

1 Mark N. Todzo, State Bar No. 168389
2 Howard Hirsch, State Bar No. 213209
3 Victoria Hartanto, State Bar No. 259833
4 LEXINGTON LAW GROUP
5 503 Divisadero Street
6 San Francisco, CA 94117
7 Telephone: (415) 913-7800
8 Facsimile: (415) 759-4112
9 mtodzo@lexlawgroup.com
10 vhartanto@lexlawgroup.com

11 Counsel for Plaintiff
12 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

JUL 22 2014

CLERK OF THE SUPERIOR COURT
By YOLANDA ESTRADA Deputy

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

15 Coordination Proceeding Special Title:) Judicial Council Coordination Proceeding
16 PROPOSITION 65 COCAMIDE DEA CASES) Case No. 4765
17 _____)
18 This Document Relates To:) **[PROPOSED] CONSENT**
19 *CEH v. Skinfood USA, Inc., et al., A.C.S.C. Case*) **JUDGMENT AS TO TUESDAY**
20 *No. RG 13-707307*) **MORNING, INC.**

21 **1. INTRODUCTION**

22 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
23 Environmental Health (“CEH”) and defendant Tuesday Morning, Inc. (“Settling Defendant”).
24 CEH and Settling Defendant are referred to collectively as the “Parties.”

25 1.2 Settling Defendant is a corporation that employs ten (10) or more persons and
26 that sells shampoo and liquid soaps that contain coconut oil diethanolamine condensate (cocamide
27 diethanolamine) (hereinafter, “cocamide DEA”) in the State of California or has done so in the past.

1 1.3 On August 23, 2013, CEH served a 60-Day Notice of Violation under
2 Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &
3 Safety Code §§ 25249.5, *et seq.*) (the “Notice”) to Settling Defendant, the California Attorney
4 General, the District Attorneys of every County in the State of California, and the City Attorneys
5 for every City in the State of California with a population greater than 750,000. The Notice alleges
6 violations of Proposition 65 with respect to the presence of cocamide DEA in shampoo and liquid
7 soaps sold by Settling Defendant.

8 1.4 On December 18, 2013, CEH filed the action entitled *CEH v. Skinfood USA,*
9 *Inc., et al.*, Case No. RG 13-707307, in the Superior Court of California for Alameda County. On
10 March 12, 2014, CEH named Settling Defendant as a defendant in that action pursuant to California
11 Code of Civil Procedure §474. On April 1, 2014, the *Skinfood* action was coordinated with several
12 other related Proposition 65 actions in the *Proposition 65 Cocamide DEA Cases*, Case No. JCCP
13 4765, currently pending before this Court.

14 1.5 For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
15 Court has jurisdiction over the allegations of violations contained in the operative Complaint
16 applicable to Settling Defendant (the “Complaint”) and personal jurisdiction over Settling
17 Defendant as to the acts alleged in the Complaint; (ii) that venue is proper in the County of
18 Alameda; and (iii) that this Court has jurisdiction to enter this Consent Judgment.

19 1.6 Nothing in this Consent Judgment is or shall be construed as an admission by
20 the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with
21 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
22 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
23 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
24 other legal proceeding. This Consent Judgment is the product of negotiation and compromise and
25 is accepted by the Parties for purposes of settling, compromising and resolving issues disputed in
26 this action. This Consent Judgment is based on Settling Defendant’s sales of products
27 manufactured, distributed or supplied by Nougat London Ltd. (“Nougat London”).

1 **2. DEFINITIONS**

2 2.1 “Covered Products” means shampoo and liquid soaps manufactured, distributed
3 or supplied by Nougat London.

4 2.2 “Effective Date” means the date on which this Consent Judgment is entered by
5 the Court.

6 **3. INJUNCTIVE RELIEF**

7 3.1 **Reformulation of Products.** As of the Effective Date, Settling Defendant shall
8 not distribute, sell or offer for sale any Covered Products that contain cocamide DEA and that will
9 be sold or offered for sale to California consumers. For purposes of this Consent Judgment, a
10 Covered Product “contains cocamide DEA” if cocamide DEA is an intentionally added ingredient
11 as disclosed on the label of a Covered Product.

12 3.2 **Specification to Suppliers.** Prior to placing any new orders with Nougat
13 London for Covered Products (if any) after the Effective Date, Settling Defendant shall issue
14 specifications to Nougat London requiring that Covered Products not contain any cocamide DEA.

15 3.3 **Action Regarding Specific Covered Products.**

16 3.3.1 On or before the Effective Date, Settling Defendant shall cease selling the
17 Nougat London Caring Hand Wash Fig & Pink Cedar, SKU No. 1214554, Item No. HNDWSH
18 1LTR-FIG (the “Section 3.3 Product”) in California. On or before the Effective Date, Settling
19 Defendant shall also: (i) cease shipping the Section 3.3 Product to any of its stores and/or customers
20 that resell the Section 3.3 Product in California if the Section 3.3 Product is labeled as containing
21 cocamide DEA, and (ii) send instructions to its stores and/or customers that resell the Section 3.3
22 Product in California instructing them, if the Section 3.3 Product is labeled as containing cocamide
23 DEA, either to: (a) return all the Section 3.3 Product to Settling Defendant for destruction; or (b)
24 directly destroy the Section 3.3 Product.

25 3.3.2 Any destruction of Section 3.3 Product shall be in compliance with all
26 applicable laws.

1 3.3.3 Within sixty days of the Effective Date, Settling Defendant shall provide
2 CEH with written certification from Settling Defendant confirming compliance with the
3 requirements of this Section 3.3.

4 **4. ENFORCEMENT**

5 4.1 CEH may, by motion or application for an order to show cause before the
6 Superior Court of Alameda County, enforce the terms and conditions contained in this Consent
7 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3
8 above, CEH shall provide Settling Defendant with a Notice of Violation and a copy of any test
9 results which purportedly support CEH's Notice of Violation. The Parties shall then meet and
10 confer regarding the basis for CEH's anticipated motion or application in an attempt to resolve it
11 informally, including providing Settling Defendant a reasonable opportunity of at least thirty (30)
12 days to cure any alleged violation. Should such attempts at informal resolution fail, CEH may file
13 its enforcement motion or application. This Consent Judgment may only be enforced by the
14 Parties.

15 **5. PAYMENTS**

16 5.1 **Payments by Settling Defendant.** Within fifteen (15) business days of the
17 Effective Date, Settling Defendant shall pay the total sum of \$15,000 as a settlement payment. The
18 total settlement amount for Settling Defendant shall be paid in four separate checks delivered to
19 counsel for CEH at the address set forth in Section 8.1 below. The funds paid by Settling
20 Defendant shall be allocated between the following categories:

21 5.1.1 \$1,650 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
22 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12 (25%
23 to CEH and 75% to the State of California's Office of Environmental Health Hazard Assessment).
24 The civil penalty check shall be made payable to the Center For Environmental Health.

25 5.1.2 \$2,250 as a payment in lieu of civil penalty to CEH pursuant to Health &
26 Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH will use
27 such funds to continue its work educating and protecting people from exposures to toxic chemicals.

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1 CEH may also use a portion of such funds to monitor compliance with this Consent Judgment and
2 to purchase and test Settling Defendant's products to confirm compliance. In addition, as part of its
3 Community Environmental Action and Justice Fund, CEH will use four percent (4%) of such funds
4 to award grants to grassroots environmental justice groups working to educate and protect people
5 from exposures to toxic chemicals. The method of selection of such groups can be found at the
6 CEH web site at www.ceh.org/justicefund. The payment pursuant to this Section shall be made
7 payable to the Center For Environmental Health.

8 5.1.3 \$11,100 as reimbursement of a portion of CEH's reasonable attorneys' fees
9 and costs. A check for \$9,600 shall be made payable to the Lexington Law Group, and a check for
10 \$1,500 shall be made payable to the Center For Environmental Health.

11 6. MODIFICATION

12 6.1 **Written Consent.** This Consent Judgment may be modified from time to time
13 by express written agreement of the Parties with the approval of the Court, or by an order of this
14 Court upon motion and in accordance with law.

15 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
16 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to modify
17 the Consent Judgment.

18 7. CLAIMS COVERED AND RELEASED

19 7.1 This Consent Judgment is a full, final and binding resolution between CEH on
20 behalf of itself and the public interest and Settling Defendant and its parents, subsidiaries and
21 affiliated entities that are under common ownership, and each of their present and former directors,
22 officers, employees, shareholders, agents, attorneys, predecessors, successors, and assigns
23 (collectively referred to as the "Defendant Releasees") of any violation of Proposition 65 that was
24 or could have been asserted in the Complaint against Settling Defendant and Defendant Releasees,
25 based on failure to warn about alleged exposure to cocamide DEA contained in Covered Products
26 that were sold by Settling Defendant prior to the Effective Date.

1 7.2 Compliance with the terms of this Consent Judgment by Settling Defendant
2 shall constitute compliance with Proposition 65 by Settling Defendant and its Defendant Releasees
3 with respect to any alleged failure to warn about cocamide DEA in Covered Products sold by
4 Settling Defendant after the Effective Date.

5 7.3 Nothing in this Section 7 affects CEH's right to commence or prosecute an
6 action under Proposition 65 against any person other than Settling Defendant and Defendant
7 Releasees.

8 **8. NOTICE**

9 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
10 notice shall be sent by first class and electronic mail to:

11 Howard Hirsch
12 Lexington Law Group
13 503 Divisadero Street
14 San Francisco, CA 94117
15 hhirsch@lexlawgroup.com

16 8.2 When Settling Defendant is entitled to receive any notice under this Consent
17 Judgment, the notice shall be sent by first class and electronic mail to:

18 Tuesday Morning, Inc.
19 Attention: Meredith Bjorck
20 6250 LBJ Freeway
21 Dallas, Texas 75240
22 mbjorck@tuesdaymorning.com

23 Copy to:
24 Trenton H. Norris
25 Sarah Esmaili
26 Arnold & Porter LLP
27 Three Embarcadero Center, 7th Floor
28 San Francisco, CA 94111-4024
 Trent.Norris@aporter.com
 Sarah.Esmaili@aporter.com

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

1 **9. COURT APPROVAL**

2 9.1 This Consent Judgment shall become effective upon entry by the Court. CEH
3 shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant shall
4 support entry of this Consent Judgment.

5 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
6 effect and shall never be introduced into evidence or otherwise used in any proceeding for any
7 purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

8 **10. ATTORNEYS' FEES**

9 10.1 In the event of any motion, application for an order to show cause or other
10 proceeding to enforce a violation of this Consent Judgment, the prevailing Party shall be entitled to
11 its reasonable attorneys' fees and costs incurred as a result of such motion or application.

12 10.2 Except as otherwise provided in this Consent Judgment, each Party shall bear its
13 own attorneys' fees and costs.

14 10.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
15 sanctions pursuant to law.

16 **11. OTHER TERMS**

17 11.1 The terms of this Consent Judgment shall be governed by the laws of the State
18 of California.

19 11.2 This Consent Judgment shall apply to and be binding upon CEH and Settling
20 Defendant, and its respective divisions, subdivisions, and subsidiaries, and the successors or
21 assigns of any of them.

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

7 11.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
8 that Settling Defendant might have against any other party, whether or not that party is a Settling
9 Defendant.

10 11.5 This Court shall retain jurisdiction of this matter to implement or modify the
11 Consent Judgment.

12 11.6 The stipulations to this Consent Judgment may be executed in counterparts and
13 by means of facsimile or portable document format (pdf), which taken together shall be deemed to
14 constitute one document.

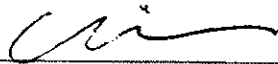
15 11.7 Each signatory to this Consent Judgment certifies that he or she is fully
16 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into
17 and execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.
18 The Parties, including their counsel, have participated in the preparation of this Consent Judgment
19 and this Consent Judgment is the result of the joint efforts of the Parties. This Consent Judgment
20 was subject to revision and modification by the Parties and has been accepted and approved as to its
21 final form by all Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in
22 this Consent Judgment shall not be interpreted against any Party as a result of the manner of the
23 preparation of this Consent Judgment. Each Party to this Consent Judgment agrees that any statute
24 or rule of construction providing that ambiguities are to be resolved against the drafting Party
25 should not be employed in the interpretation of this Consent Judgment and, in this regard, the
26 Parties hereby waive California Civil Code § 1654.

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1 IT IS SO STIPULATED:

2 CENTER FOR ENVIRONMENTAL HEALTH

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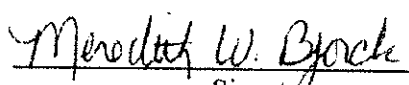


5 Charlie Pizarro
6 Associate Director

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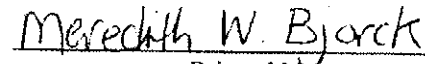
8 TUESDAY MORNING, INC.

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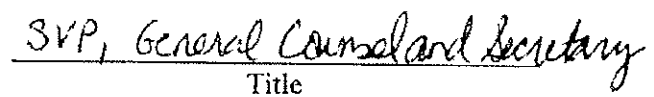
10 Signature

11



12 Printed Name

13



14 Title

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19 IT IS SO ORDERED:

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21 Dated: JUL 22, 2014

22 GEORGE C. HERNANDEZ, JR.

23 Judge of the Superior Court

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