

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

10 Counsel for Plaintiff
11 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

OCT 24 2014

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

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) ~~PROPOSED~~ CONSENT
19) JUDGMENT AS TO KAS DIRECT,
20) LLC
21)
22)
23)
24)
25)
26)
27)
28)

1. INTRODUCTION

1.1 The parties to this Consent Judgment (“Parties”) are the Center for Environmental Health (“CEH”) and defendant KAS Direct, LLC (“Settling Defendant”). CEH and Settling Defendant are referred to collectively as the “Parties.”

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

1 1.3 On January 3, 2014, 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 manufactured, distributed, and/or sold by Settling Defendant.

8 1.4 On May 28, 2014, CEH filed the action entitled *CEH v. Biopelle, Inc., et al.*,
9 Case No. RG 14-726964, in the Superior Court of California for Alameda County, naming
10 Settling Defendant as a defendant in that action. On July 7, 2014, the *Biopelle* action was
11 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 cease
16 selling the Toys ‘R’ Us 2 in 1 Shampoo and Conditioner, SKU No. 7-17851-20129-5 (“Section
17 3.3 Product”) in California. On or before the Effective Date, Settling Defendant shall also: (i)
18 cease shipping the Section 3.3 Product to any of its stores and/or customers that resell the Section
19 3.3 Product in California; and (ii) send instructions to its stores and/or customers that resell the
20 Section 3.3 Product in California instructing them either to: (a) return all the Section 3.3 Product
21 to Settling Defendant for destruction, or (b) directly destroy the Section 3.3 Product.

22 3.3.2 Any destruction of the Section 3.3 Product shall be in compliance
23 with all applicable laws.

24 3.3.3 Within sixty (60) days of the Effective Date, Settling Defendant
25 shall provide CEH with written certification from Settling Defendant confirming compliance with
26 the requirements of this Section 3.3.

27
28

1 **4. ENFORCEMENT**

2 4.1 CEH may, by motion or application for an order to show cause before the
3 Superior Court of Alameda County, enforce the terms and conditions contained in this Consent
4 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3
5 above, CEH shall provide Settling Defendant with a Notice of Violation and a copy of any test
6 results which purportedly support CEH's Notice of Violation. The Parties shall then meet and
7 confer regarding the basis for CEH's anticipated motion or application in an attempt to resolve it
8 informally, including providing Settling Defendant a reasonable opportunity of at least thirty (30)
9 days to cure any alleged violation. Should such attempts at informal resolution fail, CEH may
10 file its enforcement motion or application. This Consent Judgment may only be enforced by the
11 Parties.

12 **5. PAYMENTS**

13 5.1 **Payments by Settling Defendant.** Within five (5) business days of the
14 Effective Date, Settling Defendant shall pay the total sum of \$20,000 as a settlement payment.
15 The total settlement amount for Settling Defendant shall be paid in four separate checks delivered
16 to counsel for CEH at the address set forth in Section 8.1 below. The funds paid by Settling
17 Defendant shall be allocated between the following categories:

18 5.1.1 \$2,200 as a civil penalty pursuant to Health & Safety Code §
19 25249.7(b), such money to be apportioned by CEH in accordance with Health & Safety Code §
20 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health
21 Hazard Assessment). The civil penalty check shall be made payable to the Center for
22 Environmental Health.

23 5.1.2 \$3,000 as a payment in lieu of civil penalty to CEH pursuant to
24 Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b).
25 CEH will use such funds to continue its work educating and protecting people from exposures to
26 toxic chemicals. CEH may also use a portion of such funds to monitor compliance with this
27 Consent Judgment and to purchase and test Settling Defendant's products to confirm compliance.
28 In addition, as part of its Community Environmental Action and Justice Fund, CEH will use four

1 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
2 educate and protect people from exposures to toxic chemicals. The method of selection of such
3 groups can be found at the CEH web site at www.ceh.org/justicefund. The payment pursuant to
4 this Section shall be made payable to the Center for Environmental Health.

5 5.1.3 \$14,800 as reimbursement of a portion of CEH's reasonable
6 attorneys' fees and costs. A check for \$12,800 shall be made payable to the Lexington Law
7 Group, and a check for \$2,000 shall be made payable to the Center for Environmental Health.

8 **6. MODIFICATION**

9 6.1 **Written Consent.** This Consent Judgment may be modified from time to
10 time by express written agreement of the Parties with the approval of the Court, or by an order of
11 this Court upon motion and in accordance with law.

12 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
13 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
14 modify the Consent Judgment.

15 **7. CLAIMS COVERED AND RELEASED**

16 7.1 This Consent Judgment is a full, final, and binding resolution between CEH on
17 behalf of itself and the public interest and Settling Defendant, and its parents, subsidiaries,
18 affiliated entities that are under common ownership, directors, officers, employees, and attorneys
19 ("Defendant Releasees"), and each entity to whom they directly or indirectly distribute or sell
20 Covered Products, including but not limited to distributors, wholesalers, customers, retailers,
21 franchisees, cooperative members, licensors, and licensees ("Downstream Defendant Releasees"),
22 of any violation of Proposition 65 that was or could have been asserted in the Complaint against
23 Settling Defendant, Defendant Releasees, and Downstream Defendant Releasees, based on failure
24 to warn about alleged exposure to cocamide DEA contained in Covered Products that were sold
25 by Settling Defendant prior to the Effective Date.

26 7.2 Compliance with the terms of this Consent Judgment by Settling Defendant
27 and Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant,
28 Defendant Releasees, and Downstream Defendant Releasees with respect to any alleged failure to

1 warn about cocamide DEA in Covered Products manufactured, distributed, or sold by Settling
2 Defendant after the Effective Date.

3 7.3 Nothing in this Section 7 affects CEH's right to commence or prosecute an
4 action under Proposition 65 against any person other than Settling Defendant, Defendant
5 Releasees, or Downstream Defendant Releasees.

6 **8. NOTICE**

7 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
8 notice shall be sent by first class and electronic mail to:

9 Mark Todzo
10 Lexington Law Group
11 503 Divisadero Street
12 San Francisco, CA 94117
13 mtodzo@lexlawgroup.com

14 8.2 When Settling Defendant is entitled to receive any notice under this Consent
15 Judgment, the notice shall be sent by first class and electronic mail to:

16 Will Troutman
17 Fulbright & Jaworski LLP
18 555 South Flower Street, 41st Floor
19 Los Angeles, CA 90071
20 william.troutman@nortonrosefulbright.com

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

23 **9. COURT APPROVAL**

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

27 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
28 effect and shall never be introduced into evidence or otherwise used in any proceeding for any
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

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

9 10.2 Except as otherwise provided in this Consent Judgment, each Party shall bear
10 its own attorneys' fees and costs.

11 10.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
12 sanctions pursuant to law.

13 **11. OTHER TERMS**

14 11.1 The terms of this Consent Judgment shall be governed by the laws of the State
15 of California.

16 11.2 This Consent Judgment shall apply to and be binding upon CEH and Settling
17 Defendant, and its respective divisions, subdivisions, and subsidiaries, and the successors or
18 assigns of any of them.

19 11.3 This Consent Judgment contains the sole and entire agreement and
20 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
21 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
22 merged herein and therein. There are no warranties, representations, or other agreements between
23 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
24 implied, other than those specifically referred to in this Consent Judgment have been made by any
25 Party hereto. No other agreements not specifically contained or referenced herein, oral or
26 otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation,
27 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
28 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent

1 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
2 whether or not similar, nor shall such waiver constitute a continuing waiver.

3 11.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
4 that Settling Defendant might have against any other party, whether or not that party is a settling
5 defendant.

6 11.5 This Court shall retain jurisdiction of this matter to implement or modify the
7 Consent Judgment.

8 11.6 The stipulations to this Consent Judgment may be executed in counterparts
9 and by means of facsimile or portable document format (pdf), which taken together shall be
10 deemed to constitute one document.

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

15 11.8 The Parties, including their counsel, have participated in the preparation of
16 this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.
17 This Consent Judgment was subject to revision and modification by the Parties and has been
18 accepted and approved as to its final form by all Parties and their counsel. Accordingly, any
19 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
20 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
21 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
22 be resolved against the drafting Party should not be employed in the interpretation of this Consent
23
24
25
26
27
28

1 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

2

3 **IT IS SO STIPULATED:**

4 **CENTER FOR ENVIRONMENTAL HEALTH**

5

6



7

Charlie Pizarro
Associate Director

8

9

KAS DIRECT, LLC

10

11

12

Signature

13

14

Printed Name

15

16

17

Title

18

19

IT IS SO ORDERED:

20

21

Dated: _____, 2014

22

Judge of the Superior Court

23

24

25

26

27

28

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


Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

KAS DIRECT, LLC


Signature

MARK ELLIS
Printed Name

CHIEF FINANCIAL OFFICER
Title

IT IS SO ORDERED:

Dated: OCT 24, 2014

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