

1 Mark N. Todzo, State Bar No. 168389
2 Howard 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

10 Counsel for Plaintiff
11 CENTER FOR ENVIRONMENTAL HEALTH

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

14 Coordination Proceeding Special Title:) Judicial Council Coordination
15 PROPOSITION 65 COCAMIDE DEA CASES) Proceeding
16) Case No. 4765
17)
18 This Document Relates To:) ~~PROPOSED~~ CONSENT
19) JUDGMENT AS TO DAVION, INC.
20)
21)
22)
23)
24)
25)
26)
27)
28)

29 **1. INTRODUCTION**

30 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
31 Environmental Health (“CEH”) and defendant Davion, Inc. (“Settling Defendant”). CEH and
32 Settling Defendant are referred to collectively as the “Parties.”

33 1.2 Settling Defendant is a corporation that employs ten (10) or more persons and
34 that manufactures, distributes, and/or sells shampoo and liquid soaps that contain coconut oil
35 diethanolamine condensate (cocamide diethanolamine) (hereinafter, “cocamide DEA”) in the
36 State of California or has done so in the past.

1 1.3 On October 11, 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 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
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 Defendant.

8 1.4 On March 12, 2014, CEH filed the action entitled *CEH v. ABACO Partners*
9 *LLC, et al.*, Case No. RG 14-717127, in the Superior Court of California for Alameda County,
10 naming Settling Defendant as a defendant in that action. On April 1, 2014, the *ABACO* action
11 was coordinated with several other related Proposition 65 actions in the *Proposition 65 Cocamide*
12 *DEA Cases*, Case No. JCCP 4765, currently pending before this Court.

13 1.5 For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
14 Court has jurisdiction over the allegations of violations contained in the operative Complaint
15 applicable to Settling Defendant (“Complaint”) and personal jurisdiction over Settling Defendant
16 as to the acts alleged in the Complaint; (ii) venue is proper in the County of Alameda; and (iii)
17 this Court has jurisdiction to enter this Consent Judgment.

18 1.6 Nothing in this Consent Judgment is or shall be construed as an admission by
19 the Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall compliance
20 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
21 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
22 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
23 other legal proceeding. This Consent Judgment is the product of negotiation and compromise and
24 is accepted by the Parties for purposes of settling, compromising, and resolving issues disputed in
25 this action.

26 **2. DEFINITIONS**

27 2.1 “Covered Products” means shampoo and liquid soaps.

28

1 2.2 “Effective Date” means the date on which this Consent Judgment is entered by
2 the Court.

3 **3. INJUNCTIVE RELIEF**

4 3.1 **Reformulation of Covered Products.** As of the Effective Date, Settling
5 Defendant shall not manufacture, distribute, sell, or offer for sale any Covered Product that
6 contains cocamide DEA and that will be sold or offered for sale to California consumers. For
7 purposes of this Consent Judgment, a product “contains cocamide DEA” if cocamide DEA is an
8 intentionally added ingredient in the product and/or part of the product formulation.

9 3.2 **Specification to Suppliers.** No more than thirty (30) days after the Effective
10 Date, Settling Defendant shall issue specifications to its suppliers of Covered Products requiring
11 that Covered Products not contain any cocamide DEA, and shall instruct each supplier to use
12 reasonable efforts to eliminate Covered Products containing cocamide DEA on a nationwide
13 basis.

14 3.3 **Action Regarding Specific Products.**

15 3.3.1 On or before the Effective Date, Settling Defendant shall, to the extent
16 such products have not been reformulated such that they do not contain cocamide DEA, cease
17 selling the following products: (i) the Perfect Purity Lemon Grass Grapefruit Body Wash, SKU
18 No. 0-77443-56018-7; and (ii) the Perfect Purity for Kids Anti-Bacterial Strawberry Hand Soap,
19 SKU No. 0-77443-93108-6 (“Section 3.3 Products”). On or before the Effective Date, Settling
20 Defendant shall also: (i) cease shipping the Section 3.3 Products to any of its stores and/or
21 customers that resell the Section 3.3 Products in California; and (ii) send instructions to its stores
22 and/or customers that resell the Section 3.3 Products in California instructing them either to: (a)
23 return all the Section 3.3 Products to Settling Defendant for destruction, or (b) directly destroy the
24 Section 3.3 Products. The requirements of this Section apply only to those Section 3.3 Products
25 that contain cocamide DEA.

26 3.3.2 Any destruction of the Section 3.3 Products shall be in compliance with all
27 applicable laws.

28

1 3.3.3 Within sixty (60) days of the Effective Date, Settling Defendant shall
2 provide 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
13 file 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.** Settling Defendant shall pay the total sum of
17 \$15,000 as a settlement payment as set forth on Exhibit A, on or before the dates set forth on
18 Exhibit A. Each settlement payment from Settling Defendant shall be paid in separate checks as
19 set forth on Exhibit A and delivered to counsel for CEH at the address set forth in Section 8.1
20 below. Any failure by Settling Defendant to comply with the payment terms herein shall be
21 subject to a stipulated late fee to be paid by Settling Defendant in the amount of \$100 for each
22 day the full payment is not received after the applicable date set forth on Exhibit A. The late fee
23 required under this Section shall be recoverable, together with reasonable attorneys' fees, in an
24 enforcement proceeding brought pursuant to Section 4 of this Consent Judgment. The total funds
25 paid by Settling Defendant shall be allocated between the following categories:

26 5.1.1 \$1,650 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
27 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
28 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard

1 Assessment).

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

11 5.1.3 \$11,100 as reimbursement of a portion of CEH's reasonable attorneys' fees
12 and costs.

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 Defendant, and its 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 Defendant, Defendant Releasees, and Downstream Defendant Releasees, based on failure

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

3 7.2 Compliance with the terms of this Consent Judgment by Settling Defendant
4 and Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant,
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 Defendant 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 Defendant, 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 Defendant is entitled to receive any notice under this Consent
20 Judgment, the notice shall be sent by first class and electronic mail to:

21 Thomas H. Clarke, Jr.
22 Ropers, Majeski, Kohn & Bentley PC
23 1001 Marshall Street, Suite 500
24 Redwood City, CA 94063
25 telarke@rmkb.com

26 8.3 Any Party may modify the person and address to whom the notice is to be sent
27 by sending the other Party notice by first class and electronic mail.

28 9. COURT APPROVAL

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

1 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
2 effect and shall never be introduced into evidence or otherwise used in any proceeding for any
3 purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

4 **10. ATTORNEYS' FEES**

5 10.1 Should CEH prevail on any motion, application for an order to show cause, or
6 other proceeding to enforce a violation of this Consent Judgment, CEH shall be entitled to its
7 reasonable attorneys' fees and costs incurred as a result of such motion or application. Should
8 Settling Defendant prevail on any motion application for an order to show cause or other
9 proceeding, Settling Defendant may be awarded its reasonable attorneys' fees and costs as a result
10 of such motion or application upon a finding by the Court that CEH's prosecution of the motion
11 or application lacked substantial justification. For purposes of this Consent Judgment, the term
12 substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986,
13 Code of Civil Procedure §§ 2016, *et seq.*

14 10.2 Except as otherwise provided in this Consent Judgment, each Party shall bear
15 its own attorneys' fees and costs.

16 10.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
17 sanctions pursuant to law.

18 **11. OTHER TERMS**

19 11.1 The terms of this Consent Judgment shall be governed by the laws of the State
20 of California.

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

24 11.3 This Consent Judgment contains the sole and entire agreement and
25 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
26 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
27 merged herein and therein. There are no warranties, representations, or other agreements between
28 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or

1 implied, other than those specifically referred to in this Consent Judgment have been made by any
2 Party hereto. No other agreements not specifically contained or referenced herein, oral or
3 otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation,
4 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
5 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
6 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
7 whether or not similar, nor shall such waiver constitute a continuing waiver.

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

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

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

16 11.7 Each signatory to this Consent Judgment certifies that he or she is fully
17 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into
18 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
19 Party.

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

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

IT IS SO STIPULATED:
CENTER FOR ENVIRONMENTAL HEALTH



Charlie Pizarro
Associate Director

DAVION, INC.

Signature

Printed Name

Title

IT IS SO ORDERED:

Dated: _____, 2015


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

IT IS SO STIPULATED:
CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

DAVION, INC.



Signature

James A. Placa III

Printed Name

Vice President

Title

IT IS SO ORDERED:

Dated: APR 16 2015 ~~2015~~

GEORGE C. HERNANDEZ, JR.
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

EXHIBIT A

Settlement Payments and Allocations

Total Settlement Payment: \$15,000

- Within five (5) days of the Effective Date, Settling Defendant shall pay \$7,500 in four (4) separate checks as follows:
 - \$1,650 to the Center for Environmental Health as a civil penalty pursuant to Section 5.1.1.
 - \$2,250 to the Center for Environmental Health as a payment in lieu of civil penalty pursuant to Section 5.1.2.
 - \$2,100 to the Lexington Law Group as attorneys' fees and costs pursuant to Section 5.1.3.
 - \$1,500 to the Center for Environmental Health as attorneys' fees and costs pursuant to Section 5.1.3.

- Within forty-five (45) days of the Effective Date, Settling Defendant shall pay \$7,500 in one check as follows:
 - \$7,500 to the Lexington Law Group as attorneys' fees and costs pursuant to Section 5.1.3.