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11 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

MAY - 2 2014

CLERK OF THE SUPERIOR COURT
By YOLANDA ESTRADA Deputy

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF ALAMEDA

17 CENTER FOR ENVIRONMENTAL HEALTH,)
18 a non-profit corporation,)

18 Plaintiff,)

19 vs.)

20 COMMONWEALTH SOAP & TOILETRIES,)
21 INC., *et al.*,)

22 Defendant.)

Case No. RG 13-698427

~~PROPOSED~~ CONSENT
JUDGMENT AS TO LUSH
HANDMADE COSMETICS LTD.

24 **1. INTRODUCTION**

25 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
26 Environmental Health (“CEH”) and defendant Lush Handmade Cosmetics Ltd. (“Settling
27 Defendant”). CEH and Settling Defendant are referred to collectively as the “Parties.”
28

1 1.2 Settling Defendant is a corporation that employs ten (10) or more persons and
2 that manufactures, distributes and/or sells shampoos and liquid soaps that contain coconut oil
3 diethanolamine condensate (cocamide diethanolamine) (hereinafter, “cocamide DEA”) in the
4 State of California or has done so in the past.

5 1.3 On July 15, 2013, CEH served a 60-Day Notice of Violation under Proposition
6 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety
7 Code §§ 25249.5, *et seq.*) (the “Notice”) to Settling Defendant, the California Attorney General,
8 the District Attorneys of every County in the State of California, and the City Attorneys for every
9 City in State of California with a population greater than 750,000. The Notice alleges violations
10 of Proposition 65 with respect to the “warning provision” of Proposition 65, which is found at
11 California Health and Safety Code Section 25249.6. On or about October 18, 2013, CEH served
12 a Supplemental 60-Day Notice of Violation under Proposition 65 (the “Supplemental Notice”) to
13 Settling Defendant, the California Attorney General, the District Attorneys of every County in the
14 State of California, and the City Attorneys for every City in State of California with a population
15 greater than 750,000. The Supplemental Notice alleges violations of Proposition 65 with respect
16 to the “warning provision” of Proposition 65 consistent with the violations alleged in the Notice,
17 concerning occupational exposures.

18 1.4 On October 8, 2013, CEH filed the action entitled *CEH v. Commonwealth*
19 *Soap & Toiletries, Inc., et al.*, Case No. RG 13-698427, in the Superior Court of California for
20 Alameda County, naming Settling Defendant as a defendant in that action. Following the
21 expiration of more than sixty-six (66) days after CEH’s service of the Supplemental Notice, and
22 upon entry of this Consent Judgment, the Complaint shall be deemed amended *nunc pro tunc* to
23 include occupational exposures to cocamide DEA from the Covered Products, defined below,
24 manufactured, distributed, sold or offered for sale by Settling Defendant, provided that no public
25 enforcer has diligently prosecuted any of the allegations set forth in the Supplemental Notice.

26 1.5 For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
27 Court has jurisdiction over the allegations of violations contained in the operative Complaint
28 applicable to Settling Defendant (the “Complaint”) and personal jurisdiction over Settling

1 Defendant as to the acts alleged in the Complaint; (ii) that venue is proper in the County of
2 Alameda; and (iii) that this Court has jurisdiction to enter this Consent Judgment.

3 1.6 Nothing in this Consent Judgment is or shall be construed as an admission by
4 the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance
5 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
6 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
7 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
8 other legal proceeding. This Consent Judgment is the product of negotiation and compromise and
9 is accepted by the Parties for purposes of settling, compromising and resolving issues disputed in
10 this action.

11 **2. DEFINITIONS**

12 2.1 “Covered Products” means shampoos and liquid soaps, including without
13 limitation bubble baths, soaps, hand soaps, body washes, shower gels and bath balms.

14 2.2 “Effective Date” means the date on which this Consent Judgment is entered
15 by the Court.

16 **3. INJUNCTIVE RELIEF**

17 3.1 **Reformulation of Covered Products.** As of the Effective Date, neither
18 Settling Defendant nor any other Defendant Releasee as set forth in Section 7.1 herein, including
19 Lush Cosmetics, LLC, shall manufacture, distribute, sell or offer for sale any Covered Product
20 that contains cocamide DEA and that will be sold or offered for sale to California consumers or
21 will result in exposure of cocamide DEA to Settling Defendant’s employees in California in the
22 course of their employment, except as permitted in paragraph 3.3. For purposes of this Consent
23 Judgment, a product “contains cocamide DEA” if cocamide DEA is an intentionally added
24 ingredient in the product and/or part of the product formulation.

25 3.2 **Specification to Suppliers.** To the extent it has not already done so, no more
26 than 30 days after the Effective Date, Settling Defendant shall issue specifications to its suppliers
27 of Covered Products requiring that Covered Products not contain any cocamide DEA, and shall
28 instruct each supplier to use reasonable efforts to eliminate Covered Products containing

1 cocamide DEA in California.

2 3.3 **Grace Period for Products Manufactured Prior to Effective Date.**

3 Liability for Covered Products that were manufactured and distributed for retail sale prior to the
4 Effective Date or were used by employees in the course of their employment prior to the
5 Effective Date shall be subject to the release of liability pursuant to Section 7 of this Consent
6 Judgment, without regard to when such Covered Products were, or are in the future, sold to
7 consumers or used by employees. However, notwithstanding the foregoing, Settling Defendant
8 represents that as of September 18, 2013, Lush Cosmetics, LLC, removed from its California
9 retail stores any remaining Covered Products, and Lush Internet, Inc. ceased the sale over the
10 internet of Covered Products to California consumers.

11 **4. ENFORCEMENT**

12 4.1 CEH may, by motion or application for an order to show cause before the
13 Superior Court of Alameda County, enforce the terms and conditions contained in this Consent
14 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3
15 above, CEH shall provide Settling Defendant with a Notice of Violation and a copy of any test
16 results which purportedly support CEH's Notice of Violation. The Parties shall then meet and
17 confer regarding the basis for CEH's anticipated motion or application in an attempt to resolve it
18 informally, including providing Settling Defendant a reasonable opportunity of at least thirty (30)
19 days to cure any alleged violation. Should such attempts at informal resolution fail, CEH may
20 file its enforcement motion or application. The prevailing party on any motion to enforce this
21 Consent Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a result
22 of such motion or application. This Consent Judgment may only be enforced by the Parties.

23 **5. PAYMENTS**

24 5.1 **Payments by Settling Defendant.** Within five (5) business days of the Effective
25 Date, Settling Defendant shall pay the total sum of \$32,500 as a settlement payment. The total
26 settlement amount for Settling Defendant shall be paid in four separate checks delivered to the
27 offices of the Lexington Law Group (Attn: Mark Todzo), 503 Divisadero Street, San Francisco,
28 California 94117. The funds paid by Settling Defendant shall be allocated between the following

1 categories:

2 5.1.1 \$3,575 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
3 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
4 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard
5 Assessment). The civil penalty check shall be made payable to the Center For Environmental
6 Health.

7 5.1.2 \$4,875 as a payment in lieu of civil penalty to CEH pursuant to Health &
8 Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH will use
9 such funds to continue its work educating and protecting people from exposures to toxic
10 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
11 Judgment and to purchase and test Settling Defendant's products to confirm compliance. In
12 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
13 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
14 educate and protect people from exposures to toxic chemicals. The method of selection of such
15 groups can be found at the CEH web site at www.ceh.org/justicefund. The payment pursuant to
16 this Section shall be made payable to the Center For Environmental Health.

17 5.1.3 \$24,050 as reimbursement of a portion of CEH's reasonable attorneys' fees
18 and costs. A check for \$20,800 shall be made payable to the Lexington Law Group, and a check
19 for \$3,250 shall be made payable to the Center For Environmental Health.

20 **6. MODIFICATION**

21 6.1 **Written Consent.** This Consent Judgment may be modified from time to
22 time by express written agreement of the Parties with the approval of the Court, or by an order of
23 this Court upon motion and in accordance with law.

24 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
25 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
26 modify the Consent Judgment.

27 **7. CLAIMS COVERED AND RELEASED**

28 7.1 This Consent Judgment is a full, final and binding resolution between CEH on

1 behalf of itself and the public interest and Settling Defendant, and its parents, subsidiaries,
2 affiliated entities that are under common ownership, and for each its directors, officers,
3 employees, and attorneys, including but not limited to Lush Cosmetics, LLC, Lush Cosmetics,
4 Inc., Lush Cosmetics NY, LLC, Lush Internet, Inc., Lush Ltd. and Lush Manufacturing Ltd.
5 (“Defendant Releasees”) of any violation of Proposition 65 that was or could have been asserted
6 in the Complaint against Settling Defendant and Defendant Releasees, based on failure to warn
7 about alleged exposure to any individual, including consumers and Settling Defendant’s
8 employees, to cocamide DEA contained in Covered Products that were sold, manufactured, or
9 distributed by Settling Defendant prior to the Effective Date.

10 7.2 Compliance with the terms of this Consent Judgment by Settling Defendant
11 and the Defendant Releasees shall constitute compliance with Proposition 65 by Settling
12 Defendant and its Defendant Releasees with respect to any alleged failure to warn about
13 cocamide DEA in Covered Products manufactured, distributed, or sold by Settling Defendant
14 after the Effective Date.

15 7.3 Nothing in this Section 7 affects CEH’s right to commence or prosecute an
16 action under Proposition 65 against any person other than Settling Defendant and Defendant
17 Releasees.

18 **8. NOTICE**

19 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
20 notice shall be sent by first class and electronic mail to:

21 Mark Todzo
22 Lexington Law Group
23 503 Divisadero Street
24 San Francisco, CA 94117
25 mtodzo@lexlawgroup.com

26 8.2 When Settling Defendant is entitled to receive any notice under this Consent
27 Judgment, the notice shall be sent by first class and electronic mail to:
28

1 Mark Wolverton
2 President, Lush Cosmetics Inc.
3 and Lush Handmade Cosmetics
4 Unit 120-8365 Ontario Street
5 Vancouver, BC
6 Canada V5X 3E8
7 mark@lush.com

8 With a copy to:

9 Joshua Bloom
10 Barg Coffin Lewis & Trapp, LLP
11 350 California Street, 22nd Floor
12 San Francisco, CA 94104
13 jab@bcltlaw.com

14 8.3 Any Party may modify the person and address to whom the notice is to be sent
15 by sending the other Party notice by first class and electronic mail.

16 **9. COURT APPROVAL**

17 9.1 This Consent Judgment shall become effective upon entry by the Court. CEH
18 shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant
19 shall support entry of this Consent Judgment. Once approved, the Parties agree that this Consent
20 Judgment is a final and binding judgment as to the claims covered herein.

21 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
22 effect and shall never be introduced into evidence or otherwise used in any proceeding for any
23 purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

24 **10. ATTORNEYS' FEES**

25 10.1 Should CEH prevail on any motion, application for an order to show cause or
26 other proceeding to enforce a violation of this Consent Judgment, CEH shall be entitled to its
27 reasonable attorneys' fees and costs incurred as a result of such motion or application. Should
28 Settling Defendant prevail on any motion application for an order to show cause or other
proceeding, Settling Defendant may be awarded its reasonable attorneys' fees and costs as a result
of such motion or application upon a finding by the Court that CEH's prosecution of the motion
or application lacked substantial justification. For purposes of this Consent Judgment, the term

1 substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986,
2 Code of Civil Procedure §§ 2016, *et seq.*

3 10.2 Except as otherwise provided in this Consent Judgment, each Party shall bear
4 its own attorneys' fees and costs.

5 10.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
6 sanctions pursuant to law.

7 **11. OTHER TERMS**

8 11.1 The terms of this Consent Judgment shall be governed by the laws of the State
9 of California.

10 11.2 This Consent Judgment shall apply to and be binding upon CEH and Settling
11 Defendant, and its respective divisions, subdivisions, and subsidiaries, and the successors or
12 assigns of any of them.

13 11.3 This Consent Judgment contains the sole and entire agreement and
14 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
15 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
16 merged herein and therein. There are no warranties, representations, or other agreements between
17 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
18 implied, other than those specifically referred to in this Consent Judgment have been made by any
19 Party hereto. No other agreements not specifically contained or referenced herein, oral or
20 otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation,
21 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
22 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
23 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
24 whether or not similar, nor shall such waiver constitute a continuing waiver.

25 11.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
26 that Settling Defendant might have against any other party, whether or not that party is a Settling
27 Defendant.

28 11.5 This Court shall retain jurisdiction of this matter to implement or modify the

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Consent Judgment.

11.6 The stipulations to this Consent Judgment may be executed in counterparts and by means of facsimile or portable document format (pdf), which taken together shall be deemed to constitute one document.

11.7 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into and execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

11.8 The Parties, including their counsel, have participated in the preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This Consent Judgment was subject to revision and modification by the Parties and has been accepted and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to be resolved against the drafting Party should not be employed in the interpretation of this Consent Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

IT IS SO ORDERED:

Dated: MAY - 2 2014
~~2013~~

 GEORGE C. HERNANDEZ, JR.
Judge of the Superior Court

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IT IS SO STIPULATED:
CENTER FOR ENVIRONMENTAL HEALTH



Signature

CHARLIE PIZZANO

Printed Name

ASSOCIATE DIRECTOR

Title

LUSH HANDMADE COSMETICS LTD.

Signature

Printed Name

Title

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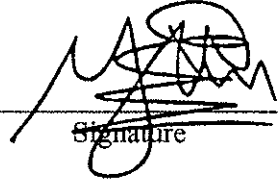
**IT IS SO STIPULATED:
CENTER FOR ENVIRONMENTAL HEALTH**

Signature

Printed Name

Title

LUSH HANDMADE COSMETICS LTD.



Signature

Graham W. Brown

Printed Name

Manufacturing Director

Title