

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

6 Rick Franco, State Bar No. 170970
7 Center for Environmental Health
8 2201 Broadway, Suite 302
9 Oakland, California 94612
10 Telephone: (510) 655-3900
11 Facsimile: (510) 655-9100
12 rick@ceh.org
13
14 Counsel for Plaintiff
15 CENTER FOR ENVIRONMENTAL HEALTH
16

ENDORSED
FILED
ALAMEDA COUNTY

JUN - 3 2014

CLERK OF THE SUPERIOR COURT
By **YOLANDA ESTRADA** Deputy

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF ALAMEDA
15

17 CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 13-707307
18 a non-profit corporation,)
19 Plaintiff,)
20 vs.) ~~PROPOSED~~ CONSENT
21 SKINFOOD USA, INC., *et al.*,) JUDGMENT AS TO IMPERIAL DAX
22 Defendant.) COMPANY, INC.
23)

24 **1. INTRODUCTION**

25 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
26 Environmental Health (“CEH”) and defendant Imperial Dax Company, Inc. (“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 sells shampoo 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 September 27, 2013, CEH served a 60-Day Notice of Violation under
6 Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
7 & Safety Code §§ 25249.5, *et seq.*) (the "Notice") to Settling Defendant, the California Attorney
8 General, the District Attorneys of every County in the State of California, and the City Attorneys
9 for every City in the State of California with a population greater than 750,000. The Notice
10 alleges violations of Proposition 65 with respect to the presence of cocamide DEA in shampoo
11 and liquid soaps manufactured, distributed and/or sold by Settling Defendant.

12 1.4 On December 18, 2013, CEH filed the action entitled *CEH v. Skinfood USA,*
13 *Inc., et al.*, Case No. RG 13-707307, in the Superior Court of California for Alameda County,
14 naming Settling Defendant as a defendant in that action.

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

20 1.6 Nothing in this Consent Judgment is or shall be construed as an admission by
21 the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance
22 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
23 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
24 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
25 other legal proceeding. This Consent Judgment is the product of negotiation and compromise and
26 is accepted by the Parties for purposes of settling, compromising and resolving issues disputed in
27 this action.

28

1 **2. DEFINITIONS**

2 2.1 “Covered Products” means shampoo and liquid soaps.

3 2.2 “Effective Date” means the date on which this Consent Judgment is entered by
4 the Court.

5 **3. INJUNCTIVE RELIEF**

6 3.1 **Reformulation of Covered Products.** As of the Effective Date, Settling
7 Defendant shall not manufacture, distribute, sell or offer for sale any Covered Product that
8 contains cocamide DEA and that will be sold or offered for sale to California consumers. For
9 purposes of this Consent Judgment, a product “contains cocamide DEA” if cocamide DEA is an
10 intentionally added ingredient in the product and/or part of the product formulation.

11 3.2 **Action Regarding Specific Products.**

12 3.2.1 On or before the Effective Date, Settling Defendant shall cease selling the
13 following specific products in California: (i) Dax Vegetable Oil Shampoo, SKU No. 0-77315-
14 00402-3; and (ii) Dax Vegetable Oil Shampoo Gentle Formula, SKU No. 0-77315-00402-3 (the
15 “Section 3.2 Products”). On or before the Effective Date, Settling Defendant shall also: (i) cease
16 shipping the Section 3.3 Products to any of its stores and/or customers that resell the Section 3.2
17 Products in California, and (ii) send instructions to its stores and/or customers that resell the
18 Section 3.2 Products in California instructing them either to: (a) return all the Section 3.2
19 Products to Settling Defendant for destruction; or (b) directly destroy the Section 3.2 Products.

20 3.2.2 Any destruction of Section 3.2 Products shall be in compliance with all
21 applicable laws.

22 3.2.3 Within sixty days of the Effective Date, Settling Defendant shall provide
23 CEH with written certification from Settling Defendant confirming compliance with the
24 requirements of this Section 3.2.

25 **4. ENFORCEMENT**

26 4.1 CEH may, by motion or application for an order to show cause before the
27 Superior Court of Alameda County, enforce the terms and conditions contained in this Consent
28 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3

1 above, CEH shall provide Settling Defendant with a Notice of Violation and a copy of any test
2 results which purportedly support CEH's Notice of Violation. The Parties shall then meet and
3 confer regarding the basis for CEH's anticipated motion or application in an attempt to resolve it
4 informally, including providing Settling Defendant a reasonable opportunity of at least thirty (30)
5 days to cure any alleged violation. Should such attempts at informal resolution fail, CEH may
6 file its enforcement motion or application. The prevailing party on any motion to enforce this
7 Consent Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a result
8 of such motion or application. This Consent Judgment may only be enforced by the Parties.

9 **5. PAYMENTS**

10 5.1 **Payments by Settling Defendant.** Within five (5) business days of the Effective
11 Date, Settling Defendant shall pay the total sum of \$15,000 as a settlement payment. The total
12 settlement amount for Settling Defendant shall be paid in four separate checks delivered to
13 counsel for CEH at the address set forth in Section 8.1 below. The funds paid by Settling
14 Defendant shall be allocated between the following categories:

15 5.1.1 \$1,650 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
16 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
17 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard
18 Assessment). The civil penalty check shall be made payable to the Center For Environmental
19 Health.

20 5.1.2 \$2,250 as a payment in lieu of civil penalty to CEH pursuant to Health &
21 Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH will use
22 such funds to continue its work educating and protecting people from exposures to toxic
23 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
24 Judgment and to purchase and test Settling Defendant's products to confirm compliance. In
25 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
26 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
27 educate and protect people from exposures to toxic chemicals. The method of selection of such
28 groups can be found at the CEH web site at www.ceh.org/justicefund. The payment pursuant to

1 this Section shall be made payable to the Center For Environmental Health.

2 5.1.3 \$11,100 as reimbursement of a portion of CEH's reasonable attorneys' fees
3 and costs. A check for \$9,600 shall be made payable to the Lexington Law Group, and a check
4 for \$1,500 shall be made payable to the Center For Environmental Health.

5 **6. MODIFICATION**

6 6.1 **Written Consent.** This Consent Judgment may be modified from time to
7 time by express written agreement of the Parties with the approval of the Court, or by an order of
8 this Court upon motion and in accordance with law.

9 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
10 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
11 modify the Consent Judgment.

12 **7. CLAIMS COVERED AND RELEASED**

13 7.1 This Consent Judgment is a full, final and binding resolution between CEH on
14 behalf of itself and the public interest and Settling Defendant, and its parents, subsidiaries,
15 affiliated entities that are under common ownership, directors, officers, employees, and attorneys
16 ("Defendant Releasees") of any violation of Proposition 65 that was or could have been asserted
17 in the Complaint against Settling Defendant and Defendant Releasees, based on failure to warn
18 about alleged exposure to cocamide DEA contained in Covered Products that were sold by
19 Settling Defendant prior to the Effective Date.

20 7.2 Compliance with the terms of this Consent Judgment by Settling Defendant
21 and the Defendant Releasees shall constitute compliance with Proposition 65 by Settling
22 Defendant and its Defendant Releasees with respect to any alleged failure to warn about
23 cocamide DEA in Covered Products manufactured, distributed, or sold by Settling Defendant
24 after the Effective Date.

25 7.3 Nothing in this Section 7 affects CEH's right to commence or prosecute an
26 action under Proposition 65 against any person other than Settling Defendant and Defendant
27 Releasees.

28 **8. NOTICE**

1 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
2 notice shall be sent by first class and electronic mail to:

3 Mark Todzo
4 Lexington Law Group
5 503 Divisadero Street
6 San Francisco, CA 94117
7 mtodzo@lexlawgroup.com

8 8.2 When Settling Defendant is entitled to receive any notice under this Consent
9 Judgment, the notice shall be sent by first class and electronic mail to:

10 Stewart M. Leviss, Esq.
11 Berkowitz, Lichtstein, Kuritsky, Giasullo, & Gross, LLC
12 75 Livingston Avenue
13 Roseland, NJ 07068
14 sleviss@blkgg.com

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

17 **9. COURT APPROVAL**

18 9.1 This Consent Judgment shall become effective upon entry by the Court. CEH
19 shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant
20 shall support entry of this Consent Judgment.

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 in connection with enforcement of this Consent Judgment.

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

1 Consent Judgment.

2 11.6 The stipulations to this Consent Judgment may be executed in counterparts
3 and by means of facsimile or portable document format (pdf), which taken together shall be
4 deemed to constitute one document.

5 11.7 Each signatory to this Consent Judgment certifies that he or she is fully
6 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into
7 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
8 Party.

9 11.8 The Parties, including their counsel, have participated in the preparation of
10 this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.
11 This Consent Judgment was subject to revision and modification by the Parties and has been
12 accepted and approved as to its final form by all Parties and their counsel. Accordingly, any
13 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
14 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
15 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
16 be resolved against the drafting Party should not be employed in the interpretation of this Consent
17 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

18

19 **IT IS SO STIPULATED:**

20

21 **CENTER FOR ENVIRONMENTAL HEALTH**

22

23



24

Charlie Pizarro
Associate Director

25

26

27

28

1 IMPERIAL DAX COMPANY, INC.

2
3 David Jay
4 Signature

5 David Jay
6 Printed Name

7
8 President
9 Title

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO ORDERED:

Dated: JUN - 3, 2014

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