.

A: Outside counsel signed off on the principle that as long as the box included a warning against consumption, which I recommended too, though only in an abundance of caution, that they would be o.k. with using 1,4-bute on the beads. They also recommended that the box include an age recommendation – that an age recommendation would minimize risk. I passed on these recommendations to Blake Lexington in the email I was shown a few minutes ago.

Q: Let's cut to the chase. Are Princess Beads safe?

A: Absolutely safe! We did everything we could to make sure that the toy was not defective in any way. There was no evidence, and there is still no scientifically valid evidence that I have seen, that putting the beads in your mouth would actually cause the 1,4-bute to separate from the glue compound. If the beads are used like they are supposed to be used, the fact that HappyLand coated them with a solvent containing 1,4-bute poses no harm.

Q: No further questions.

NEIMAN: Then we are concluded. Madam notary, would you please prepare a transcript of this deposition so that Erin may review it. Erin, once the transcript is prepared and delivered to you, you have 30 days to review it and make sure that it accurately reflects the answers you gave. If it does not, you should contact your attorney so as to deal with any inaccuracies. If the transcript does accurately reflect your answers, you may sign where provided indicating as much. If you do not sign within the 30 days, your answers will be assumed to have been accurately recorded.

FURTHER DEPONENT SAYETH NAUGHT

STATE OF MIDLANDS : CIRCUIT COURT : BRECKINRIDGE COUNTY

---:

Andy Davis, as parent and natural parent of :
Joseph Davis, a minor, : Case No. 10-CV-1017 ECC
:
Plaintiff, :
:
- versus – :
:
HappyLand Toy Co., :
:
Defendant. :

---:

I hereby certify that I have read the foregoing transcript of my deposition given at the time and place aforesaid, consisting of pages 1 to 4, inclusive, and I do again subscribe and make oath that the same is a true, correct and complete transcript of my deposition so given as aforesaid, and includes changes, if any, so made by me.

_____ November 20, 2009

Erin Swift Date

Subscribed and sworn to before me this 20th day of November 2009

_____ November 20, 2009

Amy Aronson Date My commission expires: May 1, 2010

CONFIDENTIALITY AGREEMENT

September 1, 2008

Alex Johnson
1234 Jungle Drive
Midlands, USA

Re: Confidential Information of HappyLand Toy Co.

Dear Alex

In connection with your employment as Assistant to the CEO with HappyLand Toy Co. ("HT"), HT will provide to, or make known to, Alex Johnson (hereinafter "Johnson" or "You") certain material, including, but not limited to, non-public proprietary information concerning the business, finance, payroll, employment records, assets and liabilities (together, the "Confidential Information") of HT. As a condition of your employment with HT, Johnson agrees to treat the Confidential Information in accordance with the following terms and conditions of this Confidentiality Agreement ("the Agreement"):

1. Johnson agrees the Confidential Information is proprietary and confidential and will be used by Johnson for the sole purpose of carrying out Johnson's duties with HT. Unless previously consented to in writing by HT, Johnson will not disclose the Confidential Information to any third party for any reason under any circumstances. Any violation of this Agreement or any other HT policy regarding Confidential Information is grounds for disciplinary action up to and including termination.

2. The term "Confidential Information" does not include any information: (a) that is or becomes publicly available (other than as a result of a breach by Johnson of this Confidentiality Agreement); (b) which is or becomes available to Johnson from a source other than HT; and (c) is known by Johnson prior to disclosure by HT.

3. In the event that Johnson is compelled by law to disclose the Confidential Information, Johnson shall provide reasonably prompt written notice to HT of any such requirement so that HT may seek a protective order or other appropriate remedy. Johnson agrees to cooperate with HT in any such proceeding, at the expense of HT. Regardless of whether a protective order or other appropriate remedy is obtained, Johnson will only furnish that portion of the Confidential Information that is required by law to be produced.

4. If Johnson's employment with HT ends, upon HT's request (whether orally or in writing), Johnson shall promptly return to HT the Confidential Information furnished to Johnson; alternatively, Johnson shall promptly destroy all such Confidential Information and any analysis, computations, studies or reports prepared by Johnson and/or any extracts from the Confidential Information contained in such analysis, computations, studies or reports. Johnson agrees that in the event that the destruction option is chosen, Johnson shall certify, in writing and under oath, that all copies of all Confidential Information have been destroyed. Any Confidential

Information provided to Johnson orally shall continue to be subject to the terms of this Confidentiality Agreement. Further, Johnson agrees not to make this information available to any third party, orally or in writing, following the expiration and/or termination of the Agreement.

5. HT makes no representation or warranty as to the accuracy of the Confidential Information. HT shall have no liability to Johnson relating to, or resulting from, HT's or Johnson's use of the Confidential Information.

6. It is understood and agreed that money damages would not be a sufficient remedy for a breach of this Confidentiality Agreement and that in addition to all other remedies available at law or in equity to HT, HT shall be entitled to equitable relief, including but not limited to injunctive relief and specific performance, without proof of actual damages and without having to post a bond or other security in pursuit of such relief. It is further understood and agreed that because money damages are difficult to establish in the event of a breach of this Agreement by Johnson, that Johnson shall pay to HT the sum of one million dollars ($1,000.000) plus HT's costs and reasonable attorneys' fees in the event a breach of this Agreement is established by HT.

7. Johnson's obligations of confidentiality under this Confidentiality Agreement shall expire five (5) years from the date of this Confidentiality Agreement

8. This Confidentiality Agreement embodies the entire understanding between HT and Johnson with respect to Confidential Information and supersedes any prior agreements relating thereto.

9. This Confidentiality Agreement may only be modified in writing by the parties hereto.

10. This Confidentiality Agreement shall be governed by, and construed in accordance with, the laws of the State of Midlands. The parties hereto waive their right to trial by jury relating to any breach hereof.

Please confirm your agreement to the foregoing by signing and returning one originally executed copy of this letter to me.

Very truly yours

HappyLand Toy Co.

Adrian Hommel
General Counsel

READ AND AGREED TO:

_____	September 1, 2008
Alex Johnson	Date

Blake,

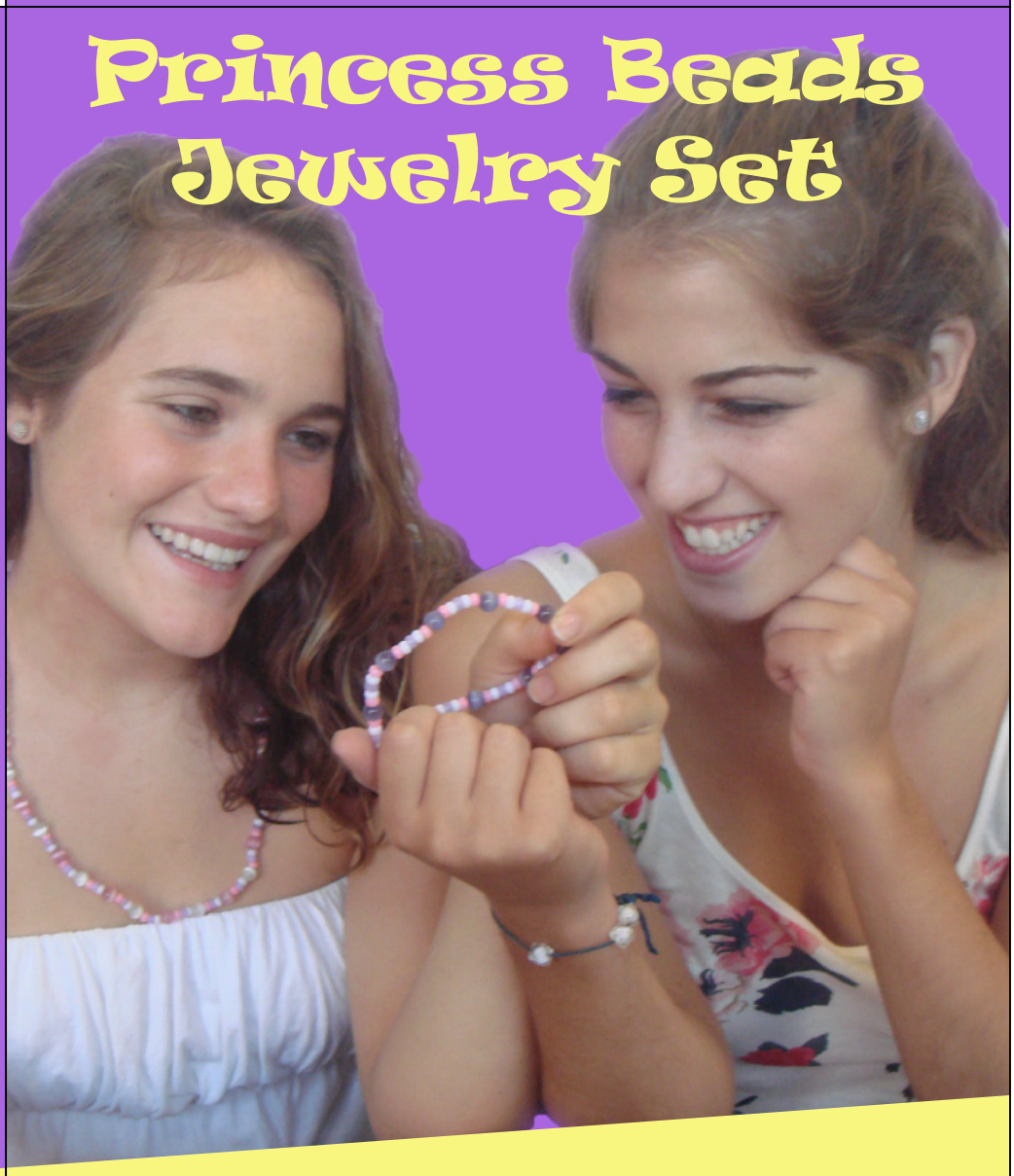
I think you need to rethink whether to use 1,4-B in the Beads. That stuff turns into GHB. We're playing with fire. Do you know how bad it would look if this came out?

I know I said by email on 5/16 that 1,4-B is ok if we use the right warnings. But I only said that as a CYA – and because I thought that's what you wanted to hear.

ES

Princess Beads

Princess Beads
Jewelry Set



9+

Bracelets!
Necklaces!
Earrings!
AND MORE!

So Easy to Use!

Step 1: Arrange Beads any way **YOU** want them

***REMEMBER:** At least one Ring between each Pearl!*

Step 2: Spray Beads with Water Spray Bottle

Step 3: Wait 10 minutes

Voila! You're a Princess!

Also from Happyland:

Tapping Tones Musical Shoes

Bouncing Baby Bubble Basket

"What Does the Lion Say?"

9+

Contains:
-200 Pearls
-500 Rings
-1 Water Spray Bottle

Contenido:
-200 Perlas
-500 Anillos
-1 Botella Atomizadora de Agua

44100 0041

WARNING: Remove all packaging before giving to a child. Retain packaging for future reference.

WARNING! Choking hazard. Not for consumption. May be toxic if swallowed.

0-3

ADVERTENCIA: Retire todos los envases antes de darle el producto a un niño. Conserve el envasado para futuras referencias.

ADVERTENCIA! Peligro de asfixia. No para el consumo. Puede ser tóxico si se ingiere.

Revised 9.6.2010

AFFIDAVITS

AFFIDAVIT OF QUINN BROWN

After being duly sworn upon oath, Quinn Brown hereby deposes and states as follows:

My name is Quinn Brown. I live in Midlands at 130 W. 4th Street. Toy design has always been my passion. I've been designing stuff since I was old enough to hold a glue stick. I kept designing plenty of gadgets through high school. For college, I went to Gershbain Design School in New York where I majored in Product Design. I learned a lot there, but I realized that if I wanted to design toys for a living, I had to start as soon as I could. I got an offer from HappyLand and accepting was a no-brainer. My other offer at the time was from the Haughey Toy Company, famous for developing the line of dolls with big cackles. The pay at the Haughey Toy Company is good, but HappyLand does all its own manufacturing, marketing, and, best of all, designing. I joined HappyLand in 2004 as a Project Leader, which meant my own design team and free reign over what projects I wanted. It was and still is my dream job.

Blake Lexington founded HappyLand and served as its CEO. Lexington is an amazing and inspiring leader. It's really obvious that Lexington is in this business for the right reasons. Lexington made millions years ago, so I know Lexington is doing this for the love of the kids. Lexington is also a great boss—always encouraging, always patient, always open-minded. I can't say enough good things about Lexington.

HappyLand started me at a base salary of $80,000 annually and gave me a $5,000 raise every year. For products that originate from my designs, I get 1% of all net profits as a commission. When I first started out at HappyLand, I didn't really get the difference between "gross receipts" and "net profits," so when I saw a report saying the company was projecting that we'd sell just over $2,000,000 of the very first toy I ever created, I got all excited thinking about how I was going to spend my own personal $20,000. Not so much. That toy sold for $29.99, but once you included parts, manufacturing, shipping, and general overhead, I found out later that

each one cost us $28.53 to make. Total profit to Quinn Brown: $1,013.30. That experience was an expensive lesson for me about the need to always keep my eye on the costs of the toys I design, and I've gotten a lot better at it since then. The most I've ever made from commission on one toy is about $140,000 over 3 years and the next most is about $90,000 over 4 years.

One product that originated from my designs is the make-your-own-jewelry set called the Princess Beads. The idea was completely my own. I first had the idea in January 2008 and I knew right away it was going to be amazing. The idea behind the Princess Beads is really simple: I wanted girls to be able to make their own jewelry. There are already a lot of kits that allow kids to string beads together, and there are many costume jewelry sets aimed at the younger crowd. But I wanted my product to be even easier for the girls to use. Ideally, I wanted a box of pretty beads that would become sticky when sprayed with water and then harden in place when they dry. The first name that came to me was Princess Beads. I thought this would be a great product for girls in high school. They could make their own jewelry. And since the product was going to be aimed at an older and more mature crowd, we wouldn't have to be as worried about choking hazards or other sorts of misuse.

Of course, the challenge was finding the technology to make the toy. I needed the Beads to become sticky only after they became wet. Otherwise, the Beads would clump together in the box and the whole toy would be pointless. I had no idea how to do it. I'm no scientist. Fortunately, being a Project Leader means I can leave the hard math and science to the whiz kids in our technology department and I can stick to coming up with the great idea. So I contacted our chief engineer, Colin Rodriguez. Colin is amazing. He's the brains behind a lot of HappyLand's most successful products. On January 3, 2008, I walked into Colin's office and told him, "Colin, I'm ringing in the new year with a new idea. Princess Beads. Every high

school girl will be wearing them by the end of the year." I told him the plan and that I needed two solutions from him. First, I needed a way to make the Beads stick together when wet and then stay stuck together after they dried. Second, I needed a way to deal with the surface area issue. When two spheres touch, the point of contact is very small and possibly not enough to bind them together. Colin promised that his team would figure something out.

I didn't hear from Colin for a month and I became concerned. I went down to his lab sometime in February 2008 and asked him what the hold-up was. Colin told me that the "higher -ups" told him to focus on better toy ideas and to put the Princess Beads on the back burner. I'm positive that "higher-ups" meant CEO Blake Lexington. Usually I agreed with Lexington, but I really thought the Beads were going to be a big hit. For the next two months, I kept bringing up the Beads at weekly new project meetings with Lexington and the other toy designers. Each week, Lexington would tell me we needed to focus on products that we could create on a faster timetable. If we had just started designing the toy instead of worrying about how long it would take, we could have been finished before we had time to worry about it again! I wasn't meant for the corporate world.

Eventually I figured that HappyLand was never going to make the Beads and I even wondered whether I should strike out on my own and create the Beads. The problem was, I don't know how to handle the chemistry side of the product. But just as I was giving up all hope, I got an email from Blake Lexington on March 9, 2009, announcing that Lexington had green-lighted my Beads idea. This was the first I had heard about it. My first reaction was, why didn't Lexington call me before sending out the email? But then I put hurt feelings to the side and got to work on making Princess Beads a reality.

Lexington made it very clear that my Beads project would have the company's full

support. On March 10, Lexington told me by phone that I should take all the time I needed. "If you need six months, take six months. If you need a year, take a year. Take whatever time you need to make the Princess Beads perfect," Lexington said. I had never felt rushed before, and it was nice of Lexington to reaffirm the company's patience. During that same phone conversation, I asked Lexington what our budget was for the Princess Beads. "Don't worry about it. Just make the best toy possible," Lexington said.

I had four people working for me on the Princess Beads project. Colin Rodriguez was our chemistry guy, in charge of solving the bonding issue. Smith Michaels was our aesthetics guy. Basically, I told Smith to make the Beads "pop" – to make them look as pretty and instantly attractive as possible. DeLois Jones was in charge of product testing, surveying our target audience, and figuring out how we could make this toy as popular as possible. Finally, Mia George was in charge of materials other than beads—the water spray bottle, the instructions, and all of the packaging.

I set April 15 as our first status update. This date turned out to be fortuitous because two days earlier, on April 13, Lexington copied me on an email to Colin Rodriguez. Despite the earlier promises that we could have all the time we needed, Lexington was all of a sudden pushing Rodriguez to make a major breakthrough in just three days. But Colin did not disappoint. By April 15, he found a chemical called 1,5-pentanediol that would make the beads sticky when wet. "It's a little expensive, but I'm still trying to figure out how much we need," Colin told us. I responded, "We'll deal with that problem later. Just let Lexington know the good news." I had Colin send Lexington an email on April 15, 2009, letting Lexington know about the 1,5-pentanediol. Lexington sent us a positive response by email that same day.

Colin also solved the surface area problem by April 15, as well. The solution was to use

two sizes of beads. The larger size would be spherical pearls. The smaller size would be rings. (For clarity, I will refer to the smaller, ring-shaped beads as “rings” and the larger, spherical-shaped beads as “pearls.” When I say “beads,” “Beads,” or “Princess Beads,” I am referring to the toy as a whole—both the rings and the pearls.) The two sizes would accomplish two goals. They would give kids more options when designing their jewelry because they could vary not only the colors but also the sizes of the beads in their patterns. The other important effect was that the rings had more surface area on their flatter side, which made them perfect binding agents. Basically, you could create any pattern you wanted as long as at least one ring separated two pearls. Thus, you could attach a ring to a pearl; you could attach a ring to another ring; you just couldn’t attach a pearl directly to another pearl. Colin did amazing work.

By April 15, the rest of the team was zooming along, too. Mia was making good progress on the packaging. Smith had found the perfect beads: assorted bright colors, 5 millimeter diameter for the rings, 8 millimeter diameter for the pearls, very shiny and fun. DeLois had gotten good results from her product testing and had found that Smith’s beads would be a big hit. DeLois also found that high school girls were not going to be our best audience. Apparently, high-school girls tended to think the beads were a little silly. But girls between the ages of 8 and 14—basically, fourth grade through junior high school—loved the beads. We briefly considered aiming a variation of the product at boys, but product testing in that area showed the idea to be fruitless. Based on my team’s progress, I spoke with Lexington on April 16 and Lexington approved a next status update by June.

On Friday, May 15, I left work a little early to meet a friend from college who was visiting from Norway. I had turned off my cell phone because I didn’t want to be bothered. When I got home that night around midnight, I turned my phone back on and saw I had a

voicemail from Lexington from around 5:15 p.m. I didn't even know Lexington had my cell number. Lexington had never called me before. Lexington's voice on the message sounded somewhat frantic, asking how our progress was on the Princess Beads. I was confused. As a Project Leader, I was working on about a dozen other projects, but the Beads were the only one that Lexington asked about.

I was pretty worn out at that point, so I decided to email Lexington the next morning, May 16, with a status report. In that email, I explained to Lexington that we were having a few problems with the Beads. The design was taking longer than we anticipated. The 1,5-pentanediol was causing the beads to swell up when wet. That was a major concern of mine. I didn't want anyone to choke on the Beads, particularly young children or infants. And the 1,5-pentanediol was turning out to be way more expensive than I had expected, which would have put us between the rock of raising our target price (which I knew would decrease the total number of units sold) and the hard place of accepting a substantially lower per-unit profit margin. Lexington emailed Erin Swift, our risk assessment officer, to get the okay on an alternative Colin came up with, and that I proposed, called 1,4-butanediol.

Apparently, the 1,4 would have a lot of the same good effects as the 1,5 without the swelling, delay, or high costs. There is a significant difference in price between the two chemicals, which I told Lexington in an email. I know nothing about chemistry. But Colin brought me up to speed and I had the Material Safety Data Sheets for both the 1,4 and 1,5—and I figured those documents would tell me everything I needed to know. I read each MSDS and felt that 1,4-butanediol wasn't just eight times cheaper than 1,5-pentanediol; it was also safer.

Anyway, I thought Lexington's email on May 16 to Swift was perfect. We thought it might be good to switch to 1,4-butanediol and Lexington didn't micro-manage. Instead,

Lexington just tried to grease the wheels and get us approval. Swift wrote back later that day with approval from a risk-management perspective, Lexington forwarded me the email, and I told Lexington that Princess Beads would shift designs to 1,4-butanediol. Based on Swift's research, and concerns about a young kid swallowing the beads, we decided to coat the Princess Beads with 1,4-butanediol and label the product as being for kids aged 9 and up. All of the Princess Beads—both the rings and the pearls—were coated with 1,4-butanediol. HappyLand coated each pearl and each ring with 50 milligrams of 1,4-butanediol. With 700 beads in each box, that meant each box contained only 35 grams of 1,4-butanediol.

Once we made the switch to 1,4-butanediol, my teams and I had those beads done in weeks. We started advertising the Princess Beads in June 2009. It was such a thrill to see my product featured on HappyLand's television commercials! I love the jingle we played on the radio ads: *You don't need a castle to be a princess! / You don't need a crown to be the queen! / Just make yourself a Princess necklace / You'll be the coolest girl your school has ever seen!* By July 1, the Princess Beads were being sold online to families throughout Midlands and across the country. Each box contained 200 individual pearls, 500 individual rings, and one water spray bottle, and had a retail price of $19.99.

The Princess Beads were selling like umbrella drinks at a Jimmy Buffett concert—it seemed like every kid wanted multiple sets. That was the beauty of the toy. If a kid buys a dinosaur figurine or a water pistol, that's it, he has the toy and there is no need to buy a second toy. But Princess Beads could be used to make an infinite number of jewelry designs—bracelets, necklaces, anklets, all with unique patterns. If you wanted to make more designs, you could buy another box of Princess Beads. Our sales team told me that, by the end of July, we had sold 100,000 boxes of Princes Beads to 90,000 families. That's almost $2 million in revenue. Each

box cost us about $2 to produce, so that means our profits after one month were already more than $1.8 million! I did some quick math about the costs of advertising and labor and figured that the total cost per box for purposes of my 1% commission on net profits was just under $10 per box, which meant that I had already made more than $10,000. I figured this was just the beginning—once kids went back to school in August, the Princess Beads would sell even better. The Princess Beads were going to make me a millionaire.

All of that success and excitement came crashing down when I received an email from Blake Lexington on August 14, 2009. I was vacationing at the time, my first vacation in more than a year, when my Blackberry delivered the worst news of my career: the Midlands Department of Health was investigating the Princess Beads and Lexington had ordered a halt to the sales of the Princess Beads. Lexington was even contemplating a recall of the Beads we'd already sold. Apparently, one family claimed their kid had been killed by some Princess Beads (I don't know whether the kid supposedly swallowed rings, pearls, or both). Obviously, my heart goes out to that family—the Davises, I think.

But there was nothing dangerous about the Beads. Yes, the chemical binding agent we used in the beads was 1,4-butanediol, which can metabolize into GHB when ingested. Like I said, I'm no scientist. But I read all the literature about 1,4-butanediol and GHB, so I know that GHB is only dangerous in certain quantities. Each of our beads only contained 50 mg of 1,4-butanediol, which, from what I've been told, means a child weighing about 30 pounds—about a sixth of the weight of the average fully-grown adult—would need to consume about 50 Princess Beads for the Beads to prove fatal. That's absurd. When designing the Princess Beads, I assumed no kid would swallow 50 beads. I didn't do any research on this point, but that's just common sense.

Of course, I took other precautions—design precautions and labeling precautions. Since the Princess Beads were aimed for junior high school girls, not for infants or children who might swallow them, I wanted to make the Princess Beads as unattractive as possible to young children. I briefly considered making the color of the Beads very dull—black, brown, gray—but Smith Michaels threw a hissy fit, correctly pointing out that our target audience—especially the younger edge of our target audience—would want shiny colors. Unfortunately, I knew that shiny colors would make the Beads more attractive to very young children as well. So instead of changing the colors, I changed the taste. I had Colin Rodriguez research different tastes and odors we could apply to the Beads so that children would find the Beads foul and unappealing. We did testing of 25 different chemicals, observing how ten two-year-old kids reacted to different flavor Princess Beads. We found a winner: denatonium, a bitter chemical compound. Denatonium is an odorless, colorless substance that, even in the smallest amounts, is unbearably bitter to most humans. It has no known health risks to humans. When we put denatonium on the Beads (both the rings and the pearls), no kids—not even the ones who put everything in their mouths—ingested a Princess Bead more than once. In other words, once they tasted the denatonium, they stopped eating the Princess Beads. This completely assuaged my concerns. There wasn't nearly enough 1,4-butanediol in a single bead (ring or pearl) to hurt anyone, so if a kid wouldn't eat more than one Princess Bead, no one could possibly get hurt.

Nonetheless, HappyLand took additional precautions with the packaging. Every box of Princess Beads says, "Not for consumption." The Princess Beads were designed so that girls could make themselves jewelry—not so that young kids could swallow them. They don't even look like candy! The warning is right there on the box. It's the parents' job to monitor their children. Our warning label also included two age restrictions. The box says the Beads are for

kids ages 9 and up, and it also says that children younger than 3 years old should not be playing with the Beads. I hear that the child who died was younger than 3. Again, I feel terrible for that family. But as a toy designer, I can only do so much. I can only tell people how to use the toy—I can't make someone follow the directions.

Of the Available Exhibits, I am familiar with the following and only the following: Exhibits 8, 9, 10, 11, 12, 13, 15, 16, and 17 (which are all emails that I either sent or received); Exhibits 20 and 21 (the Material Safety Data Sheets that I reviewed for 1,4 butanediol and 1,5-pentanediol, respectively); Exhibit 28 (the packaging for the Princess Beads); and Exhibit 29(d) (the Princess Beads that HappyLand manufactured). I hereby attest to having read the above statement and swear or affirm it to be my own. I also swear or affirm to the truthfulness of its content. Before giving this statement, I was told it should contain everything I knew that may be relevant to my testimony and I followed those instructions. I also understand that I can and must update this affidavit if anything new occurs to me until the moment before opening statements begin in this case.

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Quinn Brown

Subscribed and sworn before me on this, the 18th of March, 2010.

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Susan Coffey, Notary Public

AFFIDAVIT OF ANDY DAVIS

After being duly sworn upon oath, Andy Davis hereby deposes and states as follows:

My name is Andy Davis. I live at 107 Myers St. Apt. 3B, Midlands City, Midlands. I was married to my spouse Lee Davis until Lee died in June 2008 in a freak car accident. Lee and I had two children together, Hillary and Joey. Hillary was born August 1, 1999. Joey was born October 2, 2006. Lee's death was really hard on Hillary. Joey was too young to understand.

Joey was generally a happy child. He loved to play—with other kids, with adults, with dogs and especially with toys. He had so much energy! In general, Joey was pretty healthy. The only exception was that sometimes he would have trouble breathing. Starting around his first birthday, Joey would have occasional episodes in which he would start gasping for air, wheezing and clutching his chest. These episodes happened every month or two, and each episode would last anywhere from 2-3 minutes to 10 minutes. Joey's episodes usually happened in the morning or right before he went to bed, and they happened more often during bad weather. I took Joey to a doctor in October 2008. The doctor said that if the breathing problems continued, I should take Joey to a specialist. She even recommended a local specialist. But I didn't have the money. Unfortunately, Joey's breathing problems never improved and the episodes kept happening; the last one I saw was the day after Hillary's 10th birthday.

In November 2008, I lost my job at a local super market. Since then, I've gone from one temp job to another. I've been a real estate agent, a receptionist, a telemarketer, you name it. Since I was laid off, none of my jobs has paid well or provided health insurance. Almost every dollar I make goes to rent and groceries. We're not on food stamps and the kids have enough to eat, but we've had to make a lot of sacrifices. For example, because we don't have insurance, I can't take the kids for doctor visits as often as I know I should. Christmas and birthdays are

always the hardest. Joey never cared what he got so long as there was a lot of noise and a party. Hillary cares but she knows times are tough, so she doesn't ask for much.

So when Hillary asked me for Princess Beads for her 10th birthday, I could hardly say no. On July 24, 2009, I went online and bought a box of Princess Beads. It cost $19.99. The box said that Princess Beads was a make-your-own-jewelry set. It was made by HappyLand, so I figured it was probably high quality. According to the box, if you got the beads wet, they became sticky and you could stick the beads together to form a necklace or bracelet or some other piece of jewelry. I saw the picture on the Princess Beads box and I remember that I had seen a lot of Hillary's friends wearing Princess Beads. That's probably why she wanted them.

I gave Hillary the Princess Beads on her 10th birthday, August 1, 2009. Hillary was so happy. For the next few days, Hillary was constantly playing with the Princess Beads. (For clarity, I will refer to the smaller, ring-shaped beads as "rings" and the larger, spherical-shaped beads as "pearls." When I say "beads," "Beads," or "Princess Beads," I am referring to the toy as a whole—both the rings and the pearls.) Hillary would rearrange the beads and, when she finally settled on a pattern, she would spray the beads with water and let them sit. A few minutes later, Hillary would be wearing a new bracelet or necklace made out of Princess Beads. I was thrilled Hillary was enjoying her birthday present! I just wished she hadn't left the Beads everywhere. I found them in the couch, on the carpet next to the couch, and all over her room. I told Hillary to keep the Beads in one place. Unfortunately, that one place was the living room coffee table. Despite my repeated instruction to keep the beads in the box, Hillary always left the Princess Beads loose all over the coffee table, including on August 8, 2009,

I was a little concerned about Hillary always leaving the unused Beads on the coffee table in the living room because that put the beads within Joey's reach. Joey was at Hillary's birthday

party when she opened the Princess Beads. He pointed at the box and got very excited. When I saw him get excited about the Princess Beads, I checked all of the warnings and information on the Princess Beads box. The box said the Beads are for children age 9 and up. No problem there, since Hillary had just turned 10. The box also said, "Choking hazard. Not for consumption. May be toxic if swallowed." When I read that, I made sure to be cautious. When I was home, I kept a careful eye on Joey—exactly like I did even before I got Hillary the Princess Beads. On the few occasions I saw Joey reach for the Princess Beads, touch them, or put them in his mouth, I told him to leave them alone. One time I said, "Stop putting the beads in your mouth!" Another time, I said to Joey, "Those are big kid toys. They're not for you!"

Joey seemed far more interested in the rings than the pearls, probably because the rings look like candy. The fact that they look like candy made me concerned that he might try to eat them. On the other hand, the rings (unlike the pearls) seemed too small to choke on. I figured that while Joey shouldn't eat the rings, they weren't nearly as big a threat as the pearls. Still, I was vigilant about preventing Joey from eating either rings or pearls.

The Princess Beads weren't the first thing I'd seen Joey put in his mouth. He started teething when he was about eight months old and continued teething after he turned two. I gave him teething rings. I read up on what you're supposed to give your kids and what you're not supposed to give them. I know that teething is natural and that, even apart from teething, young children like to put things in their mouth. I know you're supposed to give them toys to chew on and suck on, but you need to make sure the toys don't have any small parts that can be swallowed or choked on. After Joey turned two years old, I noticed that his teething became less frequent but he still liked to put things in his mouth. I often saw Joey put his fingers in his mouth. I saw Joey bite his stuffed animals and chew on his GI Joe figurines. In March 2009, I

had to stop him from chewing Lee's Mardi Gras beads, which were a souvenir from a trip Lee and I had taken to New Orleans a few years before. I even had to take away his building block toys because he kept chewing on them and I was afraid he might choke on them.

In addition to monitoring Joey to make sure he didn't put the Princess Beads in his mouth, the other precaution I took was telling Brett Miller on August 3, 2009, to make sure Joey didn't play with or eat the Princess Beads. Brett is Joey's babysitter. I paid Brett $8 an hour and usually threw in a few dollars for food. Brett began babysitting for us a month after Lee died and continued babysitting for us until August 8, 2009. We used to have a nanny with a lot of professional experience—her name was Mary—but when Lee died, I didn't have the income to afford Mary. Brett was a pretty good babysitter, always available on short notice. Brett had a great tone with Joey and kept an eye on Hillary, too, though Hillary always insisted she didn't need a babysitter. Brett always made sure Joey was in bed at a decent hour. It's hard to know how attentive Brett was because, obviously, I wasn't there—if I could be with Joey 24/7, I wouldn't have needed a babysitter. Sometimes, though, I'd see Brett with Joey as I was getting ready to leave or as I returned home. Also, Hillary shared her thoughts on Brett. Between what I saw and what Hillary told me, it seemed like Brett could sometimes be a little distracted—on the computer, on the phone, or watching television. I would have preferred that Brett be more attentive but nothing ever went wrong—until August 8, 2009.

August 8, 2009, was a Saturday and it was a rare day off from work. At the time, I was working two temp jobs, which meant working a lot of nights and weekends. That day, I had an interview for a full-time position. I had Brett come over around 10 a.m. so I could focus on getting ready and preparing for the interview. Joey had a slight cold—just sniffles and a runny

nose—and I told Brett that soup was in the refrigerator. I also told Brett that I had noticed Joey teething a lot recently and that Brett should give Joey some ice to suck on if necessary.

I left the apartment at 11 a.m. The interview started at noon. At about 1:00 p.m., I glanced at my phone and noticed five missed calls from Brett. Brett knew not to call unless it was an emergency. I freaked out, excused myself from the interview, and called Brett from the hallway. No answer. I checked my voicemail and saw that Brett had left a message at 12:25 p.m. I could tell something was wrong as soon as I started listening to the message: Brett was speaking much faster and louder than normal and I could hear the stress in Brett's voice. Brett sounded scared and Brett's voice kept getting louder and faster during the message. Brett said that Brett had found Joey shaking on the carpet about ten minutes before and that they were on the way to Polk General Hospital. I left the interview and headed to the hospital.

I got to the hospital at 1:30 p.m. The nurses sent me to an emergency room. Joey was in a bed, motionless. His eyes were closed. He was hooked up to tubes. Brett and Hillary were there, too. Brett came right up to me and said, "I'm sorry, Andy, I'm so sorry. It's my fault. I left the living room for two seconds and when I came back…." Brett trailed off, sobbing.

The doctor, Dr. Casey French, pulled me aside. "Joey is comatose," he explained. "Your babysitter reports finding Joey shaking and unconscious on your living room floor. Joey arrived here at 12:30. He was disoriented. Joey was seizing at one point. Joey vomited and then soon lost consciousness. His vital signs are good and we're still trying to figure out what's going on. I noticed that Joey vomited a lot of small plastic objects. We collected the objects and we will have them tested. It is rare, though not impossible, for children to choke on things of this size, but choking doesn't explain the seizing or the unconsciousness, especially since he didn't appear to be choking on anything when he arrived at the hospital." The doctor had me stay in the

waiting room for the next half hour. I sent Brett home. I told Brett, "You were supposed to watch Joey. You were supposed to watch my son. If you had been paying attention, none of this would have happened." That was the last time I saw or spoke to Brett, though Brett has tried to apologize a bunch of times. I don't even take Brett's calls anymore or listen to Brett's voice messages. As soon as I see I have a message from Brett, I just delete it.

When Brett left, Hillary looked at me and said, "It wasn't Brett's fault. Brett wasn't the one who left the Princess Beads out." She started crying. At about 2:00 p.m. on August 8, 2009, Dr. French came to the waiting room and told me he wanted to talk with me separately. I told Hillary I would be right back. Dr. French led me down the hallway and told me that Joey had died. He said it was respiratory arrest. Dr. French said he didn't know what caused Joey's death, but he and the other doctors would find out. It's been more than a year since Joey died and I don't feel like the wound has even begun to heal. I think about my son every day. Joey's death has really affected Hillary too: I wish I could afford to send her to grief counseling.

In the week after Joey's death, I learned from Dr. French and Dr. Tuchmont that, in their opinion, Princess Beads caused Joey's August 8, 2009 seizure. I had given Dr. Tuchmont Hillary's Princess Beads so Dr. Tuchmont could test them. According to Dr. Tuchmont, the Beads (both rings and pearls) contain GHB, the same chemical used as a date rape drug. I just can't understand how a toy company could put something like that in a children's toy.

I was so angry. I dialed the HappyLand corporate office. Some secretary answered. I said I was Andy Davis and that I wanted to speak with someone about Princess Beads. I was put on hold. I don't know what I was thinking. I just wanted to tell them what the toy had done to Joey. I was about to hang up when someone else answered the phone. The person said, "This is Blake Lexington. I'm the CEO at HappyLand. Can I help you?" That's right, they put the CEO

on the phone. I told Lexington that Princess Beads had poisoned my two-year-old son. Lexington asked me how Joey had gotten the beads. I asked what that had to do with anything. Then Lexington told me that, even though it was terrible that something had happened to Joey, it probably wasn't related to Princess Beads and that even if it was, I shouldn't have let Joey play with the toy. I started yelling that the toy wasn't safe for ANY kid and that I was going to make HappyLand Company pay. Lexington said, "Go ahead and try. HappyLand isn't responsible for Joey's problems because Joey is younger than nine years old." I called a lawyer that afternoon. I'm suing HappyLand for so much money that Hillary and I will never have to worry about money again—enough that HappyLand never does anything like this again.

Of the Available Exhibits, I am familiar with the following and only the following: Exhibits 1-2 (Exhibits A and B to the Complaint); Exhibit 24 (Record of Outpatient Visit, dated October 5, 2008); Exhibit 28 (Labels for packaging of Princess Beads); Exhibit 29(b) (Hillary's Princess Beads) and 29(d) (generic set of Princess Beads); and Exhibit 30 (Photograph of Joey Davis). I hereby attest to having read the above statement and affirm it to be my own. I also swear or affirm to the truthfulness of its content. Before giving this statement, I was told it should contain everything I knew that may be relevant to my testimony and I followed those instructions. I also understand that I can and must update this affidavit if anything new occurs to me until the moment before opening statements begin in this case.

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Andy Davis

Subscribed and sworn before me on this, the 18th of March, 2010.

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Susan Coffey, Notary Public

AFFIDAVIT OF TRISTAN FROST

After being duly sworn upon oath, Tristan Frost hereby deposes and states as follows:

My name is Tristan Frost. I'm a journalist. I went to Northwestern and double majored in journalism and acting, with a minor in finance. I work for Blitz News Network (BNN) and I specialize in undercover journalism. I like to think of myself as a modern day Upton Sinclair. It is my personal mission to expose corporate America for all its excesses. I once went undercover as part of the Walton gubernatorial campaign and broke the story about one of Walton's staffers cheating on her taxes. I also once went undercover as Ronald Victory's personal assistant, and ultimately sold the movie rights from my information to Trifecta Movie Studios.

My most recent assignment was going undercover at HappyLand Toy Company. HappyLand had been sued by several competitors for allegedly stealing toy ideas and I wanted to get the scoop. There were also rumors that one of the country's largest toy manufacturers, Griffin Industries, was considering a buyout of HappyLand. Finally, Lexington was rumored to be sleeping with movie star Alex Grace, one of the biggest celebrities in Midlands. Francis Leo, my editor and mentor at BNN, thought that these three reasons made HappyLand perfect for my next assignment. I actually thought it was a little small-time for me—I wanted to be uncovering the next Enron—but you don't argue with the boss. In July 2008, I applied for a job as CEO Blake Lexington's secretary and personal assistant. I'm pretty famous, so I knew I had to be careful. I created a fake name—Alex Johnson—and wore a disguise. I also got my hands on a fake driver's license and social security card and then whipped up a totally fictitious, but highly believable, resume. Finally, I asked some BNN journalists to pretend to be people who had formerly employed me as a secretary or personal assistant. I interviewed with Lexington, got the job, and started work at HappyLand on September 1, 2008. Francis Leo told me that I had one year—until September 1, 2009—to land a big story.

I signed a confidentiality agreement on September 1, 2008. I promised to, among other things, keep everything I learned at the company confidential. I laughed to myself as I signed. I never had any intention of honoring the agreement. The whole point of my employment was to dig up dirt so that BNN could run an exposé. Besides, the confidentiality agreement had a clause saying that any breach of the agreement would result in damages of one million dollars, and that was a small price to pay if I could break a big story.

I tried everything to find the dirt at HappyLand and I was in the perfect position. I was the personal assistant and secretary to the CEO, which meant I was privy to every document at the company. I listened in on Lexington's phone calls and even bugged Lexington's office so I could later listen to the few meetings to which I wasn't invited. Lexington was very busy, so every email sent to or from Lexington was also routed to my computer. I kept a private copy of every document I found that could even potentially be scandalous or newsworthy. I looked for proof of insider trading, lavish "corporate seminars" in Tahiti, and undeserved executive bonuses. Despite my best efforts, I found nothing. I looked for information that would indicate a sale of HappyLand to Griffin Industries, but found nothing. I searched for even the hint of a Lexington-Grace affair, but it turns out that the truth can be boring: Lexington was, in fact, a happily married and devoted spouse.

Moreover, HappyLand Toys was surprisingly well-run and always over-spent on research before releasing a product into the market. In my discussions with company founder Blake Lexington, the toy designers, or risk-management staff, I always found everyone at HappyLand to be very dedicated to product safety and quality. They were even diligent and conscientious about their financial reporting with internal auditors on board to keep the company finances in check. The upper management of the company was professional, ethical and dedicated to

corporate responsibility. In fact, they almost had me reconsidering my viewpoint on the entire corporate world I was trying to expose.

I remember one product in particular that HappyLand was considering releasing in January 2009. It was a game called Wall Ball, which came with an assortment of almost spherical balls of various sizes. The object was to toss or roll your balls closer to a wall (without hitting the wall) than your opponent's balls. The game had an elaborate set of rules that would challenge children of all ages. I sat in on the meetings in which Lexington discussed the Wall Ball product with Ari Budzinski, the project designer for Wall Ball. Budzinski told Lexington that Wall Ball was testing as well as any product HappyLand had ever tested, the sales projections topped $25 million in the first year alone, and the risk was low. "What risk?" Blake asked. Budzinski explained that, during testing, Wall Ball led to a negligible number of injuries to kids. "No way," Lexington said. "When it comes to children, no injury is negligible. I won't allow any product that might hurt children, no matter how much money it might make us." Lexington killed Wall Ball that very day and the product was never released.

While HappyLand's commitment to product safety and squeaky clean accounting were impressive, they were also causing me problems. On the first of every month, I updated Francis Leo on my progress. Before August 2009, I had nothing to report. At first—through 2008—Leo was very understanding and patient, telling me not to worry. But, like every other American company, BNN was struggling in late 2008 and early 2009, and the more BNN struggled, the less patient Leo became. By June 1, 2009, Leo told me I better find a story soon. By July 1, Leo told me I was running out of time. On August 1, Leo said, "You've been at HappyLand 11 months and you've found absolutely nothing. If you don't find something spectacular in the next month, you better hope HappyLand will keep you on as a secretary—because there won't be a

job waiting for you at BNN." I tried to protest but Leo was insistent: I would lose my job at BNN if I couldn't find a major story by September 1, 2009.

I love my job at BNN, and, especially given the job market at that time, I wasn't going to find anything nearly as good if I had to look elsewhere for employment. I thought hard about whether I had found anything newsworthy at HappyLand. The closest thing to scandal was the May 15, 2009 memo from the board of directors to Lexington. That memo threatened Lexington's job if Lexington didn't come up with a profitable toy idea soon. Ironically, Lexington and I were in similar situations. But this memo wasn't juicy enough to merit a story—or a year's worth of undercover work.

Then, on August 10, 2009, as I was polishing my resume, the phone rang at HappyLand. Our switchboard operator said it was an unhappy parent who wanted to speak to someone at the top. Normally, I would redirect the call or just take the caller's name and have Customer Service handle it. But my reporter's instinct kicked in—I saw the possibility of fireworks and I lit the fuse. I transferred the call to Lexington without telling Lexington who was on the phone. I didn't hang up after hitting "transfer"; instead, I listened in on the call. The parent was named Andy. I have met plaintiff Andy Davis since and I am certain that the voice was the same and, in fact, Andy Davis told me that Andy was the one who called on August 10, 2009.

That day, Andy said that Andy's two-year-old son, Joey, had just died from a GHB overdose caused by HappyLand's Princess Beads. Lexington expressed sorrow for Andy's loss and tried to calm Andy down. Andy yelled at Lexington, "I'm going to sue HappyLand for all it's worth!" Lexington asked Andy if Andy had read the product warnings for Princess Beads. "No, I didn't. Do they say anything about putting GHB in a kid's toy?" Andy responded. Lexington said that HappyLand would never put GHB in a children's toy and that there must be

a mistake. Lexington told Andy that Andy should contact HappyLand's legal department and that "we can work something out so that everyone wins," and that's when Andy lost it. "Everyone wins? I lost my son. I'm going to sue you and I'll say whatever I have to in order to bring down your company." Andy hung up. Lexington immediately came out of the office and I pretended I hadn't been listening. "Tell Legal I'm on my way down," Lexington said.

At that point, I started investigating the Princess Beads. The Princess Beads are a make-your-own-jewelry set. If you spray the beads with water, they get sticky. They come in two sizes—a smaller, ring-shaped size and a larger, pearl-shaped size. (For clarity, I will refer to the smaller, ring-shaped beads as "rings" and the larger, spherical-shaped beads as "pearls." When I say "beads," "Beads," or "Princess Beads," I am referring to the toy as a whole—both the rings and the pearls.)

The emails I recovered tell the story of what happened with the Princess Beads. I had saved the emails in case anything happened with the Princess Beads and it turned out to be fortuitous. All of the emails I produced to the parties in this lawsuit were printed directly from Lexington's email, to which I had access. Here's what happened. In March, Lexington gave the green light for Princess Beads. In April, Lexington told Brown and the Princess Beads team that they needed to move quickly on the Princess Beads and the team responded with the good news that they had solved the chemistry riddle of how to get the beads to stick together. They were going to use a chemical called 1,5-pentanediol.

In May, just after Lexington got the threatening memo from the Board of Directors, Lexington put some pressure on the Princess Beads team to hurry up. I've never seen Lexington so anxious and nervous as in the week after Lexington got that memo from the Board. Fortunately, the Princess Beads team found an alternative to 1,5-pentanediol that would be faster

and cheaper to manufacture. Lexington was elated. I must say, I was impressed with Lexington because, despite the pressure from the Board to release Princess Beads as soon as possible, Lexington still tried to be strict about product safety. Lexington asked Swift to assess the safety of 1,4-butanediol. Swift responded by email on May 16, saying that as long as HappyLand took certain precautions and used the right warnings, 1,4-butanediol would not be harmful.

But at 9 a.m. on Monday, May 18, Swift came by Lexington's office before Lexington had arrived. "Is Blake in?" Swift asked. I told Swift that Lexington would be in soon. "I'll just leave this on Blake's chair. Make sure that you tell Blake to check the chair," Swift said, as she held a single paper that appeared to be handwritten. Swift walked into Lexington's office and then left. As soon as Swift was out of sight, I snuck into Lexington's office and found the paper on Lexington's chair, which I will refer to as the Swift Note. I had seen Swift's handwriting before and the Swift Note appeared to be in Swift's writing. The Swift Note contradicted what Swift had said in an email to Lexington two days earlier, so I made a photocopy of the Swift Note and left the original in Lexington's office. When Lexington made it into the office around 9:30, I said, "Boss, Erin Swift came by while you were out and dropped a note off on your chair." I watched Lexington pick up the Swift Note and read it. The blood drained from Lexington's face, Lexington swallowed, and Lexington then put the note in the shredder. That same day, Lexington asked me to double-check whether 1,4-butanediol was banned by the Midlands Drug Prevention Abuse Control Act. I'm no chemist but I do know how to do a Google search. It took me about five seconds to find the Act, and it took me another ten seconds to do a search showing that it didn't list 1,4-butanediol among the banned chemicals. I told Lexington and Lexington looked relieved.

(Since Lexington shredded the original, I have the only copy of the Swift Note. In August 2009, I was subpoenaed by both parties in this lawsuit to produce all relevant documents in my possession. On September 3, 2009, I produced everything mentioned in the last paragraph of this affidavit except the Swift Note. The reason I did not produce the Swift Note in September 2009 is that, despite a thorough and diligent search of my records, I couldn't find the Swift Note. I eventually found the Swift Note on December 29, 2009. On December 30, 2009, I sent the Swift Note to the parties in the lawsuit and broke the story about it on BNN. The Swift Note had been in my files the whole time. I can't believe I missed it!)

After I had compiled all of this information, I went to my editor the same night Andy Davis called. Leo was thrilled. That was August 10, 2009, and I never went into work at HappyLand again. Instead, the next day, I was standing in front of the HappyLand building with a camera crew, breaking the story on HappyLand and Joey Davis. August 11, 2009 was the first time that everyone in America knew my name. It won't be the last.

Thanks to me, HappyLand Toys' greed was exposed and corporations are held to a higher standard every week by the BNN. Of course, this has also provided personal benefits. The Princess Beads didn't just save my job. The scandal was also the big break in my career. I won an Oski Award for my coverage of the Princess Beads scandal and Joey Davis's death. I wrote a book about my year at HappyLand called *Happy Happy Toy Toy*. It's 400 pages but, other than the 50 pages about Princess Beads, there's not a lot of dirt. My book agent, Denver Wallace, recommended that I wait until after the *Davis v. HappyLand* trial to start selling the book. I'm going to testify in that trial and I plan to use my testimony, and the trial as a whole, as a way to increase excitement about my upcoming book release. I realize that the more sensational my

testimony, the better my book will sell and the more money I will make. I'm a journalist, but I'm also a capitalist.

Of the Available Exhibits, I am familiar with the following and only the following: Exhibit 7 (the memo from the HappyLand Board to Lexington); Exhibits 8 through 17 (which are all emails that Blake Lexington either sent or received); Exhibit 26 (the confidentiality agreement that I signed using the name "Alex Johnson"); Exhibit 27 (the handwritten note from Erin Swift); Exhibit 28 (the packaging for the Princess Beads); and Exhibit 29(d) (the Princess Beads that HappyLand manufactured). I hereby attest to having read the above statement and swear or affirm it to be my own. By signing this document I swear to or affirm the truthfulness of its content. I understand that I have an opportunity to update this affidavit and that unless such is done prior to such a time whereas I may be called upon to testify in court, and that in such an event a copy of my updated statement is given to all parties involved in this case, I am bound by the content herein.

_____

Tristan Frost

Subscribed and sworn before me on this date, January 3, 2010.

_____

Sue Coffey, Notary Public

AFFIDAVIT OF REESE GARDNER

After being duly sworn upon oath, Reese Gardner hereby deposes and states as follows:

My name is Dr. Reese Gardner. I am a medical doctor with expertise in the area of pharmacology. I used to be the Chief Pharmacologist at St. Sebastian Hospital in Los Angeles. I then took a faculty position at Johns Hopkins Medical School. About ten years ago, I left Johns Hopkins and academia to become a consultant—essentially an expert witness. I've testified, either in court or by expert declaration, in more than 40 legal cases. In each case, I have testified for the defense and only for the defense. My credentials are more fully explained in the curriculum vitae I provided to both parties in this case. I have not included any of my many published articles in the resume because none relates to the issues in this case; specifically, I have never published on the topic of GHB or its related chemicals, including 1,4-butanediol.

On June 4, 2010, I was hired by the party that is calling me at trial. I charged my standard rate of $800 per hour, both for time spent in preparing for trial and at trial itself. I spent 35 hours on this case prior to trial. As is typical of my work as a consultant, my sources of information in this case were limited to documents. Specifically, I reviewed the affidavits of the following people: Dr. Chase Tuchmont, Andy Davis, Quinn Brown, and Brett Miller. I also reviewed certain documents and other materials, which are listed at the end of this affidavit. Other than the attorneys for the party that is calling me, I did not speak with anyone involved in this case, including the people whose affidavits I reviewed. Nor did I have access to the victim's body or any other physical evidence or exhibits. I did not perform any tests in this case. Nonetheless, the affidavits and documents I reviewed were sufficient to reach several conclusions. All of my conclusions are contained in this affidavit and all were drawn to the prevailing standard of certainty in my field.

By the time I got involved, it seemed that everyone in the media—and Dr. Tuchmont—

had jumped to the conclusion that HappyLand was responsible for Joey Davis's death. People, even scientists, are often too quick to blame corporations. I disagree with the conclusion that the Princess Beads that Joey swallowed necessarily caused his death. I disagree on two grounds. First, the theory that the beads fatally poisoned Joey is flawed in its own right. Second, there are several other alternate causes that cannot properly be ruled out.

There are many reasons to doubt the theory that the Princess Beads caused Joey's death. (Princess Beads come in two sizes. For clarity, I will refer to the smaller, ring-shaped beads as "rings" and the larger, spherical-shaped beads as "pearls." When I say "beads," "Beads," or "Princess Beads," I am referring to the toy as a whole—both the rings and the pearls. None of my conclusions in any way depends upon any distinction between rings and pearls.) As Dr. Tuchmont points out, Joey's GHB concentration—148 mg/L in his bloodstream—is below the GHB-blood concentration usually seen in those who are killed by GHB overdose. Usually, someone who dies from a GHB overdose has a peak GHB-blood concentration of 300 mg/L. Dr. Tuchmont says the peak concentration was likely higher than 148. I admit this is possible. GHB concentrations increase as the substance enters the bloodstream, then peak, and then finally decrease as the body metabolizes the GHB. No one can say with certainty when the GHB in Joey's blood peaked. GHB usually peaks after 30 minutes, but if the dosage was not administered orally or intravenously, but rather through the Beads, it would take longer to peak. In that respect, Dr. Tuchmont's theory makes sense. If Joey ate the beads between 12:00 p.m. and 12:10 p.m., as Miller indicates, the GHB would have peaked after the blood was drawn. That would explain why Joey didn't suffer respiratory arrest until approximately 2:00 p.m.

Of course, while the facts are consistent with Princess Beads causing Joey's death, that scenario is not certain. No studies have been done on how quickly GHB from Princess Beads

metabolizes, especially in young children. Moreover, given what is known about the dosage of GHB necessary to produce a fatality (150 mg of GHB per kg of body weight), Joey should not have died from 25 Princess Beads: it should have taken about 45 Princess Beads to kill him and, even then, the chemicals would need to metabolize fully in his system. In sum, there are just too many unknowns. How much GHB resulted from ingestion of 25 Princess Beads? When did Joey Davis ingest the Beads? Why did it take so long for his body to crash after he vomited? While the scientific community does not know the rate at which the 1,4-butanediol in Princess Beads metabolizes into GHB, we do know that once the GHB-causing agent is removed from the body, the concentration of GHB should peak no more than 45 minutes later. In this case, Joey Davis vomited at 12:35 p.m. on August 8, 2009, and there are no reports of Princess Beads remaining in his system after he vomited. Given that, his slowed breathing, slowed heart rate, and respiratory arrest should have occurred by approximately 1:20 p.m., when, in fact, those events occurred much later.

But even aside from the problems with the theory that the Princess Beads caused a fatal GHB overdose, there are four alternate causes. First, I cannot rule out the possibility that Joey suffered from a pre-existing respiratory illness. Joey had one doctor's visit after his second birthday. His physician referred Joey Davis to a respiratory specialist, probably because Joey's symptoms—shortness of breathing, gasping, wheezing, and episodic problems—are all consistent with asthma. Likewise, the timing of Joey's breathing problems—early morning or late evening, and on cold days—is also consistent with asthma. Asthma attacks can cause respiratory arrest. It is possible that Joey had undiagnosed, untreated asthma, he had an attack on August 8, and that attack caused fatal respiratory arrest. I concede that this does not in any way explain the GHB in Joey's bloodstream and it is hard to think that the GHB was only

coincidental. Still, it is possible Joey died because of asthma and not because of the Beads.

The second alternate cause is succinic semialdehyde dehydrogenase deficiency (SSDD), which is a disease that causes the body to overproduce GHB. Lacking a full medical history for Joey Davis, SSDD cannot be ruled out as the cause of his death. Although I reviewed all of the available medical records for Joey Davis, the family's economic situation was such that he did not have regular check-ups. As a result, there are no blood tests for Joey Davis taken in the year before he died. What if, for example, two weeks before he died—before he had any contact with Princess Beads—Joey had elevated levels of GHB? We would not know because his blood wasn't tested until August 8. SSDD can start at childbirth or it can start later in life, including as late as age 25. Nonetheless, SSDD is the least likely of the possible causes of Joey's death. Children with SSDD often exhibit severe symptoms, such as mental retardation, slowed physical development, eye problems, lethargy and laziness, and frequent seizures. Joey Davis suffered from none of these symptoms. Also, SSDD is usually genetic and I found no evidence that anyone in Joey's family has SSDD. Finally, if Joey had SSDD, I cannot explain why that disorder would have been fatal on August 8. To the extent that the Beads may have increased an already elevated level of GHB in Joey's blood, the Beads would still be a partial cause of death.

The third alternate cause of Joey's death is that another object produced Joey's elevated GHB levels. Many household objects include GHB or substances that metabolize into GHB. Dr. Tuchmont should have collected and tested the objects in Joey's home to see if any have GHB, 1,4-butanediol, or GBL. Absent that, it is impossible to rule out other products as the cause of death. However, I admit the babysitter's account points to the Princess Beads rather than other household items as the cause of Joey's GHB overdose. From what I gather, the Princess Beads were right next to Joey when he was found on the carpet and he had the Beads in his stomach

before he vomited them at the hospital. Moreover, the toxicology screen did not reveal the presence of any other chemicals that would be consistent with household products other than the Beads. Brett Miller did not report any products or items nearby Joey at the time he was found on the carpet on August 8. On a related note, I should point out that denatonium, while present in the Beads, did not contribute to Joey's death; it is a non-toxic substance, even to children.

The fourth alternate cause is one overlooked by the medical examiner: asphyxia. It is undisputed that Joey Davis swallowed the Princess Beads. If he choked on the beads, that could cause significant restrictions of his breathing. Prolonged choking can cause asphyxia, which can cause respiratory arrest and hypoxia. Asphyxia is a condition of severe oxygen deficiency produced by an inability to breathe. Where hypoxia develops slowly—as in altitude sickness—symptoms include headaches, fatigue, breathing troubles, dizziness, and nausea. In the case of severe hypoxia, where onset is rapid, symptoms include a loss of consciousness, coma, seizures, and death. Severe hypoxia usually includes a discoloration of the skin; it turns blue.

While several of Joey's symptoms are consistent with asphyxia and hypoxia resulting from choking on the beads, this alternate cause does not entirely fit the facts. Joey vomited the beads at 12:37 p.m. on August 8, 2009, but his heart rate and breathing didn't crash until 1:50 and he didn't suffer respiratory arrest until 2:00. If Joey was choking on the beads (as opposed to being poisoned by them), it doesn't make any sense that the most severe effects would occur more than an hour after the objects were removed from his system. That makes asphyxia unlikely. Also, according to the documents I reviewed, no one observed any discoloration of Joey's skin, suggesting that he was not suffering from hypoxia.

In sum, while each of these four alternate causes is imperfect, they cannot be ruled out, either. I think that respiratory arrest is the single most likely cause of Joey's death, GHB

poisoning is the single most likely cause of Joey's respiratory arrest, and the Princess Beads are the single most likely cause of the GHB poisoning. However, just because a particular cause—in this case, the Beads—is most likely does not mean that it meets the test for scientific certainty, that it is likely, or even that it is more likely than not. There are simply too many unknowns and flaws with Dr. Tuchmont's theory that the Princess Beads caused Joey's death. We may never know for sure what killed Joey Davis.

Separate from the question of whether the Princess Beads caused Joey's death, it is my opinion that HappyLand is being unfairly criticized. HappyLand did not use GHB in the Princess Beads; it used 1,4-butanediol. 1,4-butanediol does metabolize into GHB, but a lot of household items include 1,4-butanediol. Nobody is criticizing the leading plastics manufacturers. The only reason HappyLand's toy design is being criticized is because Joey Davis died. But Joey Davis wasn't supposed to eat the Beads any more than he was supposed to drink nail-polish remover. Moreover, the actual toy design was relatively safe. HappyLand only included 50 mg of 1,4-butanediol in each Bead. In my estimation, a child would have to consume more than 45 Princess Beads to put him at serious risk. I'm no expert on mouthing behavior, but while swallowing one bead is possible, but it seems unlikely a child would swallow 25 beads that are coated with an extremely bitter-tasting substance like denatonium, as Joey did. Finally, the proof is in the numbers. If Princess Beads are so dangerous, then why is Joey Davis the only person alleged to have died from ingesting the Beads? If the Beads were truly a threat to child safety, then we would have seen more GHB overdoses.

I dealt with GHB and 1,4-butanediol many times at St. Sebastian's. I am familiar with many articles concerning GHB, including Freeland and Hartsfield's *GHB: Separating Myth from Truth*. That article is an accurate and current summary of what is known about GHB. I agree

with that article in its entirety and I relied on it while forming my conclusions in this case.

That article shows that the public's view of GHB is misshaped. Yes, GHB can be dangerous if used improperly, but so can many substances. GHB carries important health benefits, medical treatments and industrial uses. Used properly, GHB won't kill anyone. There have been fewer than 75 reported deaths definitively caused by GHB since 1970. More people die from alcohol every day. GHB is known as the "date rape drug" but, in fact, there are at least three substances more common and more effective at rendering a victim helpless, including Rohypnol. Only 5% of all date rapes involve GHB.

Of the Available Exhibits, I am familiar with the following and only the following: Exhibits 1-2 (Exhibits A and B to the Complaint); Exhibit 3 (my Curriculum Vitae); Exhibit 22 (*GHB: Separating Myth from Truth*); Exhibit 23 (autopsy); Exhibit 24 (Record of Outpatient Visit); Exhibit 28 (Princess Beads packaging); and Exhibit 29(d) (the Princess Beads manufactured by HappyLand). I did not have access to the actual Princess Beads swallowed by Joey or tested by Dr. Tuchmont. I hereby attest to having read the above statement and swear or affirm it to be my own. I also swear or affirm to the truthfulness of its content. Before giving this statement, I was told it should contain everything I knew that may be relevant to my testimony and I followed those instructions. I also understand I can and must update this affidavit if anything new occurs to me before the moment before opening statements begin in this case.

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Reese Gardner, M.D.

Subscribed and sworn before me on this, the 14th of August, 2010.

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Susan Coffey, Notary Public

AFFIDAVIT OF BLAKE LEXINGTON (DEFENSE SIDE)

After being duly sworn upon oath, Blake Lexington hereby deposes and states as follows:

My name is Blake Lexington. I founded HappyLand Toy Company in 1998 and have been its Chief Executive Officer ever since. I knew I wanted to be in business since I was a kid. When I was in sixth grade, my friend Monica made Chinese throwing stars out of two pieces of paper. Like the other products I've marketed and sold throughout my career, I never figured out how to make the stars myself; I'm more of an idea person than a details person. But I did convince Monica we should form a "company" called Star Co., recruit other kids to make and decorate the stars, and then sell them to younger kids. It worked great until teachers started complaining about kids throwing the stars at each other; I guess they were worried about someone getting their eye poked out or something. I know it sounds stupid now, but we hadn't meant for people to throw the stars at other people and it never occurred to us that they'd do it. I learned an important lesson then: you can't just assume people will use things in the way you expect.

I was in such a hurry to found my first real company that I thought about skipping college entirely, but my parents convinced me I needed to make contacts. As fate would have it, HappyLand Toy Co. was born during my fourth year at Midlands State in a dive bar just off campus called The Palms. My friends Daniel and Heidi told me they'd come up with a really great toy. They'd lined up a local manufacturer but were having trouble getting stores to sell it and the few stores that would sell it wanted a huge piece of the action. I was a business and marketing major and said, "Forget the toy stores." Daniel and Heidi said I was nuts, but I explained if they distributed their own product, they wouldn't have to worry about getting shelf space. I told them to get a 1-800 number and throw all their money into advertising. We

incorporated HappyLand the next day. Daniel and Heidi never really wanted to run a company, so they were happy to have me handle the day-to-day operations.

HappyLand has come a long way since I started it, but many things have stayed the same. Now, as then, everything—from the conception of a toy to its ultimate sale—stays within the company. It is the ultimate way to control costs, and it makes us a lot nimbler in terms of bringing products to market.

One big thing that has changed is the scale of the operation. As of August 8, 2009, the day that Joey Davis went to the hospital, HappyLand had 330 employees and independent contractors working for it and owned a headquarters that we'd bought in 2007 for $5 million. Annual gross receipts were $38.5 million in 2005, $42.5 million in 2006, $47 million in 2007, and $32 million in 2008. Our corresponding profits for those years were $9 million (2005), $11 million (2006), $16 million (2007), and a loss of $1.9 million (2008).

Although it is a corporation, HappyLand's stock is not publicly traded. I own 25% of the company's stock, Daniel and Heidi own 5% each, and various other investors own 65%. The company has a board of directors, the majority of whom are selected by outside investors. My salary as CEO is $500,000 per year. I also earn a bonus and dividends based on HappyLand's performance: The most I ever earned was in 2007, when I got a total of $900,000 in bonus and dividends. In 2008 and 2009, each year I received $300,000 in bonus and dividends.

The biggest challenge for HappyLand's business model involves the volatility of the toy market. Every year, it seems like there are one or two huge new toys that make everyone rich, four or five new toys that make a lot of money, and a bunch of new toys that don't do much of anything. By 2005, HappyLand had established a solid library of previously released toys that together brought in a fairly reliable revenue stream and were enough to prevent the company

from ever facing serious financial jeopardy. Year-to-year profitability, however, still depended on releasing at least one fairly successful new toy each and every year.

We had some problems with that in 2008. Despite spending millions on research and development, the company hadn't been able to release any new toys and the company had posted an annual loss for the year. The amount of the loss wasn't very big (just under $2 million) and I was confident that our long-term prospects remained strong. That said, this was the company's first annual loss ever and I knew that the board of directors was up in arms over it.

I was thrilled when Quinn Brown, the toy designer on the Princess Beads team, literally dreamed it up one night in March 2009 and presented it to me the next day. I said "yes" right away: I've learned to recognize a gold mine of an idea when I see one.

Getting from paper to working prototype was a little more difficult. Quinn's idea had our in-house chemistry folks stumped at first, but I kept pushing. I told them (and Quinn) the same thing I've told everyone who has ever told me something like that: "The person who says it can't be done is usually interrupted by the person who is doing it."

Eventually, just days before our 2008 financial statements were going to be released, the chem team announced that they'd figured out that this chemical called 1,5-pentanediol could make Quinn's dream work! I was ecstatic, and I made a special point to let the board know about this development when I met with them a few days later in mid-April 2009. Quinn also told me that they were going to use beads of two different sizes and shapes. (For clarity, I will refer to the smaller, ring-shaped beads as "rings" and the larger, spherical-shaped beads as "pearls." When I say "beads," "Beads," or "Princess Beads," I am referring to the toy as a whole—both the rings and the pearls.)

There were a few more bumps along the way, however. On the morning of May 15,

2009, I got a memo from the chair of our board of directors telling me that the board was unhappy with how things were going and that, unless things changed soon, they'd have to think about getting rid of me. I couldn't believe it—I'd started the company, for Pete's sake! But I also told myself that things would be fine so long as Princess Beads came out by August 2009, which would give us plenty of time before the all-important holiday season and would reach kids just before they went back to school (key for starting a fad). The Board's memo definitely worried me. I loved HappyLand and I didn't want to lose the company I founded. I made my number one priority getting Princess Beads to market. It needed to be done quickly and cheaply, and nothing else mattered.

On the afternoon of May 15, 2009, I left Quinn a voicemail asking for an update on Princess Beads. Quinn wrote back the next day and told me that they were having some trouble with the manufacturing process. I remember Quinn's email said something about the 1,5-pentanediol not really working very well, costing a lot, and maybe even creating a choking hazard. The words that really got me were "choking hazard." The last thing in the world I'd ever want is to hurt a child, and avoiding choking hazards is our number one priority in the toy business. I was incredibly relieved when I saw that Quinn mentioned the possibility of using some other chemical called 1,4-butanediol.

Any change in a product so late in the process has to get thoroughly checked out to make sure there are no surprises. I forwarded Quinn's email to Erin Swift, our Risk Assessment Officer. Erin e-mailed me back that same day and I passed it along to Quinn since Quinn was in charge of the design team. I didn't really pay attention to the details of the emails. I'm not a designer or a chemist, and I learned a long time ago that I have to trust the people who know more than I do to take care of those sorts of details. I just emphasized that we needed to make

sure everything was safe and that things needed to happen on time and on budget.

I heard back from Quinn that same day that we were good to go. We tested prototypes the next week and the first Princess Beads kit was sold and shipped on July 1, 2009. I'd like to see another toy company with that flexibility! Thanks to a fantastic marketing campaign, the Princess Beads were selling like crazy. We sold each box for $20 and we sold more than 100,000 boxes in July alone. Given that we hadn't even gotten the back-to-school bump—when kids wear a new product back to school in August, sales go through the roof—my financial people were predicting more than $20 million in revenues and more than $10 million in profits by the end of 2009. On August 3, 2009, my in-house research team told me that, through the month of July 2009, our sales matched our target demographic of girls aged 8 to 13: 99.4% of all Princess Beads boxes were purchased by or for girls (0.6% for boys), 87.0% were purchased by or for children between the ages of 7 and 15 years old, and only 11.0% were purchased by or for children older than 15 years old.

The first I heard about any problems with Princess Beads was on August 10, 2009, when my assistant—whom I knew then as "Alex Johnson" but I now know is actually Tristan Frost—said we had an upset customer on the line who was demanding to speak with me. Normally, I let our feedback consultants handle customer relations, but I still remember the days when HappyLand was run out of my garage and I think it's important not to lose touch with customers.

I picked up the phone and identified myself. Before I could say anything else, the caller said: "Blake Lexington? Perfect. You don't know who I am, but I know exactly who you are. My two-year-old son Joey died after he swallowed some of your Princess Beads. So unless you want this all over the news and your company ruined, you're going to pay me $1 million." I expressed my condolences about the child, but tried to reason with the person, explaining that

our Princess Beads couldn't kill anyone. The caller cut me off, saying, "You don't get it, do you, Lexington? None of that matters. Joey ate Princess Beads. Then he died. That's all the jury is going to care about. Are you going to take the deal or not?" Again, I tried to reason with the caller, but again the caller cut me off, saying, "Forget it. I'm going to hire the three slickest trial lawyers in Midlands. You'll be sorry." I met Andy Davis during a settlement conference in this case and, after hearing the way Andy said the phrases "my son Joey" and "one million dollars," I am certain the voice on the phone on August 10, 2009 belonged to Andy Davis.

Three days later, I got a call from Emerson Zimmer, Commissioner of the Midlands Department of Health. Zimmer told me they'd received reports about the safety of Princess Beads and we would need to issue a stop-sale and recall until further notice. No company likes the idea of having to recall a product. It is especially bad in the toy business. Parents are always concerned about their kids. They should be, of course, because they're responsible. But reputation is everything. Someone gets scared about one of your products and suddenly everything is suspect. But we really had no choice. We stopped shipping Princess Beads that same day and issued a recall for all previously sold products on August 15, 2009.

Yes, Princess Beads had 1,4-butanediol in it and, yes, 1-4-butanediol can metabolize into GHB. I take full responsibility for green-lighting the 1,4-butanediol. First off, it simply would not have been feasible to manufacture otherwise. Not only would the process itself have been much more difficult, but I later learned that using 1,5-pentanediol would have cost more than 8 times as much as using 1,4-butanediol—and it would have been much more dangerous. Second, Princess Beads was for ages nine and up because the toy was never intended to be consumed. It does not resemble food in any way. No one could confuse any part of the Princess Beads kit with something they should eat. All of our research and data indicated it would be perfectly fine

to use a compound like 1,4-butanediol as long as we followed the appropriate guidelines and regulations. No one foresaw a two-year-old getting his hands on the beads, eating so many of the beads, or in any way getting sick.

We also took other precautions in the unlikely event that someone did swallow some of the Princess Beads. Each bead had very little 1,4-butanediol on it, just 50 mg. This means, according to my staff, that a child would need to eat something like 50 or 100 Princess Beads in order to be at serious risk for injury or death. That's far-fetched. We coated each Princess Bead with denatonium, which tastes awful, to make sure children wouldn't want to eat them. Finally, take a look at our packaging for Princess Beads. I did. I made sure the packaging sent the clear message that these beads were for young teens, not infants—and for jewelry, not consumption.

I am now aware that 1,4-butanediol is illegal for use in the manufacture of any product in the State of Midlands. But we didn't violate the law because we didn't use a significant quantity of 1,4-butanediol in the Princess Beads (or any GHB at all). Each bead only contains 50 milligrams of 1,4-butanediol, which isn't enough to cause death or serious injury. When I read Section 80.01 of the Drug Abuse Prevention Control Act, I read "product" to mean a single bead, not the whole box. Admittedly, we never hired any lawyers to research this issue and we only sell the Princess Beads in boxes of 700. But we also didn't violate the law because there was no way for HappyLand to know that 1,4-butanediol was a Schedule I substance. We read the list of banned substances and we didn't see 1,4-butanediol anywhere.

I am aware now that Alex Johnson, my assistant and secretary, was really an undercover journalist named Tristan Frost. Needless to say, no one should believe Frost. Frost is a liar. Frost signed our confidentiality agreement with no intention of honoring it. Frost stole corporate documents. I've heard Frost interviewed on TV and listened in disgust as Frost lied about

HappyLand's commitment to safety, Princess Beads, and everything else that might get Frost an extra buck. Frost must have completely invented this handwritten note supposedly written by Erin Swift. Before that handwritten note was produced during this litigation, I had never seen it before. I've seen Erin's handwriting lots of times and I admit that the handwriting in the note looks like Erin's handwriting, but Frost has seen Erin's writing before. I doubt it's real. HappyLand is going to sue Frost and Frost's employer, Blitz News Network, for a lot of money.

My heart goes out to the Davis family. I have two children of my own and would never intentionally put a child's health at risk. It's not right and it would be bad business. But I honestly don't think we did anything wrong here.

Of the Available Exhibits, I am familiar with the following and only the following: Exhibit 7 (the memo from the HappyLand Board of Directors to me, which I received on the date on the memo); Exhibits 8 through 17 (which are all emails I either sent or received); Exhibits 20 and 21 (the Material Safety Data Sheets that I reviewed, though I only saw these after this suit was filed); Exhibit 25 (transcript of Erin Swift's deposition); Exhibit 26 (the confidentiality agreement that I saw Tristan Frost sign using the name "Alex Johnson"); Exhibit 27 (the handwritten note purportedly written by Erin Swift but which I believe was fabricated by Frost); Exhibit 28 (the packaging for the Princess Beads); and Exhibit 29(d) (the Princess Beads manufactured by HappyLand). I hereby attest to having read the above statement and swear or affirm it to be my own. I also swear or affirm to the truthfulness of its content. Before giving this statement, I was told it should contain everything I knew that may be relevant to my testimony and I followed those instructions. I also understand that I can and must update this affidavit if anything new occurs to me until the moment before opening statements begin in this case.

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Blake Lexington

Subscribed and sworn before me on this April 20, 2010,

Sue Coffey, Notary Public

AFFIDAVIT OF BLAKE LEXINGTON (PLAINTIFF SIDE)

After being duly sworn upon oath, Blake Lexington hereby deposes and states as follows:

My name is Blake Lexington. I founded HappyLand Toy Company and was its Chief Executive Officer from its founding in 1998 until I was fired by the Board of Directors on January 1, 2010.

I knew I wanted to be in business since I was a kid. When I was in sixth grade, my friend Monica made Chinese throwing stars out of two pieces of paper. Like the other products I've marketed and sold throughout my career, I never figured out how to make the stars myself; I'm more of an idea person than a details person. But I did convince Monica we should form a "company" called Star Co., recruit other kids to make and decorate the stars, and then sell them to younger kids. It worked great until teachers started complaining about kids throwing the stars at each other; I guess they were worried about someone getting their eye poked out or something. I know it sounds stupid now, but we hadn't meant for people to throw the stars at other people and it never occurred to us that they'd do it. I learned an important lesson then: you can't just assume people will use things in the way you expect.

I was in such a hurry to found my first real company that I thought about skipping college entirely, but my parents convinced me I needed to make contacts. As fate would have it, HappyLand was born during my fourth year at Midlands State in a dive bar just off campus called The Palms. My friends Daniel and Heidi told me they'd come up with a really great toy. They'd lined up a local manufacturer, but were having trouble getting stores to sell it and the few stores that would sell it wanted a huge piece of the action. I was a business and marketing major and said "forget the toy stores." Daniel and Heidi said I was nuts, but I explained if they distributed their own product, they wouldn't have to worry about getting shelf space. I told them

to do was get a 1-800 number and throw all their money into advertising. We incorporated HappyLand the next day. Daniel and Heidi never really wanted to run a company, so they were happy to have me handle the day-to-day operations.

HappyLand has come a long way since I started it, but many things have stayed the same. Now, as then, everything—from the conception of a toy to its ultimate sale—stays within the company. It is the ultimate way to control costs, and it makes us a lot nimbler in terms of bringing products to market.

One big thing that has changed is the scale of the operation. As of August 8, 2009, the day that Joey Davis went to the hospital, HappyLand had 330 employees and independent contractors working for it and owned a headquarters that we'd bought in 2007 for $5 million. Annual gross receipts were $38.5 million in 2005, $42.5 million in 2006, $47 million in 2007, and $32 million in 2008. Our corresponding profits for those years were $9 million (2005), $11 million (2006), $16 million (2007), and a loss of $1.9 million (2008).

Although it is a corporation, HappyLand's stock is not publicly traded. Until I was fired, I owned 25% of the company's stock, Daniel and Heidi owned 5% each, and various other investors owned 65%. The company has a board of directors, the majority of whom are selected by outside investors. My salary as CEO was $500,000 per year. I also earned a bonus and dividends based on HappyLand's performance: The most I ever earned was in 2007, when I got a total of $900,000 in bonus and dividends. I received $300,000 in bonus and dividends in both 2008 and 2009.

The biggest challenge for HappyLand's business model involves the volatility of the toy market. Every year, it seems like there are one or two huge new toys that make everyone rich, four or five new toys that make a lot of money, and a bunch of new toys that don't do much of

anything. By 2005, HappyLand had established a solid library of previously released toys that together brought in a fairly reliable revenue stream and were enough to prevent the company from ever facing serious financial jeopardy. Year-to-year profitability, however, still depended on releasing at least one fairly successful new toy each and every year.

We had some problems with that in 2008. Despite spending millions on research and development, the company hadn't been able to release any new toys and the company had posted an annual loss for the year. The amount of the loss wasn't very big (just under $2 million) and I was confident that our long-term prospects remained strong. That said, this was the company's first annual loss ever and I knew that the board of directors was up in arms over it.

I was thrilled when Quinn Brown, the toy designer on the Princess Beads team, literally dreamed it up one night in March 2009 and presented it to me the next day. I said "yes" right away: I've learned to recognize a gold mine of an idea when I see one. Quinn also told me that they were going to use beads of two different sizes and shapes—smaller, ring-shaped beads and larger, pearl-shaped beads. (For clarity, I will refer to the smaller, ring-shaped beads as "rings" and the larger, spherical-shaped beads as "pearls." When I say "beads," "Beads," or "Princess Beads," I am referring to the toy as a whole—both the rings and the pearls.)

Getting from paper to working prototype was a little more difficult. Quinn's idea had our in-house chemistry folks stumped at first, but I kept pushing. I told them (and Quinn) the same thing I've told everyone who has ever told me something like that: "The person who says it can't be done is usually interrupted by the person who is doing it."

Eventually, just days before our 2008 financial statements were going to be released, the chem team announced that they'd figured out that this chemical called 1,5-pentanediol could make Quinn's dream work! I was ecstatic, and I made a special point to let the board know

about this development when I met with them a few days later in mid-April 2009.

There were a few more bumps along the way, however. On the morning of May 15, 2009, I got a memo from the chair of our board of directors telling me that the board was unhappy with how things were going and that, unless things changed soon, they'd have to think about getting rid of me. I couldn't believe it—I'd started the company, for Pete's sake! But I also told myself that things would be fine so long as Princess Beads came out by August 2009, which would give us plenty of time before the all-important holiday season and would reach kids just before they went back to school (key for starting a fad). The Board's memo definitely worried me. I loved HappyLand and I didn't want to lose the company I founded. I made my number one priority getting Princess Beads to market. It needed to be done quickly and cheaply, and nothing else mattered.

On the afternoon of May 15, 2009, I left Quinn a voicemail asking for an update on Princess Beads. Quinn wrote back the next day and told me that they were having some trouble with the manufacturing process. I remember Quinn's email said something about the 1,5-pentanediol not really working very well, costing a lot, and maybe even creating a choking hazard. The words that really got me were "choking hazard." The last thing in the world I'd ever want is to hurt a child, and avoiding choking hazards is our #1 priority in the toy business. I was incredibly relieved when I saw that Quinn mentioned the possibility of using some other chemical.

Any change in a product so late in the process has to get thoroughly checked out to make sure there are no surprises. I forwarded Quinn's email to Erin Swift, our Risk Assessment Officer. Erin e-mailed me back that same day and I passed it along to Quinn since Quinn was in charge of the design team. I didn't really pay attention to the details of the emails. I'm not a

designer or a chemist, and I learned a long time ago that I have to trust the people who know more than I do to take care of those sorts of details. I just emphasized that we needed to make sure everything was safe, and to make sure that things needed to happen on time and on budget.

I heard back from Quinn the next day, May 16, that we were good to go. We tested prototypes the next week and the first Princess Beads kit was sold and shipped on July 1, 2009. I'd like to see another toy company with that flexibility! Thanks to a fantastic marketing campaign, the Princess Beads were selling like crazy. We sold each box for $20 and we sold more than 100,000 boxes in July alone. Given that we hadn't even gotten the back-to-school bump—when kids wear a new product back to school in August, sales go through the roof—my financial people were predicting more than $20 million in revenues and more than $10 million in profits by the end of 2009. On August 3, 2009, my research team told me that, through the month of July 2009, our sales matched our target demographic of girls aged 8-13: 99.4% of all Princess Beads boxes were purchased by or for girls (0.6% for boys), 87.0% were purchased by or for children between the ages of 7 and 15 years old, and only 11.0% were purchased by or for children older than 15 years old.

The first I heard about any problems with Princess Beads was on August 10, 2009, when my assistant—whom I knew then as "Alex Johnson" but I now know is actually Tristan Frost—said that one of the people at our front desk had an upset customer on the line who was demanding to speak with me personally. Normally, I let our feedback consultants handle customer relations, but I still remember the days when HappyLand was run out of my garage and I think it's important not to lose touch with the customers.

I picked up the phone and identified myself. The caller gave the name Andy Davis, and, before I knew it, Andy was accusing me of poisoning Andy's two-year-old son. I was stunned.

Then I remembered that Quinn's email had said there was some sort of major health hazard associated with the alternative chemical and my stomach dropped. I went into full damage-control mode. I pointed out that Princess Beads wasn't meant for kids that young. Even though I really had no basis for saying so, I also said it was probably something else that made the kid sick anyway. I also made clear that HappyLand had no intention of paying any sort of settlement and that we'd fight hard against any lawsuit. We actually had settled plenty of lawsuits previously but we'd learned that tough talk at the front end was enough to prevent most suits even from being filed. The caller hung up. I later met Andy Davis during a settlement conference in this case and, after hearing the way Andy said the phrases "my son Joey" and "poisoning," I am certain the voice on the phone on August 10, 2009 belonged to Andy Davis.

Three days later, I got a call from Emerson Zimmer, Commissioner of the Midlands Department of Health. Zimmer told me they'd received reports about the safety of Princess Beads and we would need to issue a stop-sale and recall until further notice. No company likes the idea of having to recall a product. It is especially bad in the toy business. Parents are always concerned about their kids. They should be, of course, because they're responsible. But reputation is everything. Someone gets scared about one of your products and suddenly everything is suspect. But we really had no choice. We stopped shipping Princess Beads that same day and issued a recall for all previously sold products on August 15, 2009.

Yes, Princess Beads had 1,4-butanediol in it and, yes, 1-4-butanediol can metabolize into GHB. I take full responsibility for green-lighting the 1,4-butanediol. First off, it simply would not have been feasible to manufacture otherwise. Not only would the process itself have been much more difficult, but I later learned that using 1,5-pentanediol would have cost more than 8 times as much as using 1,4-butanediol—and it would have been much more dangerous. Second,

Princess Beads was for ages nine and up because the toy was never intended to be consumed. It does not resemble food in any way. No one could confuse any part of the Princess Beads kit with something they should eat. All of our research and data indicated it would be perfectly fine to use a compound like 1,4-butanediol as long as we followed the appropriate guidelines and regulations. No one foresaw a two-year-old getting his hands on the beads, eating so many of the beads, or in any way getting sick.

We also took other precautions in the unlikely event that someone did swallow some of the Princess Beads. Each bead had very little 1,4-butanediol on it, just 50 mg. This means, according to my staff, that a child would need to eat something like 50 or 100 Princess Beads in order to be at serious risk for injury or death. That's far-fetched. We coated each Princess Bead with denatonium, which tastes awful, to make sure children wouldn't want to eat them. Finally, take a look at our packaging for Princess Beads. I did. I made sure the packaging sent the clear message that these beads were for young teens, not infants—and for jewelry, not consumption.

I am now aware the 1,4-butanediol is illegal for use in the manufacture of any product in the State of Midlands. But we didn't violate the law because we didn't use a significant quantity of 1,4-butanediol in the Princess Beads (or any GHB at all). We also didn't violate the law because there was no way for HappyLand to know that 1,4-butanediol was a Schedule I substance. We read the list of banned substances and we didn't see 1,4-butanediol anywhere.

I am aware now that Alex Johnson, my assistant and secretary, was really an undercover journalist named Tristan Frost. Needless to say, no one should believe Frost. Frost is a liar. Frost signed our confidentiality agreement with no intention of honoring it. Frost stole corporate documents. I've heard Frost interviewed on TV and listened in disgust as Frost lied about HappyLand's commitment to safety, Princess Beads, and everything else that might get Frost an

extra buck. However, Frost's account of the handwritten note from Erin Swift is largely accurate. On May 18, the Monday after Swift had approved by email the use of 1,4-butanediol in Princess Beads, Swift dropped off a handwritten note in my office. It expressed some concerns not mentioned in Swift's May 16 email that approved 1,4-butanediol. I considered Swift's concerns but, given the Board's May 15 memo and Swift's May 16 email, I decided to go forward with 1,4-butanediol.

My heart goes out to the Davis family. I have two children of my own and I would never intentionally put a child's health at risk. That's one of the reasons I was so disappointed when, on January 1, 2010, the HappyLand Board fired me. The decision to recall the Princess Beads cost HappyLand millions in sales and the company eventually posted a loss of $5 million for 2009, and that doesn't even account for the terrible loss of good will and reputation. I wish the board would have shown a bit more loyalty and backbone, but their May 2009 memo had made clear they already were thinking of getting rid of me before this ever happened. I'm certainly not hurting for money since I've saved millions over the years. My employment contract had a very generous severance package written in and I sure don't mind being paid not to work for the next three years. On the other hand, we had a buy-sell agreement that required me to sell my shares back at book value within 60 days of leaving the company. As a result, I ended up having to sell my shares when their value was still in the dumps as a result of the whole Princess Beads lawsuit. It's hard to say exactly, but I'd estimate that my termination cost me at least $10 million. But the main reason I'm angry at HappyLand's board of directors is that I founded the company and they took it away from me. And why? All I did was do exactly what the board wanted. I hope Andy Davis takes HappyLand for all it's worth—maybe then the board will realize it never should have gotten rid of me.

Of the Available Exhibits, I am familiar with the following and only the following: Exhibit 7 (the memo from the HappyLand Board of Directors to me, which I received on the date listed on the memo); Exhibits 8 through 17 (which are all emails that I either sent or received); Exhibits 20 and 21 (which are the Material Safety Data Sheets that I reviewed, though I only saw these after the lawsuit was filed); Exhibit 25 (transcript of Erin Swift's deposition); Exhibit 26 (the confidentiality agreement that I saw Tristan Frost sign using the name "Alex Johnson"); Exhibit 27 (the handwritten note from Erin Swift); Exhibit 28 (the packaging for the Princess Beads); and Exhibit 29(d) (the Princess Beads manufactured by HappyLand). I hereby attest to having read the above statement and swear or affirm it to be my own. I also swear or affirm to the truthfulness of its content. Before giving this statement, I was told it should contain everything I knew that may be relevant to my testimony and I followed those instructions. I also understand that I can and must update this affidavit if anything new occurs to me until the moment before opening statements begin in this case.

_____

Blake Lexington

Subscribed and sworn before me on this April 20, 2010,

Sue Coffey, Notary Public

AFFIDAVIT OF BRETT MILLER

After being duly sworn upon oath, Brett Miller hereby deposes and states as follows:

My name is Brett Miller and I live here in Midlands City, Midlands. I take classes at Midlands University. I've thought about being a school psychologist. I really enjoy working with kids and that's why I enjoy babysitting.

I advertise my babysitting services by posting signs in the neighborhood. I do a lot of babysitting for the Palmer family and they recommended me to the Davis family. I started babysitting for the Davis family in July 2008, just after Lee Davis passed away. Andy Davis was one of the nicest parents I've worked for and Andy's two kids were among my favorites. When I began babysitting the Davises, Hillary was almost 9 years old and Joey was almost 2 years old.

Joey was a pretty happy kid. He loved to play with toys and he was almost always in a good mood—a lot better than a lot of the kids I babysit. I noticed that, for the entire time I knew him, Joey was teething. Even after he turned two-and-a-half, I would often see him put things in his mouth—his fingers, building blocks, clothing, his toy soldiers, you name it. If it was small enough to choke on, I would try to make him stop. I've babysat for about 15 families and Joey put things in his mouth more than just about any kid I've babysat. I noticed that Joey's favorite things to put in his mouth were shiny things and things he had seen other people playing with—especially things he had seen his sister playing with. But I never saw him choke on anything. In fact, I don't think I ever saw Joey swallow anything. Andy would also try to keep Joey from putting small toys in his mouth, probably since Andy was afraid he would choke. Andy was a bit overprotective at times, always insisting that Joey not stand too close to the stove and that things like nail polish and pills not be left where Joey could reach them. In general, I think Andy's a really good parent, certainly one of the best I've encountered.

The sad part about babysitting Joey was that he wasn't the healthiest kid. He was sick a

lot—nothing more than the common cold, but still, you never like to see that. Much worse, though, was that Joey seemed to have some breathing problems. Whenever he would run around—which was all the time—he would get winded more easily than most kids his age. He would start breathing really hard, almost gasping, and he would get light-headed. I suggested to Andy that Joey see a doctor and Andy agreed. I babysat Hillary when Andy took Joey to the doctor. When they got home, I asked Andy how things went at the doctor. Andy said, "We only saw her for 5 minutes and the only thing she gave us was this" and then handed me a piece of paper. I know money was tight, and Andy never mentioned taking Joey to the doctor after that.

I was at the Davis's apartment when the box of Princess Beads arrived in late July 2009. Andy said, "This is going to be Hillary's birthday present next week. She's been asking for these beads forever so I finally went online last week and ordered a box." Andy showed me the box. At first I didn't see the warning labels on the box. Only when Andy accidentally knocked the box on its side did I see the warnings on the bottom. I said, "There's a lot of stuff written on the bottom of the box. What does it say?" I had to ask because the print was too small to see from where I was standing, a few feet away. Andy responded, "Who knows? Everything has so much junk written on it nowadays that it's not even worth reading it!" It was obvious that Andy had not read the warnings. I didn't want to annoy Andy but I was worried about Joey. I said, "What about Joey? Those beads are really shiny and the colors of the little 'ring' things look just like candy. That's the kind of thing he puts in his mouth. I don't want him to choke on the beads." At that point, however, there was a big crash and I heard Hillary start crying and I ran over to see what was wrong. That was the last time Andy and I ever discussed the Princess Beads. I never saw Andy read the warning labels for the Princess Beads.

I was there on August 1, 2009, when Hillary opened the Princess Beads at her birthday

party. I saw that there were two types of beads: smaller-ring shaped beads and larger, pearl-shaped beads. (For clarity, I will refer to the smaller, ring-shaped beads as "rings" and the larger, spherical-shaped beads as "pearls." When I say "beads," "Beads," or "Princess Beads," I am referring to the toy as a whole—both the rings and the pearls.) I was there to watch Joey so that Andy could supervise the party. Hillary and her friends seemed very excited about the Beads. I remember that Joey also seemed very excited about the Beads. He pointed at the Beads and squealed with delight. During the birthday party, Joey never touched the Princess Beads but he seemed focused on them as the girls played with them.

I babysat Joey twice between the birthday party and August 8, 2009. The first time was August 3 and the second time was August 5. On August 3, Hillary was sitting on the couch in the living room, watching television and arranging her Princess Beads. Joey and I were in the living room, too. Joey was drawing in his coloring book with crayons. He kept looking back and forth between the Princess Beads and his coloring book. I saw what he drew: small dots of different colors. They looked like rings, not pearls. The colors were the same as the rings that Hillary was arranging. I asked Joey if he was drawing the Princess Beads. He didn't answer. I showed Andy the drawings.

On August 5, Hillary wasn't home. I think she was at a friend's house. I was babysitting Joey. Hillary had left her Princess Beads on the living room table. Joey kept walking over to the table with the Princess Beads. He looked fascinated by them. I was watching him closely. A few times, he would pick up the rings and put them in his mouth. Sometimes he would pick up the pearls, but the only beads I ever saw Joey put in his mouth were the rings. Each time I saw Joey put the rings in his mouth, he spit them back out almost immediately and scrunched his nose like something tasted bad. I'm almost certain I saw him swallow one of the rings, but he

didn't choke on it or have any other bad things happen. I never moved the beads or took Joey out of the room and, in retrospect, I probably should have been more careful. When, at about 5:00 p.m., Andy returned home from work, Andy saw Joey near the beads. Andy immediately and angrily yelled, "Joey, put down those beads! I've told you again and again, those aren't for you!" When Andy said that, Andy's face seemed really upset and worried. Andy scooped Joey up, hugged him, and carried him out of the living room. Andy didn't say anything to me about it—Andy just glared at me while carrying Joey from the room.

Andy asked me to babysit the kids on Saturday, August 8, 2009. I showed up at the Davis apartment at 10 a.m. Andy had an interview that day and needed me to watch the kids. Andy said Joey had already had cereal for breakfast. Hillary was still asleep when I arrived but Joey was wide awake and very excited. He was running around the apartment, jumping on the couch and giggling. Joey is normally a high-energy kid but this amount of energy and enthusiasm was unusual, even for him. Andy left around 11 a.m. I tried to get Joey to settle down and watch some cartoons in the living room but he wouldn't sit still. He told me he was hungry so, at about noon, I went into the kitchen to make Joey some lunch. I cooked Joey's favorite—macaroni and cheese—from scratch. The kitchen is just off the living room, but I couldn't see Joey the entire time I was in there because of the positioning of the stove, though I could hear fine and I didn't hear anything especially unusual. I figured Joey was just playing with his toys.

I came back to the living room at 12:10 p.m., carrying the macaroni and cheese. Joey was lying on the floor next to the coffee table. He was on his side, facing me. His eyes were open but they looked glazed over. I could tell immediately that something was wrong. Joey looked far, far worse than during one of those breathing episodes I mentioned earlier. I asked

him if was okay and he shook his head no. "What happened?" I asked. He just said very slowly, "Don't feel good." That's the last thing I ever heard him say. He looked confused. I picked him up. He wasn't bleeding and he didn't seem to have any injuries. I looked around the room. None of Joey's toys were in the living room. The only objects I saw were the remote control, resting on the arm of the couch where I left it; one of my textbooks, on the coffee table; and Hillary's Princess Beads, on the coffee table. About 100 Beads—assorted rings and pearls—were in open plastic containers. About 50 Beads were loose on the coffee table. One ring was on the floor next to Joey, inches from his mouth. I couldn't tell whether there were fewer Beads on the coffee table when I came into the living room at 12:10 p.m. than when I left at 12:00 p.m.

I didn't see Joey swallow the Beads, but I figured he must have swallowed some of the Beads and that was why he was sick. I decided I needed to get him to the emergency room as soon as possible. I woke up Hillary, told her what was happening, and the three of us went to Polk General Hospital. I called Andy but Andy didn't pick up. I called a few times. I left Andy a message explaining what happened and telling Andy I was taking the kids to Polk General.

The Davises live close to the Hospital, so we were there by 12:30 p.m. I carried Joey into the hospital. His eyes were droopy, he seemed weak, and he wasn't saying anything. He was staring off into the distance and it didn't look like he was actually looking at something. The nurses and doctors asked me what happened and I told them everything I've said in this statement. They let me stay in the emergency room with Joey. Hillary was there too. She was obviously very upset. Joey started shaking violently and then he threw up. I saw that his vomit contained about 25 rings, all of which looked like Princess Beads. I didn't see any pearls. A few minutes later Joey fell asleep. The doctors tried to wake him but he stayed asleep.

At 1:30 p.m., Andy got to the hospital. The doctors filled Andy in on what was going on.

Andy asked me to leave. Andy said that if I paid attention while I was babysitting, this never would have happened. I understand Andy was upset, but that's really unfair. I was only out of the room for a few minutes and, besides, I wasn't the one that let Hillary leave those Beads out. I don't think I did anything wrong. I don't think I am at all responsible for Joey's death.

I was about to leave the hospital at about 2:00 when one of the doctors came over to me and asked me to look at something. The doctor—Dr. Chase Tuchmont—showed me the Beads that had been in Joey's vomit. Tuchmont removed the beads from Joey's stomach contents and put them in a separate bag. Tuchmont asked me if I recognized the beads. I said they were the same beads—the rings from the Princess Beads—that Joey was lying next to when I found him on the floor. There were about 20-25 beads, all of which were rings. Princess Beads come in about ten colors and it looked like most or all of the colors were in the bag. I asked if Joey was going to be okay. The doctor told me Joey had just died. I couldn't believe it.

I wanted to keep babysitting Hillary but Andy never asked me to babysit after that. Andy made it clear that I was no longer welcome in their home. Andy wasn't the only one. In fact, more than half (but not all) of the families I babysat for stopped asking me to babysit for them. They never referenced Joey Davis as the reason, but they said things like, "We'd be more comfortable with someone else." I wouldn't be surprised if Andy said something to the other families in the neighborhood. I've lost a lot of babysitting income—I'd say at least $2,000, but I don't have receipts or anything—because of what happened on August 8.

Of the Available Exhibits, I am familiar with the following and only the following: Exhibit 24 (Record of Outpatient Visit, dated October 5, 2008), which is the piece of paper that Andy Davis showed me after coming home from the doctor; Exhibit 28 (Labels for packaging of Princess Beads); Exhibit 29(a) (the beads swallowed by Joey); Exhibit 29(b) (the Princess Beads

owned by Hillary Davis) Exhibit 29(d) (Princess Beads manufactured by HappyLand); and Exhibit 30 (photograph of Joey Davis). I hereby attest to having read the above statement and swear or affirm it to be my own. I also swear or affirm to the truthfulness of its content. Before giving this statement, I was told it should contain everything I knew that may be relevant to my testimony and I followed those instructions. I also understand that I can and must update this affidavit if anything new occurs to me until the moment before opening statements begin in this case.

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Brett Miller

Subscribed and sworn before me on this, the 18th of March, 2010.

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Susan Coffey, Notary Public

AFFIDAVIT OF KENDALL OXMAN

After being duly sworn upon oath, Kendall Oxman hereby deposes and states as follows:

My name is Kendall Oxman. I am a board certified and licensed psychologist. Currently, I work as a professor of Child Psychology at the University of Hawaii. I also work as a consultant to national toy companies that want me to examine their toy designs and determine whether those toys will be popular among and safe for children of different sexes and ages.

In the case of *Davis v. HappyLand*, I was hired in June 2010 by the party that is calling me at trial. I have no affiliation with any of the parties. I should note, however, that one of my frequent clients is the Elephant Toy Company, which is a chief rival to HappyLand. My expert witness fee is $800 per hour, which includes the time necessary to review documents, interview sources, and prepare for and attend trial. Prior to coming to court, I spent 35 hours on this case, resulting in fees of $28,000. I reviewed the affidavits of Quinn Brown, Andy Davis, Brett Miller, and Chase Tuchmont. I also reviewed the product packaging for the Princess Beads, in particular the warnings. In drawing my conclusions, I relied solely on the aforementioned affidavits and documents. These items were sufficient. I did not perform any tests or studies for this case. I chose not to attempt to conduct interviews in this case.

In addition to this affidavit, I provided exactly three items to the parties in this case: (1) my curriculum vitae, which contains all of my credentials relevant to this litigation; (2) *Mouthing Behavior of Children*, a paper I co-wrote and published in the Spring 2007; and (3) my Expert Report, which contains all of my significant observations and conclusions associated with this case. This affidavit outlines some of the prevailing principles of my field.

It is common for a child to “mouth” objects—that is, to put an object or objects in one’s mouth. Mouthing is an important and necessary part of child development. But mouthed items

can pose health and safety risks to children. Such hazards have led psychologists, including me, to study the mouthing activity of children.

Swiss psychologist and philosopher Jean Piaget pioneered the theory of cognitive development, which serves as the basis for our current understanding of how humans develop. During a child's first two years of life, he undergoes the sensorimotor stage. In this first stage, infants begin to understand the world by coordinating sensory experiences with physical acts that involve motor skills. For example, a child of six weeks has usually learned to grasp objects or flip a switch. By eight months, a child usually understands the effect of those physical actions; for example, he will understand that flipping a light switch turns a light on and off. The child increases the sophistication of these experiments, usually through his second birthday. One of the child's key lessons from the sensorimotor stage is that objects are permanent—that is, they continue to exist even when the child cannot see them or hear them.

The second of the four stages is the preoperational stage, and it usually occurs from ages 2 through 7. The child begins to represent objects with drawings, images and words. The child learns to formulate images of objects that are not present; for example, he might be able to draw a cat from memory. Also during the preoperational stage, children become curious about the world around them and they show an increased use of reasoning skills. During this stage, the child primarily learns either by playing and experimenting, or by imitating others' behavior.

The concrete operational stage is the third stage, and usually occurs between the ages of 7 and 11. This stage is characterized by utilization of logical concepts, including seriation; transitivity; classification; and conservation. The final stage is the formal operational stage, which occurs from age 11 through adulthood as the person thinks rationally to solve problems.

Studies also document children's physical development. Until age 11, the average boy is

the same height and weight as the average girl; once they enter puberty, the two sexes grow at different rates. This chart shows the average height and weight of children by age.

Age (Years)	Birth	1	2	3	4	5	6	7	8	9	10	11
Height (inches)	20	28	31	33	37	40	42	44	45	49	51	52
Weight (pounds)	7	22	28	33	36	42	46	51	57	62	71	78

Obviously, no two children develop motor skills at an identical pace. But we know a lot about how children generally develop motor skills. At birth, children are capable of almost no motor skills. After a few weeks, children can squeeze and grasp. By three months, children are capable of holding objects for prolonged periods. By six months, children pick up objects with the palmar grasp and often put those objects in their mouths. A child employs the palmar grasp when he holds an object in his palm and wraps his fingers around it from one side. By nine months, most children are able to wiggle and crawl, and can usually pick up objects with a pincer grasp. A pincer grasp is the grasping of an object between the thumb and forefinger. Also by nine months, most children look for toys or items that they might treat as toys. By one year, a child generally can stand with the support of furniture, and then usually collapses after a second or two. By 18 months, a child can usually walk without support or aid and pick up objects without collapsing. Also by 18 months, most children can climb stairs with the aid of a railing. By two years of age, most children can run and climb stairs without aid or support.

Of the Available Exhibits, I am familiar with the following and only the following: Exhibit 4 (Curriculum Vitae of Kendall Oxman); Exhibit 18 (Mouthing Behavior Article by Kendall Oxman); Exhibit 19 (Expert Report of Kendall Oxman, dated August 15, 2009); Exhibit 28 (Labels for packaging of Princess Beads); and Exhibit 29(d) (Princess Beads manufactured by

HappyLand). I hereby attest to having read the above statement and swear or affirm it to be my own. I also swear or affirm to the truthfulness of its content. Before giving this statement, I was told it should contain everything I knew that may be relevant to my testimony and I followed those instructions. I also understand that I can and must update this affidavit if anything new occurs to me until the moment before opening statements begin in this case.

_____

Kendall Oxman

Subscribed and sworn before me this day August 15, 2010

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Carol Spencer, Notary Public

AFFIDAVIT OF CHASE TUCHMONT

After being duly sworn upon oath, Chase Tuchmont hereby deposes and states as follows:

My name is Dr. Chase Tuchmont. I am a clinical toxicologist. Currently, I am the Director of the Midlands Department of Poison Control. I also work on-call at Polk County General Hospital in the Emergency Room. When someone is poisoned, my job is to identify the possible source, the probable cause, and the best way to prevent another occurrence.

I have provided my curriculum vitae to both parties in this lawsuit. That CV includes all of my experience relevant to this case. I am testifying pursuant to a subpoena issued by the party calling me at trial. I am glad to testify. My spouse and I had just purchased a set of Princess Beads for our ten-year-old daughter, Juliana. (We had been thinking of getting her and her younger brother a toy called The Flying Squirrel but remembered at the last minute that they already had one.) The Princess Beads is a make-your-own-jewelry set that contains beads of two types. (For clarity, I will refer to the smaller, ring-shaped beads as “rings” and the larger, spherical-shaped beads as “pearls.” When I say “beads,” “Beads,” or “Princess Beads,” I am referring to the toy as a whole—both the rings and the pearls.) We were planning on giving the Princess Beads to Juliana as a back-to-school gift in late August 2009. When I saw what happened to Joey, I realized that could have been my Juliana. My goal is to make sure that neither HappyLand Company nor anyone else ever does anything like this again.

All of the conclusions I reached, tests I performed, and significant observations I made are contained in this affidavit. All of my conclusions were drawn to the prevailing standard of certainty in my field. All of my tests are the accepted tests in my field and all have been peer reviewed to meet the highest standards.

On August 8, 2009, I was in the emergency room, working with a patient who had attempted to commit suicide by carbon monoxide poisoning. At 12:30 p.m. that day, I was about

to head back to the lab when a young child, Joey Davis, arrived in the care of his babysitter, Brett Miller. I heard the babysitter tell the admitting nurse that the child had started acting drowsy, confused and off-balance at about 12:15 p.m. Because the ER was understaffed for all of the day's activity and on the off chance poisoning was involved, I assisted the lead physician—Dr. Casey French—with the treatment of Joey Davis.

We followed all the normal protocols in treating Joey Davis. At approximately 12:32, just after we had gotten Joey in an ER bed, we asked him what was wrong. He touched his stomach, though I can't say whether he was touching it in pain or in answer to our question. Dr. French immediately ordered an ultrasound but before the nurse, Gussy Jeffcott, could even step out of the room to get the equipment, Joey started seizing. The seizing lasted approximately 45 seconds and was over by 12:34. Given the seizing and apparent stomach pain, I asked Miller if the child had eaten anything that day. Miller said, "He had breakfast before I got there. I think he just had cereal. Must have been before 10."

Dr. French and I were debating whether to order an ultrasound or just immediately induce vomiting but at 12:35, as we were contemplating the options, Joey vomited on his own. There was nothing remarkable about the vomit other than the fact that it contained dozens of beads—all of which appeared to be rings from a Princess Beads set. I preserved those rings. After seizing and vomiting, Joey looked especially dazed and, while his eyes remained open, he didn't speak or respond to questions. At 12:37, I drew blood and sent it to the lab for a toxicology screen. Ideally, I also would have ordered a urine test to corroborate findings from the blood, but Joey wasn't responsive and the use of a catheter on a two-year-old seemed unnecessarily abrasive. We weren't in a particular hurry to test the blood. Though the seizing and Joey's youth were red flags, usually once a child vomits the worst is behind him and the body recovers in a few hours.

That assumption proved wrong. At 1:00 p.m., Joey fell into a deep sleep and subsequent efforts to revive him were unsuccessful. At 1:50, Joey's heart rate began dropping and his breathing slowed. At 2:00, he went into respiratory arrest and, though we tried everything, it wasn't enough. At 2:02, Joey was dead of respiratory arrest.

Dr. French reported the tragic news to Joey's parent, Andy Davis, while I went to the lab to do that toxicology screen. On the way to the lab, I spoke with Brett Miller, who identified the 25 rings that Joey vomited as Princess Beads that belonged to Joey's sister, Hillary. I then turned to the toxicology screen, working with the technicians. The toxicology report was finished that evening, August 8. The report is marked as Exhibit B to the complaint in this case. The toxicology screen showed a significant amount of gamma-hydroxybutyric acid (GHB) in Joey's blood. The mere presence of GHB is unsurprising since a normal, healthy human body naturally produces small amounts of GHB—usually less than 10 micrograms per milliliter. (A microgram is a thousand of a milligram, which is a thousandth of a gram.) But Joey's blood contained GHB in amounts of 148 milligrams per liter.

There are only two ways someone can have such a large amount of GHB in his blood: a genetic condition that causes elevated levels of GHB or poisoning from a foreign agent. I asked Joey's parent, Andy, if Joey had ever tested positive for elevated levels of GHB or if Joey had ever suffered from succinic semialdehyde dehydrogenase deficiency (SSDD), a condition that leads to overproduction of GHB in the body. Andy said no to both questions. I had Andy contact Joey's doctor, who faxed us Joey's file. I also had one of the nurses, Gussy Jeffcott, pull Joey's medical history. Nothing in Joey's medical history indicated SSDD or any other genetic condition that would cause elevated levels of GHB. One document in his medical history did

indicate past respiratory issues and respiratory issues can be caused by GHB. But there was nothing linking Joey's past respiratory issues with GHB.

Given Joey's medical history, all signs pointed to poisoning as the cause of Joey's GHB levels. The beads were an obvious suspect but I wanted to be sure. The rings Joey had vomited resembled the Princess Beads I had bought for my daughter, so I asked Andy if Joey owned a set of Princess Beads. Andy said, "Joey doesn't, but his older sister Hillary does. Joey is always trying to play with Hillary's beads. He picks them up and sometimes he'll put the beads in his mouth. I try to make him stop but I can't be with him every second of every day." I asked Andy if there were any other beads around the house that resemble the Princess Beads. Andy said no. I told Andy to go home and bring me some of the Princess Beads that Joey had not swallowed. I also wanted a control group. I asked one of the interns, James Vines, to go to my house and pick up my daughter Juliana's Princess Beads.

I then analyzed the three samples: (1) the 25 rings Joey had vomited; (2) 25 additional rings that Andy Davis brought back from the Davis's apartment; and (3) 25 rings from the unopened box of Princess Beads intended for my daughter, Juliana. All three sets appeared identical to the naked eye. I measured them and all three sets had identical sizes: the rings were 5 millimeters in diameter and 3 millimeters thick. Finally, I performed an analysis using a combination of gas chromatographic and mass spectrometric method tests (GC/MS), which together identify the chemical composition of a given material. Using these tests, I found that all three samples were identical in chemical composition. I also did some research and determined that there were no other products that looked like and had the same chemical composition, as Princess Beads. This told me two things: Joey Davis swallowed rings from the Princess Beads and those rings had not been altered since Joey's sister opened the box of Princess Beads.

I didn't recognize one of the substances identified by my GC/MS tests so I compared the results to my laboratory's library of mass spectra and I performed what is known as precursor ion fingerprinting. I eventually identified the compound as an obscure industrial chemical, 1,4-butanediol. Each Princess Bead is coated with 50 mg of 1,4-butanediol, which means the 25 rings Joey swallowed contained a total of 1.25 grams of 1,4-butanediol. 1,4-butanediol is very similar to 1,5-pentanediol. Both can be used as sizing agents—that is, they will prevent water-soluble glues from becoming sticky before the glue is needed. Used in Princess Beads, this means that the beads don't stick together before they're sprayed with water. It's actually a really ingenious design.

There are at least three key differences between 1,4-butanediol and 1,5-pentanediol. First, 1,5-pentanediol is approximately eight times more expensive than 1,4-butanediol. Second, 1,5-pentanediol is much harder to work with when compared to 1,4-butanediol. Third, when 1,5-pentanediol is ingested, it expands. In the context of the Princess Beads, this means the beads would swell if they had been made with 1,5-pentanediol. By contrast, when 1,4-butanediol is ingested, it doesn't expand or swell—instead, the chemical quickly breaks down to become GHB. Not only was the design ingenious, using the 1.4-butanediol in this way also complies with the law, at least to my way of thinking. After all, given the quantity of 1.4-butanediol used in the beads, it seems hard to imagine that that amount could be considered "significant," which is what is prohibited by the Midlands criminal code. Moreover, abusers of GHB are not likely to purchase Princess Beads to get high or make use of the drug in some other nefarious way.

GHB can cause respiratory depression and, at higher blood levels, it can cause respiratory arrest and death. I assisted the coroner with the autopsy and together we concluded Joey Davis died from respiratory arrest caused by GHB overdose. In my professional opinion, ingestion of

the Princess Beads resulted in the elevated GHB in Joey's bloodstream, and that GHB caused his fatal respiratory arrest. In my professional opinion, Princess Beads killed Joey Davis. However, the Beads were only fatal because they were ingested. Had Joey simply handled, smelled, or briefly put the beads in his mouth, the Princess Beads would not have produced a fatal result.

I've dealt with GHB more than a dozen times, usually after college students decide to experiment with GHB at a rave and then end up in the emergency room a few hours later. However, it doesn't require my experience or expertise to know that 1,4-butanediol can metabolize into GHB. Any article, Google search, or textbook that mentions 1,4-butanediol also mentions that 1,4-butanediol metabolizes into GHB. In addition to seeing GHB cases firsthand, I am familiar with Freeland and Hartsfield's article *GHB: Separating Myth from Truth*. That article is an accurate and current summary of what is known about GHB. I agree with that article in its entirety and, in fact, I relied on it while forming my conclusions in this case.

I should acknowledge that there are several weaknesses to my theory that Joey's death was caused by the Princess Beads. First, the amount of GHB I found in Joey's blood is not usually enough to cause death. Given that fatal dose of GHB or 1,4-butanediol is generally 150 mg/kg, a child of Joey's size would theoretically need to consume 2.25 grams of GHB or 1,4-butanediol. That is the amount contained in 45 Princess Beads and Joey swallowed 25 Princess Beads. Moreover, when the GHB concentration in blood is 148 mg/L (as in Joey's case), that usually produces a general anesthetic effect or a comatose state. But I have never seen (except in the case of Joey Davis), nor has any known study found, a peak GHB blood concentration of 148 (or lower) mg/L to be fatal. It is important to understand, however, that the concentration of GHB in the blood is not static. The 148 mg/L concentration I found was probably not the peak concentration. The body metabolizes GHB quickly—that's one of the reasons it's so dangerous.

That is related to the second limitation in my theory that Joey's death was caused by Princess Beads: I cannot determine the peak concentration of GHB in Joey's blood. For example, I assume that the 148 mg/L of GHB in Joey's blood was not the peak concentration. But there is no way to know for sure. Usually, we can determine the peak concentration because we know the time the GHB was ingested and how much remains. This is because GHB has a relatively short half-life—normally 40 minutes. With toxicology, a half-life is the term for the length of time that it takes for a blood level of a particular substance to be reduced to one half of its peak level by metabolism and excretion. For example, a half-life of 30 minutes means that after one hour only a quarter of the original substance remains. But the half-life of GHB in blood or urine varies exponentially with the dosage of GHB, and the effects of various dosages depend primarily on the weight of the person consuming the GHB. Joey weighed 33 pounds, so that adds uncertainty to any attempt to determine the peak concentration of GHB in his blood.

Normally, I could just take the 148 mg/L and work backwards to determine the peak concentration. GHB concentrations peak in blood and urine approximately half an hour after ingestion. But in this case, two factors make that statistic unusable. For one, all of our data about GHB effects and timing come from data involving oral or intravenous dosages. But Joey received his GHB from the 1,4-butanediol contained on the Princess Beads and I have no data about how quickly the body begins absorbing that chemical from Princess Beads (and given the press from this lawsuit, there aren't a lot of willing volunteers). Another obstacle to analysis is that, unlike oral or intravenous dosages, the GHB from the Princess Beads was not introduced into Joey's system all at once. Presumably, it gradually entered his bloodstream. Every known study considers oral or intravenous introduction of GHB. This makes it almost impossible to reverse engineer the peak concentration for GHB from the Princess Beads.

The third shortcoming to my theory that Joey's death was caused by Princess Beads is that I cannot say with 100 percent certainty that all of the GHB in Joey's system came from the Princess Bead rings. For one thing, GHB can be found in several sources, household objects, and precursors (such as 1,4-butanediol)—as the Freeland article mentions. Of course, that's extremely unlikely since Joey didn't have any of those chemicals in his system. Moreover, while I was able to determine that the rings in Joey's vomit contained 1,4-butanediol, I could not determine how much of it remained on those rings at the time Joey vomited. There is no way to account for the metabolic rate given the unique contents of Joey's stomach, including his stomach acid. No research has been done in this area.

Notwithstanding these shortcomings, it is my professional opinion that the only way Joey Davis could have gotten GHB into his body was through the ingestion of Princess Beads, specifically the rings. Based on his health history and my investigation, it was the 1,4-butanediol from the Princess Beads that caused his medical emergency. I called Andy on August 10, 2009, the same day I analyzed the Princess Beads and concluded that they were what killed Joey. I told Andy what I had determined. Andy seemed devastated and said HappyLand Toy wouldn't get away with this. I hope Andy is right.

I should mention a mistake I made in 2003 when I was assisting our now-deceased medical examiner, Prescott Ooms. I concluded a woman had died from strychnine poisoning. I was the only expert witness for the prosecution and the defense called three experts who said I was wrong. Still, the jury found my testimony convincing and convicted the husband of murder. It turns out I was wrong. A later investigation by our medical examiner's office found that I had accidentally switched the samples and there was no strychnine. The conviction was overturned,

the husband was set free, and I almost lost my job and my medical license. I feel terrible about it. It's definitely the biggest blemish on my career.

Of the Available Exhibits, I am familiar with the following and only the following: Exhibits 1-2 (Exhibits A and B to the Complaint); Exhibit 5 (Curriculum Vitae of Chase Tuchmont); Exhibit 22 (*GHB: Separating Myth from Truth*, by Freeland and Hartsfield); Exhibit 23 (Autopsy); Exhibit 24 (Record of Outpatient Visit, dated October 5, 2008); Exhibit 28 (labels for packaging of Princess Beads); and Exhibits 29(a) (beads swallowed by Joey Davis), 29(b) (Hillary Davis's Princess Beads), 29(c) (my daughter Juliana's Princess Beads), and 29(d) (Princess Beads manufactured by HappyLand, which I became familiar with only after August 2009). I hereby attest to having read the above statement and swear or affirm it to be my own. I also swear or affirm to the truthfulness of its content. Before giving this statement, I was told it should contain everything I knew that may be relevant to my testimony and I followed those instructions. I also understand that I can and must update this affidavit if anything new occurs to me until the moment before opening statements begin in this case.

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Chase Tuchmont

Subscribed and sworn before me on this, the 18th of March, 2010.

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Susan Coffey, Notary Public

AFFIDAVIT OF EMERSON ZIMMER

After being duly sworn upon oath, Emerson Zimmer hereby deposes and states as follows:

My name is Dr. Emerson Zimmer. I currently reside at 3149 Rancho Sierra Bend in Midlands Hills. I am the former Commissioner of the Midlands Department of Health ("MDH"). I now teach junior high school biology. My qualifications are set forth in a curriculum vitae I provided to both parties. I have extensive experience in academia and public policy, and have covered, taught, and helped establish the Midlands standards regarding controlled substances, including GHB and 1,4-butanediol. My experience is purely academic and governmental. I have never worked in a clinical setting, treated an actual patient, or seen firsthand the effects of GHB on humans (though I've seen its effect on rats and mice in a laboratory setting).

In this case, I was hired by Andy Davis's legal team in July 2010 to provide some background regarding how Midlands regulates controlled substances, specifically GHB and 1,4-butanediol. Ever since I stopped working with the MDH, I had always refused to testify in civil cases. But one of Andy Davis's lawyers—the attorney giving the closing argument for the plaintiffs in the *Davis v. HappyLand* trial—is one of my best friends. I couldn't turn down a good friend. Of course, the money was also persuasive. Andy Davis's lawyers are paying me $750 per hour, both for pretrial preparation and for my time at trial. As I understand it, Davis's lawyers are covering all my fees and will seek reimbursement only if the Plaintiff wins at trial or recovers a monetary award through a settlement. I have spent 25 hours preparing for this case, which comes out to $18,750, and I expect to spend at least another 3 hours at trial. While I have not yet been paid at all, I expect to be compensated as soon as this case is resolved.

This affidavit contains all of my conclusions associated with this case. I have not drawn any conclusions regarding the cause of Joey Davis's death. In particular, I express no opinion whatsoever about whether Joey Davis died from a GHB overdose or, if so, whether such

poisoning was caused by HappyLand's Princess Beads. I have not tested the Princess Beads. Nor have I reviewed any affidavits in this litigation.

In 1999, Midlands Governor Gerald Walton asked me if I would accept an appointment as Commissioner of the MDH. I accepted and continued in this role until 2009. During my decade as MDH Commissioner, the number of smokers declined by 500,000, teen smoking decreased by two-thirds, and Midlands became one of the first places in the nation to require certain restaurants to post calorie information prominently (among other restaurant innovations). I helped accomplish all of these achievements. My salary at MDH was $96,000 per year.

In 2001, the Midlands legislature asked me to testify regarding the risks and benefits associated with gamma-hydroxybutyric acid, or GHB for short. I testified before a committee tasked with determining what substances were and were not to be included in the upcoming revision to Chapter 80 of the Midlands Criminal Code, specifically in terms of the Drug Abuse, Prevention and Control Act ("DAPC Act"). I submit that I was a good choice to testify on these issues, given my scholarship in the area of GHB, which is described in my curriculum vitae. I am also familiar with many articles on the topic of GHB, including Freeland and Hartsfield's article *GHB: Separating Myth from Truth*. That article is an accurate and current summary of what is known about GHB. I agree with that article in its entirety and, in fact, I relied on it while forming my conclusions in this lawsuit and during my 2009 investigation of HappyLand.

In testifying before the committee, I explained that, in some ways, GHB required closer legislative scrutiny than other, more well-known drugs, such as heroin or marijuana. This is because GHB and its precursors are often used as part of household objects and common materials, such as plastics, paint thinners, and nail polish remover. This means that more than just recreational users are at risk—children, adults, anyone exposed to unregulated products that

might contain GHB. This can lead to respiratory problems, addictions, comas, or even death. For these reasons, I was proud to be instrumental in helping to persuade the Midlands legislature to add GHB as a Schedule I Substance.

I made sure to explain to the committee that they would want to write the law in a way that would not limit the class of people that would be protected by the statute. While generally GHB is used as a date-rape drug, I explained that the legislators really couldn't be sure what other means people might come up with to use the drug for in the future. Thus, while the initial intent was to protect against the social injuries that GHB can cause, they would want to make sure that the law would protect against unforeseen uses in the future (or even unintended uses).

In addition to testifying about the DAPC Act, I helped enforce it. The MDH is in charge of approving manufacturers' requests to use controlled substances for industrial purposes and approving controlled substances for medical purposes, including designing drugs for medical treatment. The Department is also in charge of investigating and prosecuting violators. Given credible information that a company had violated the DAPC Act, we would issue subpoenas, investigate the claim, reach a determination as to compliance, and then issue a ruling. The MDH's rulings include cease-and-desist letters, stop-production orders, recall orders, and monetary sanctions, among others. The MDH also has an open channel with the Midlands prosecutor's office, which has brought criminal charges against many individuals and corporations for failure to comply with the DAPC Act.

On August 10, 2009, I got a call from Dr. Chase Tuchmont, who told me HappyLand Toy Company had been using 1,4-butanediol in its new toy, Princess Beads. (For clarity, I will refer to the smaller, ring-shaped beads as "rings" and the larger, spherical-shaped beads as "pearls." When I say "beads," "Beads," or "Princess Beads," I am referring to the toy as a whole—both

the rings and the pearls.) Dr. Tuchmont told me that the 1,4-butanediol in the Princess Beads may have caused the death of a child named Joey Davis. Hours after I got the call from Dr. Tuchmont, the press broke the story about Joey Davis and HappyLand. I did not get involved with the Joey Davis situation specifically, but since 1,4-butanediol is a controlled substance, I called HappyLand and spoke to its CEO, Blake Lexington. I told Lexington that the MDH would be investigating allegations relating to Princess Beads and the use of 1,4-butanediol.

Lexington and HappyLand could not have been more cooperative with the investigation. Subpoenas were unnecessary. HappyLand produced everything we requested, including ingredients, formula, packaging and all documents related to product testing for Princess Beads. HappyLand also made its employees available for questioning, including Princess Beads designer Quinn Brown. HappyLand never denied that the Princess Beads contained 1,4 butanediol—Blake Lexington, Quinn Brown, and Erin Swift all admitted it to us during our investigation. While neither I nor the MDH tested the Princess Beads, I reviewed the ingredients and formula for the Princess Beads and concluded that, indeed, Princess Beads were designed and manufactured with 1,4-butanediol.

Lexington and the HappyLand employees with whom I spoke maintained, however, that HappyLand was unaware that 1,4-butanediol was banned under the DAPC Act. HappyLand said that the MDH should do a better job of broadcasting its regulations. I don't understand how HappyLand could have been unaware of the DAPC Act. True, the DAPC Act has been updated every year or two since 1990 and we don't notify companies every time we update the DAPC Act. But the ban on GHB has been in effect since 2001 and it's posted prominently on our website. The language is unambiguous. A simple Google search for "Midlands" and "GHB" will show you right away that GHB is banned in Midlands. And it should not have come as a

surprise (to HappyLand or anyone else) that the "date rape drug" might be regulated by the government. As for 1,4-butanediol, anyone with a chemistry degree—or access to a textbook or computer—can tell you it metabolizes into GHB. A simple Wikipedia or Google search for "1,4 butanediol" will tell you that it metabolizes into GHB.

Based on the MDH's investigation, I concluded that HappyLand violated the DAPC Act through its design, manufacture and dissemination of Princess Beads. 1,4-butanediol is one of the metabolic precursors for GHB. Once inside the human body, it metabolizes into GHB. 1,4-butanediol unquestionably qualifies as a precursor for GHB under the Midlands Analogue Statute, codified as Rule 80.05. In other words, 1,4-butenadiol qualifies as a Schedule I Substance, a fact that HappyLand conceded during my investigation (but maintained that it was unaware prior to my investigation).

Moreover, it is my opinion that the Princess Beads contained a "significant quantity" of 1,4-butanediol, as defined by Rules 80.01 and 80.02 of the Midlands Code. HappyLand told me that each Princess Bead contains 50 mg of 1,4-butanediol, which means each box of 700 Princess Beads contains 35 grams of 1,4-butanediol. Toxicologists believe it takes a dose of about 150 mg/kg of GHB or 1,4-butanediol to kill someone. Even if we estimate conservatively and increase that figure, there is more than enough 1,4-butanediol in a box of Princess Beads to kill someone, especially a young child.

I understand that HappyLand now claims that it understood "product" under Section 80.01 as referring to a single Princess Bead, not the entire box. It's true that, if such an interpretation were correct, a single Princess Bead would not contain a "significant quantity" 1,4-butanediol because 50 milligrams of 1,4-butanediol is insufficient to cause death or serious injury to even the smallest child. I acknowledge that the statute does not separately define the

word "product" and could thus be clearer in this regard. But it strains credulity to think that a single bead could constitute the "product," because HappyLand admitted to me that the Beads weren't sold separately. Besides, our MDH website contains links to a variety of historical rulings and interpretations by the MDH; in all of those rulings, MDH always understood the "product" to mean the product as sold, not its individual parts. Companies have a legal and ethical obligation to perform due diligence and HappyLand failed to do so.

Nonetheless, rather than bringing a formal proceeding against HappyLand—which would have cost the taxpayers a lot of money and used other departmental resources—the Midlands Department of Health, under my stewardship, negotiated a settlement with HappyLand. HappyLand and the MDH signed a Settlement Agreement in which HappyLand promised: (1) not to use 1,4-butanediol in its products without express, written preapproval from the MDH; (2) to immediately pay $1,000,000 to the MDH; and (3) to send its executives, directors and officers to annual product safety courses run by the State of Midlands. The Settlement Agreement contains a provision that says HappyLand has made no admission that its Princess Beads in any way violated the law, including the DAPC Act. The Settlement Agreement also states that HappyLand's maintains that it was unaware of the DAPC Act rules regarding 1,4-butanediol. Blake Lexington and I executed the settlement agreement on October 1, 2009.

The Princess Beads investigation was my second and final experience with HappyLand (other than testifying in this lawsuit). I serve on the board of directors of a non-profit organization called Everyday Safety, whose goal is to promote safe practices among designers of household products. Everyone knows about the risks of tobacco, but the objects sitting in our fridge or in our garage can be especially dangerous if we don't know the risks involved. Each year, our organization honors one company whose designs and safety adherence warrant

applause. In 2008, we honored HappyLand for using product testing to make their toys as safe as possible. This was before HappyLand released their Princess Beads toy, but it's still a good mark on the company's record. When we selected HappyLand, I interviewed Lexington and toured the HappyLand facilities. I was impressed with the company's commitment to safety and I cannot imagine that the company would knowingly design a toy that puts children at risk.

I no longer work for the MDH. In November 2009, I was accused of giving preferential treatment to a pharmaceutical company called HealthMed, a company that had applied for MDH preapproval of Parker Pills, a new drug that was supposed to improve public speaking skills. My staff discovered that the HealthMed's application for preapproval included falsified lab tests that purported to show the safety of Parker Pills. When confronted, HealthMed admitted to falsifying its lab tests. I decided to let HealthMed off with a warning and a small fine ($10,000). The day after we closed the file on HealthMed's fraud, the *Midlands Gazette* ran an article accusing me of giving preferential treatment to HealthMed because its CEO, Troy Parker, was my college roommate. The *Gazette* cited three other companies that had falsified lab reports (just as HealthMed had done) but had all received very public reprimands and fines of more than $100,000 (one received a fine exceeding $1,000,000). I acknowledge that I had given HealthMed preferential treatment because I knew its CEO; I knew that Troy Parker would never have endorsed such fraud, which meant that the violation didn't "go to the top." Nonetheless, before I could resign and save some face, Governor Walton publicly asked for my resignation, which I gave without protest. I resigned from the MDH on November 25, 2009.

I now teach biology at the Susan Ewing Junior High School in State Center, Midlands. I would have preferred another position in government or university-level academia, but the stain

of the HealthMed incident prevented me from getting other jobs. I find it rewarding to work with young people, which is a good thing given the $43,000 salary.

Of the Available Exhibits, I am familiar with the following and only the following: Exhibit 6 (Curriculum Vitae of Emerson Zimmer); Exhibit 22 (*GHB: Separating Myth from Truth*), and Exhibit 29(d) (the Princess Beads manufactured by HappyLand). I hereby attest to having read the above statement and swear or affirm it to be my own. I also swear or affirm to the truthfulness of its content. Before giving this statement, I was told it should contain everything I knew that may be relevant to my testimony and I followed those instructions. I also understand that I can and must update this affidavit if anything new occurs to me until the moment before opening statements begin in this case.

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Emerson Zimmer, M.D., M.P.H.

Subscribed and sworn before me on this, the 25th of March, 2010.

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Kathryn Elise, Notary Public