

1 Mark N. Todzo, State Bar No. 168389
2 Howard J. Hirsch, State Bar No. 213209
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 hhirsch@lexlawgroup.com

ENDORSED
FILED
ALAMEDA COUNTY

AUG 21 2014

6 Counsel for Plaintiff
7 CENTER FOR ENVIRONMENTAL HEALTH

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

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

12 Coordination Proceeding Special Title:
13 PROPOSITION 65 COCAMIDE DEA CASES

) Judicial Council Coordination
) Proceeding

) Case No. 4765

15 This Document Relates To:
16 *CEH v. Skinfood USA, Inc., et al.*, A.C.S.C. Case
17 No. RG 13-707307

) ~~PROPOSED~~ CONSENT
) JUDGMENT AS TO ALBERTSON'S
) LLC AND SUPERVALU INC.

20 **1. INTRODUCTION**

21 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
22 Environmental Health (“CEH”) and defendants Albertson’s LLC and SUPERVALU Inc.
23 (“Settling Defendants”). CEH and Settling Defendants are referred to collectively as the
24 “Parties.”

25 1.2 Settling Defendants are corporations that employ ten (10) or more persons and
26 that manufacture, distribute, and/or sell shampoo and liquid soaps that contain coconut oil
27 diethanolamine condensate (cocamide diethanolamine) (hereinafter, “cocamide DEA”) in the
28 State of California or have done so in the past.

1 1.3 On September 27, 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.*) (“Notice”) to Settling Defendants, 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
6 alleges violations of Proposition 65 with respect to the presence of cocamide DEA in shampoo
7 and liquid soaps that are manufactured, distributed, and/or sold by Settling Defendants.

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,
10 naming SUPERVALU Inc. as a defendant in that action. On March 12, 2014, CEH named
11 Albetson’s LLC as a defendant in that action pursuant to California Code of Civil Procedure
12 §474. On April 1, 2014, the *Skinfood* action was coordinated with several other related
13 Proposition 65 actions in the *Proposition 65 Cocamide DEA Cases*, Case No. JCCP 4765,
14 currently pending before this Court.

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 Defendants (“Complaint”) and personal jurisdiction over Settling
18 Defendants as to the acts alleged in the Complaint; (ii) venue is proper in the County of Alameda;
19 and (iii) 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 Defendants 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 **Specification to Suppliers.** No more than thirty (30) days after the Effective
12 Date, Settling Defendants shall issue a specification to their active suppliers of Covered Products
13 requiring that Covered Products in California not contain any cocamide DEA, and shall instruct
14 each supplier to use reasonable efforts to eliminate Covered Products containing cocamide DEA
15 on a nationwide basis.

16 3.3 **Action Regarding Specific Products.**

17 3.3.1 On or before the Effective Date, Settling Defendants shall cease selling the
18 following specific products in California, but only to the extent that such products contain
19 cocamide DEA: (i) Originals Uniquely Brilliant Bubble Bath in Pomegranate, SKU No. 8-79745-
20 00162-3; and (ii) Equaline Medicated Dandruff Shampoo with Menthol, SKU No. 0-41163-
21 44461-4 (collectively, the “Section 3.3 Products”). On or before the Effective Date, Settling
22 Defendants shall also: (i) cease shipping the Section 3.3 Products to any of their stores and/or
23 customers that resell the Section 3.3 Products in California; and (ii) send instructions to their
24 stores and/or wholesale/resale customers that have provided Settling Defendant with a resale
25 certificate and that resell the Section 3.3 Products in California instructing them either to: (a)
26 return all the Section 3.3 Products to Settling Defendants for destruction, or (b) directly destroy
27 the Section 3.3 Products.

28

1 3.3.2 Any destruction of the Section 3.3 Products shall be in compliance with all
2 applicable laws.

3 3.3.3 Within sixty (60) days of the Effective Date, Settling Defendants shall
4 provide CEH with written certification from Settling Defendants confirming compliance with the
5 requirements of this Section 3.3.

6 **4. ENFORCEMENT**

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

17 **5. PAYMENTS**

18 5.1 **Payments by Settling Defendants.** Within five (5) business days of the Effective
19 Date, Settling Defendants shall pay the total sum of \$20,000 as a settlement payment. The total
20 settlement amount for Settling Defendants shall be paid in four separate checks delivered to
21 counsel for CEH at the address set forth in Section 8.1 below. The funds paid by Settling
22 Defendants shall be allocated between the following categories:

23 5.1.1 \$2,200 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
24 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
25 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard
26 Assessment). The civil penalty check shall be made payable to the Center for Environmental
27 Health.

28 5.1.2 \$3,000 as a payment in lieu of civil penalty to CEH pursuant to Health &

1 Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH will use
2 such funds to continue its work educating and protecting people from exposures to toxic
3 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
4 Judgment and to purchase and test Settling Defendants' products to confirm compliance. In
5 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
6 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
7 educate and protect people from exposures to toxic chemicals. The method of selection of such
8 groups can be found at the CEH web site at www.ceh.org/justicefund. The payment pursuant to
9 this Section shall be made payable to the Center for Environmental Health.

10 5.1.3 \$14,800 as reimbursement of a portion of CEH's reasonable attorneys' fees
11 and costs. A check for \$12,800 shall be made payable to the Lexington Law Group, and a check
12 for \$2,000 shall be made payable to the Center for Environmental Health.

13 6. MODIFICATION

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

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

20 7. CLAIMS COVERED AND RELEASED

21 7.1 This Consent Judgment is a full, final, and binding resolution between CEH on
22 behalf of itself and the public interest and Settling Defendants, and their parents, subsidiaries,
23 affiliated entities that are under common ownership, directors, officers, employees, and attorneys
24 ("Defendant Releasees"), and each entity to whom they directly or indirectly distribute or sell
25 Covered Products, including but not limited to distributors, wholesalers, customers, retailers,
26 franchisees, cooperative members, licensors, and licensees ("Downstream Defendant Releasees"),
27 of any violation of Proposition 65 that was or could have been asserted in the Complaint against
28 Settling Defendants, Defendant Releasees, and Downstream Defendant Releasees, based on

1 failure to warn about alleged exposure to cocamide DEA contained in Covered Products that were
2 sold by Settling Defendants prior to the Effective Date.

3 7.2 Compliance with the terms of this Consent Judgment by Settling Defendants
4 and Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendants,
5 Defendant Releasees, and Downstream Defendant Releasees with respect to any alleged failure to
6 warn about cocamide DEA in Covered Products manufactured, distributed, or sold by Settling
7 Defendants after the Effective Date.

8 7.3 Nothing in this Section 7 affects CEH's right to commence or prosecute an
9 action under Proposition 65 against any person other than Settling Defendants, Defendant
10 Releasees, or Downstream Defendant Releasees.

11 **8. NOTICE**

12 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
13 notice shall be sent by first class and electronic mail to:

14 Mark Todzo
15 Lexington Law Group
16 503 Divisadero Street
17 San Francisco, CA 94117
18 mtodzo@lexlawgroup.com

19 8.2 When Settling Defendants are entitled to receive any notice under this Consent
20 Judgment, the notice shall be sent by first class and electronic mail to:
21
22
23
24
25
26
27
28

1 Bruce Nye
2 Adams Nye Becht LLP
3 222 Kearny Street, 7th Floor
4 San Francisco, CA 94108
5 bnye@adamsnye.com

6 with a copy to:

7 Albertson's LLC
8 Attn: Michael Dingel, Esq.
9 250 Parkcenter Blvd.
10 Boise, Idaho 83702
11 Michael.Dingel@albertsons.com

12 and to

13 Supervalu
14 Attn: Tom Darling
15 Senior Litigation Attorney
16 SUPERVALU
17 Eastview Innovation Center Office
18 7075 Flying Cloud Drive | Eden Prairie, MN 55344
19 tom.darling@supervalu.com

20 8.3 Any Party may modify the person and address to whom the notice is to be sent
21 by sending the other Party notice by first class and electronic mail.

22 9. COURT APPROVAL

23 9.1 This Consent Judgment shall become effective upon entry by the Court. CEH
24 shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendants
25 shall support entry of this Consent Judgment.

26 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
27 effect and shall never be introduced into evidence or otherwise used in any proceeding for any
28 purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

10. ATTORNEYS' FEES

10.1 Should CEH prevail on any motion, application for an order to show cause, or
other proceeding to enforce a violation of this Consent Judgment, CEH shall be entitled to its
reasonable attorneys' fees and costs incurred as a result of such motion or application. Should
Settling Defendants prevail on any motion application for an order to show cause or other

1 proceeding, Settling Defendants may be awarded their reasonable attorneys' fees and costs as a
2 result of such motion or application upon a finding by the Court that CEH's prosecution of the
3 motion or application lacked substantial justification. For purposes of this Consent Judgment, the
4 term substantial justification shall carry the same meaning as used in the Civil Discovery Act of
5 1986, Code of Civil Procedure §§ 2016, *et seq.*

6 10.2 Except as otherwise provided in this Consent Judgment, each Party shall bear
7 its own attorneys' fees and costs.

8 10.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
9 sanctions pursuant to law.

10 **11. OTHER TERMS**

11 11.1 The terms of this Consent Judgment shall be governed by the laws of the State
12 of California.

13 11.2 This Consent Judgment shall apply to and be binding upon CEH and Settling
14 Defendants, and their respective divisions, subdivisions, and subsidiaries, and the successors or
15 assigns of any of them.

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

28 11.4 Nothing in this Consent Judgment shall release, or in any way affect any rights

1 that Settling Defendants might have against any other party, whether or not that party is a settling
2 defendant.

3 11.5 This Court shall retain jurisdiction of this matter to implement or modify the
4 Consent Judgment.

5 11.6 The stipulations to this Consent Judgment may be executed in counterparts
6 and by means of facsimile or portable document format (pdf), which taken together shall be
7 deemed to constitute one document.

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

12 11.8 The Parties, including their counsel, have participated in the preparation of
13 this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.
14 This Consent Judgment was subject to revision and modification by the Parties and has been
15 accepted and approved as to its final form by all Parties and their counsel. Accordingly, any
16 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
17 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
18 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
19 be resolved against the drafting Party should not be employed in the interpretation of this Consent
20
21 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

22 **IT IS SO STIPULATED:**

23 **CENTER FOR ENVIRONMENTAL HEALTH**

24 

25
26 _____
27 Charlie Pizarro
28 Associate Director

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ALBERTSON'S LLC

Signature

AM *ALBERTSON*
Printed Name

Vice President, Litigation
Title *Regulatory Compliance*

SUPERVALU INC.

Signature

Printed Name

Title

IT IS SO ORDERED:

Dated: _____, 2014

Judge of the Superior Court

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

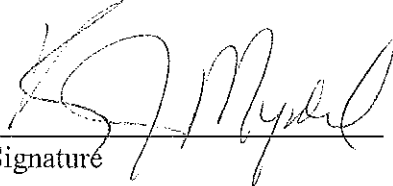
ALBERTSON'S LLC

Signature

Printed Name

Title

SUPERVALU INC.


Signature

Kim J. Myrdahl
Printed Name

VP Litigation, Compliance & Regulatory
Title

IT IS SO ORDERED:

AUG 21
Dated: _____, 2014

GEORGE C. HERNANDEZ, JR.

Judge of the Superior Court