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ORIGINAL FILED**
Superior Court of California
County of Los Angeles

MAR 07 2014

Sherri R. Carter, Executive Officer/Clerk
By Stephen M. Smythe, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
CENTRAL DISTRICT

17 SHEFA LMV, LLC,
18 Plaintiff,

19 v.

20 CHATTEM, INC.,
21 Defendant.

)
) Unlimited Jurisdiction
)
) CASE NO. BC 528423
)
) Honorable Michelle R. Rosenblatt
) Dept. 40
)
) **AMENDED**
) **[PROPOSED] CONSENT JUDGMENT**
) **AND ORDER THEREON**

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1 **1. INTRODUCTION**

2 **1.1. Shefa LMV, LLC and Chattem, Inc.**

3 This Consent Judgment is entered into by and between plaintiff Shefa LMV, LLC (“Shefa
4 LMV”) and Chattem, Inc. (“Chattem”), with Shefa LMV and Chattem collectively referred to as
5 the “parties,” and individually as a “party.” Shefa LMV is an entity organized in the State of
6 California, which has asserted that it seeks to promote awareness of exposure to toxic chemicals
7 and to improve human health by reducing or eliminating hazardous substances contained in
8 consumer and commercial products. Shefa LMV alleges that Chattem employs ten or more
9 persons and is a person in the course of doing business for purposes of the Safe Drinking Water
10 and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.6, *et seq.*
11 (“Proposition 65”).

12 **1.2. General Allegations**

13 Shefa LMV alleges that Chattem has manufactured, imported, distributed and/or sold
14 shampoo products that contain cocamide diethanolamine (“cocamide DEA”) without the requisite
15 Proposition 65 warnings. Cocamide DEA is on the Proposition 65 list as known to cause birth
16 defects and other reproductive harm.

17 **1.3. Product Description**

18 As used in this Consent Judgment, “Products” shall mean products containing cocamide
19 DEA including, but not limited to, Selsun Blue Medicated Treatment Dandruff Shampoo, Selsun
20 Blue Moisturizing Treatment Dandruff Shampoo, Selsun Blue 2-in-1 Treatment Dandruff
21 Shampoo, and Selsun Blue Dandruff Shampoo Normal to Oily, that are manufactured, imported,
22 distributed and/or sold by Chattem for sale in the State of California.

23 **1.4. Notice of Violation**

24 On June 22, 2013, Shefa LMV served Chattem and various public enforcement agencies
25 with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided recipients with
26 notice alleging that Chattem was in violation of Proposition 65 for failing to warn consumers and
27 customers that the Products exposed users in California to cocamide DEA. No public enforcer has
28 diligently prosecuted the allegations set forth in the Notice.

1 **1.5. Complaint**

2 On or about November 21, 2013, Shefa LMV filed a complaint in the Superior Court in and
3 for the County of Los Angeles against Chattem, Inc., *Shefa LMV, LLC v. Chattem, Inc.*, Case
4 No. BC528423, alleging violations of Proposition 65, based on the alleged exposures to cocamide
5 DEA contained in certain products sold by Chattem (“Complaint”).

6 **1.6. No Admission**

7 Chattem denies the material, factual and legal allegations contained in Shefa LMV’s Notice
8 and Complaint and maintains that it has at all times been in compliance with all laws and all
9 products that it has sold, manufactured, imported and/or distributed in California, including the
10 Products. Nothing in this Consent Judgment shall be construed as an admission by Chattem of any
11 fact, finding, issue of law or violation of law, nor shall compliance with this Consent Judgment
12 constitute or be construed as an admission by Chattem of any fact, finding, conclusion, issue of law
13 or violation of law. However, this Section shall not diminish or otherwise affect Chattem’s
14 obligations, responsibilities and duties under this Consent Judgment.

15 **1.7. Consent to Jurisdiction**

16 For purposes of this Consent Judgment only, the parties stipulate that this Court has
17 jurisdiction over Chattem as to the allegations contained in the Complaint, that venue is proper in
18 the County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions of
19 this Consent Judgment.

20 **1.8. Execution Date**

21 For purposes of this Consent Judgment, the term “Execution Date” shall mean the date this
22 Consent Judgment is signed by both parties.

23 **1.9. Effective Date**

24 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date the
25 Court enters Judgment pursuant to the terms of this Consent Judgment.

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1 **2. INJUNCTIVE RELIEF: REFORMULATION**

2 **2.1. Reformulation of Covered Products**

3 As of the Effective Date, Chattem shall not manufacture, distribute, sell or offer for sale
4 any Covered Product that contains Cocamide DEA and that will be sold or offered for sale to
5 California consumers. For purposes of this Consent Judgment, a product “contains cocamide
6 DEA” if cocamide DEA is an intentionally added ingredient in the product and/or part of the
7 product formulation.

8 **2.2. Suppliers**

9 No more than 30 days after the Effective Date, Chattem shall issue specifications to its
10 suppliers of Covered Products requiring that Covered Products not contain any cocamide DEA,
11 and shall instruct each supplier to use reasonable efforts to eliminate Covered Products containing
12 cocamide DEA on a nationwide basis.

13 **2.3. Sell Through Period**

14 Notwithstanding the restrictions of Section 2.1, any of Chattem’s downstream customers
15 that have in inventory any of the Covered Products that contain Cocamide DEA that exceed the
16 Cocamide DEA Limits shall have six (6) months from the Effective Date without penalty or cost to
17 sell such Covered Products or otherwise display a warning pursuant to Proposition 65.

18 **3. MONETARY PAYMENTS**

19 **3.1. Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

20 Chattem shall pay a total civil penalty payment of \$14,500 within ten (10) days of the
21 Execution Date, as follows: the civil penalty shall be apportioned in accordance with California
22 Health & Safety Code § 25249.12 (c) and (d), with 75% of these funds remitted to the State of
23 California’s Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
24 25% of the penalty remitted to Shefa LMV, both pursuant to the procedures set forth in Section
25 3.3.

26 **3.2. Reimbursement of Shefa LMV’s Fees and Costs**

27 The parties acknowledge that Shefa LMV and its counsel offered to resolve this dispute
28 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving

1 this fee issue to be resolved after the material terms of the agreement had been settled. Chattem
2 expressed a desire to resolve the fee and cost issue after the other settlement terms had been
3 agreed. The Parties then attempted to (and did) reach an accord on the compensation due to Shefa
4 LMV and its counsel under general contract principles and the private attorney general doctrine
5 codified at California Code of Civil Procedure § 1021.5, for all work performed in this matter,
6 except fees that may be incurred on appeal. Under these legal principles, Chattem shall pay the
7 amount of \$12,500 for fees and costs incurred investigating, litigating and enforcing this matter,
8 including the fees and costs incurred (and yet to be incurred) negotiating, drafting, and obtaining
9 the Court's approval of this Consent Judgment in the public interest.

10 **3.3. Payment Procedures**

11 All payments required by Sections 3.1 and 3.2 shall be within ten (10) days of the
12 Execution Date, in three checks made payable as follows:

- 13 (a) one check to "OEHHA" in the amount of \$10,875;
- 14 (b) one check to "Law Office of Daniel N. Greenbaum in Trust for Shefa LMV, LLC" in
15 the amount of \$3,625;
- 16 (c) one check to "Law Office of Daniel N. Greenbaum" in the amount of \$12,500.

17 **3.4. Issuance of 1099 Forms**

18 After the settlement funds have been transmitted to Shefa LMV's counsel, Chattem shall
19 issue separate 1099 forms, as follows:

- 20 (a) one 1099 form to the "Office of Environmental Health Hazard Assessment" (EIN:
21 68-0284486) in the amount of \$10,875;
- 22 (b) a second 1099 form to "Shefa LMV, LLC" in the amount of \$3,625, whose address
23 and tax identification number shall be furnished upon request;
- 24 (c) a third 1099 to "Law Office of Daniel N. Greenbaum" (EIN: 45-3084082) in the
25 amount of \$12,500;

26 **3.5. Issuance of Payments.**

27 **3.5.1.** All payments owed to Shefa LMV, pursuant to Section 3.1, shall be
28 delivered to the following payment address:

1 Daniel N. Greenbaum, Esq.
2 Law Office of Daniel N. Greenbaum
3 1467 South Holt Avenue #2
4 Los Angeles, CA 90035

5 **3.5.2.** All payments owed to OEHHA (EIN: 68-0284486), pursuant to Section 3.1,
6 shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at the following addresses:

7 Mike Gyrics
8 Fiscal Operations Branch Chief
9 Office of Environmental Health Hazard Assessment
10 P.O. Box 4010
11 Sacramento, CA 95812-4010

12 With a copy of the checks payable to OEHHA mailed to the Law Office of Daniel N. Greenbaum
13 at the address set forth above in 3.5.1, as proof of payment to OEHHA.

14 **4. CLAIMS COVERED AND RELEASED**

15 **4.1. Shefa LMV's Release of Chattem**

16 Plaintiff, acting on its own behalf and in the public interest, releases Chattem, its parents,
17 subsidiaries, affiliated entities that are under common ownership, directors, officers, employees,
18 attorneys, and each entity to whom Chattem directly or indirectly distributes or sells Products,
19 including, but not limited to, downstream distributors, wholesalers, customers, retailers, including
20 specifically, but not limited to Walgreen Co., franchisees, cooperative members, licensors, and
21 licensees ("Releasees"), from all claims for violations of Proposition 65 up through the date on
22 which this Consent Judgment is signed by both parties based on exposure to cocamide DEA from
23 the Products as set forth in the Notice. Compliance with the terms of this Consent Judgment
24 constitutes compliance with Proposition 65 with respect to exposures to cocamide DEA from the
25 Products as set forth in the Notice.

26 Shefa LMV, also, in its individual capacity only and *not* in its representative capacity,
27 provides a release herein which shall be effective as a full and final accord and satisfaction, as a
28 bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses,
claims, liabilities and demands of Shefa LMV of any nature, character or kind, whether known or
unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to the
cocamide DEA in the Products manufactured, distributed or sold by Chattem.

4.2. Chattem's Release of Shefa LMV

1 Chattem on behalf of itself, its past and current agents, representatives, attorneys,
2 successors, and/or assignees, hereby waives any and all claims against Shefa LMV, its attorneys
3 and other representatives, for any and all actions taken or statements made (or those that could
4 have been taken or made) by Shefa LMV and its attorneys and other representatives, whether in the
5 course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this
6 matter with respect to the Products.

7 **5. COURT APPROVAL**

8 This Consent Judgment is not effective until it is approved and entered by the Court and
9 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
10 after it has been fully executed by all parties. In the event the Court does not approve this Consent
11 Judgment within one year, the funds paid pursuant to Section 3 of this Consent Judgment shall be
12 returned to Chattem within ten (10) days after the expiration of one year.

13 **6. SEVERABILITY**

14 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
15 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
16 provisions remaining shall not be adversely affected.

17 **7. GOVERNING LAW**

18 The terms of this Consent Judgment shall be governed by the laws of the State of California
19 and the obligations of Chattem hereunder as to the Products apply only within the State of
20 California. In the event that Proposition 65 is repealed, preempted or is otherwise rendered
21 inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are
22 rendered inapplicable or no longer required as a result of any such repeal or preemption or
23 rendered inapplicable by reason of law generally as to the Products, including, without limitation,
24 the removal of cocamide DEA from OEHHA's list of Proposition 65 chemicals, then Chattem shall
25 notify Shefa LMV and its counsel and may have no further obligations pursuant to this Consent
26 Judgment with respect to, and to the extent that, the Products are so affected.

27 **8. NOTICES**

28 Unless specified herein, all correspondence and notices required to be provided pursuant to

1 this Consent Judgment shall be in writing and (i) personally delivered, (ii) sent by first-class,
2 (registered or certified mail) return receipt requested, or (iii) sent by overnight courier to one party
3 from the other party at the following addresses:
4

5 To Chattem:

6 Thad Whitfield
7 Vice President and General Counsel
8 Chattem, Inc.
9 1715 W 38th St.
10 Chattanooga, Tennessee 37409

To Shefa LMV:

Daniel N. Greenbaum, Esq.
Law Office of Daniel N. Greenbaum
1467 South Holt Avenue #2
Los Angeles, CA 90035

11 With a copy to:

12 George J. Gigounas, Esq.
13 DLA Piper LLP
14 555 Mission St., Ste 2400
15 San Francisco, CA 94105

16 Any party, from time to time, may specify in writing to the other party a change of address to
17 which all notices and other communications shall be sent.

18 **9. COUNTERPARTS; FACSIMILE/PDF SIGNATURES**

19 This Consent Judgment may be executed in counterparts and by facsimile or pdf signature,
20 each of which shall be deemed an original, and all of which, when taken together, shall constitute
21 one and the same document. A facsimile or pdf signature shall be as valid as the original.

22 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

23 Shefa LMV and its attorneys agree to comply with the reporting form requirements
24 referenced in California Health & Safety Code § 25249.7(f).

25 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

26 Shefa LMV and Chattem agree to mutually employ their, and their counsel's, best efforts to
27 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent
28 Judgment by the Court in a timely manner. The parties acknowledge that, pursuant to California
Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this
Consent Judgment, which Shefa LMV shall draft and file, and Chattem shall not oppose. If any
third party objection to the noticed motion is filed, Shefa LMV and Chattem shall work together to
file a joint reply or separate replies if the parties so desire and appear at any hearing before the

1 Court. This provision is a material component of the Consent Judgment and shall be treated as
2 such in the event of a breach. If the Court does not grant the motion to approve this Consent
3 Judgment, and if the parties choose not to pursue a modified Consent Judgment within 30 days
4 after the Court's denial of the motion to approve, then, upon remittitur, any and all payments made
5 pursuant to Section 3 of this Consent Judgment will be returned to Chattem.

6 **12. MODIFICATION**

7 This Consent Judgment may be modified only: (1) by written agreement of the parties and
8 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
9 of any party and entry of a modified Consent Judgment by the Court.

10 **13. AUTHORIZATION**

11 The undersigned are authorized to execute this Consent Judgment and have read,
12 understood, and agree to all of the terms and conditions of this Consent Judgment.

13
14
15 AGREED TO:

AGREED TO:

16
17 Date: 11/4/2013

Date: 11/5/2013

18
19 By: 

By: 

Plaintiff, Shefa LMV, LLC

Theodore K. Whitfield, Jr.

20 Print: Alisa Fried

Vice President and General Counsel

21 Its: Managing Member

Defendant, Chattem, Inc.

22
23 **IT IS SO ORDERED:**

24
25 DATE: MAR 07 2014

BY: MICHELLE R. ROSENBLATT

Hon. Michelle R. Rosenblatt

Los Angeles Superior Court