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ENDORSED
FILED
ALAMEDA COUNTY

OCT 24 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. Biopelle, Inc.*, A.C.S.C. Case No. RG14-) **JUDGMENT AS TO BIOPELLE,**
20 726964) **INC.**

21 **1. INTRODUCTION**

22 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
23 Environmental Health (“CEH”) and defendant Biopelle, Inc. (“Settling Defendant”). CEH and
24 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 manufactures, distributes and/or sells shampoo, liquid soaps and cleansers that contain
27 coconut oil diethanolamine condensate (cocamide diethanolamine) (hereinafter, “cocamide
28 DEA”) in the State of California or has done so in the past.

1 1.3 On February 7, 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.*) (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
6 alleges violations of Proposition 65 with respect to the presence of cocamide DEA in shampoo,
7 liquid soaps and cleansers manufactured, distributed and/or sold by Settling Defendant.

8 1.4 On May 28, 2014, CEH filed the action entitled *CEH v Biopelle, Inc.*, Case No.
9 RG 14-726964, naming Settling Defendant as a defendant in that action. On July 7, 2014, the
10 *Biopelle* action was coordinated with several other related Proposition 65 actions in the
11 *Proposition 65 Cocamide DEA Cases*, Case No. JCCP 4765, currently pending before this Court.

12 1.5 For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
13 Court has jurisdiction over the allegations of violations contained in the operative Complaint
14 applicable to Settling Defendant (the “Complaint”) and personal jurisdiction over Settling
15 Defendant as to the acts alleged in the Complaint; (ii) that venue is proper in the County of
16 Alameda; and (iii) that this Court has jurisdiction to enter this Consent Judgment.

17 1.6 Nothing in this Consent Judgment is or shall be construed as an admission by
18 the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance
19 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
20 conclusion of law, issue of law, or violation of law, and all such allegations are specifically
21 denied. Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy,
22 argument or defense the Parties may have in any other legal proceeding. This Consent Judgment
23 is the product of negotiation and compromise and is accepted by the Parties for purposes of
24 settling, compromising and resolving issues disputed in this action.

25 **2. DEFINITIONS**

26 2.1 “Covered Products” means shampoo, liquid soaps and cleansers manufactured,
27 distributed and/or sold by Settling Defendant.

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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. Lot numbers
9 (which correspond to a specific manufacture date) for Covered Products manufactured prior to the
10 Effective Date are shown on Exhibit A. Settling Defendant represents that the lot numbers on
11 Exhibit A apply to Covered Products manufactured prior to the Effective Date.

12 3.2 **Specification to Suppliers.** Settling Defendant has advised its suppliers that
13 Covered Products for sale into California shall not contain intentionally added cocamide DEA.

14 3.3 **Action Regarding Specific Products.**

15 3.3.1 On or before the Effective Date, Settling Defendant shall cease selling the
16 Biopelle Cream Cleanser, SKU No. 8-51263-00139-2 (the “Section 3.3 Product”) in California.
17 On or before the Effective Date, Settling Defendant shall also: (i) cease shipping the Section 3.3
18 Product to any of its stores and/or customers that it knows resells the Section 3.3 Product in
19 California, and (ii) send instructions to its stores and/or customers that it knows resells 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; (b) directly destroy the Section 3.3 Product or (c) not sell
22 the Section 3.3 Product into California.

23 3.3.2 Any destruction by Settling Defendant of Section 3.3 Product shall be in
24 compliance with all applicable laws.

25 3.3.3 Within sixty days of the Effective Date, Settling Defendant shall provide
26 CEH with written certification from Settling Defendant confirming compliance with the
27 requirements of Section 3.3.1.

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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 and a copy of any test results which
6 purportedly support CEH's notice. The Parties shall then meet and confer regarding the basis for
7 CEH's anticipated motion or application in an attempt to resolve it informally, including
8 providing Settling Defendant a reasonable opportunity of at least thirty (30) days to cure any
9 alleged violation. Should such attempts at informal resolution fail, CEH may file its enforcement
10 motion or application. This Consent Judgment may only be enforced by the Parties. Settling
11 Defendant contends that despite the efforts undertaken by Settling Defendant, Settling
12 Defendant's Covered Products may be sold in California by third parties who are not authorized
13 agents of Settling Defendant and Settling Defendant cannot prevent that from occurring.

14 **5. PAYMENTS**

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

20 5.1.1 \$1,650 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
21 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
22 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard
23 Assessment). The civil penalty check shall be made payable to the Center For Environmental
24 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
28 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent

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

7 5.1.3 \$11,100 as reimbursement of a portion of CEH's reasonable attorneys' fees
8 and costs. A check for \$9,600 shall be made payable to the Lexington Law Group, and a check
9 for \$1,500 shall be made payable to the Center For Environmental Health.

10 6. MODIFICATION

11 6.1 **Written Consent.** This Consent Judgment may be modified from time to
12 time only by: (1) express written agreement of the Parties;, or (2) by an order of this Court upon
13 motion and in accordance with law.

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

17 7. CLAIMS COVERED AND RELEASED

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

1 Subject to the provisions of Section 3.3.1, this release specifically includes all Covered Products
2 containing cocamide DEA manufactured before the Effective Date, as shown by applicable lot
3 numbers on Exhibit A, regardless of when the item was sold, purchased or used.

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

9 7.3 This is a full and final release applying to all unknown and/or unanticipated
10 claims, penalties, damages and injunctive terms relating to or arising out of the claims alleged in
11 the Notice and Complaint, as well as those now known, whether or not disclosed, and CEH, on its
12 own behalf only, and with regard to the claims alleged in the Notice and Complaint, hereby
13 relinquishes and waives all rights or benefits conferred upon it by the provisions of Section 1542
14 of the California Civil Code, which states as follows:

15 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
16 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
17 EXIST IN HIS OR HER FAVOR AT THE TIME OF
18 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR
19 HER MUST HAVE MATERIALLY AFFECTED HIS OR HER
20 SETTLEMENT WITH THE DEBTOR.

21 7.4 Nothing in this Section 7 affects CEH's right to commence or prosecute an
22 action under Proposition 65 against any person other than Settling Defendant, Defendant
23 Releasees, or Downstream Releasees.

24 **8. NOTICE**

25 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
26 notice shall be sent by first class and electronic mail to:
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28

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

6 8.2 When Settling Defendant is entitled to receive any notice under this Consent
7 Judgment, the notice shall be sent by first class and electronic mail to:

8 Malcolm Weiss
9 Hunton & Williams LLP
10 550 South Hope Street
11 Suite 2000
12 Los Angeles, CA 90071
13 mweiss@hunton.com

14 and

15 Biopelle Inc.
16 c/o Elliott Milstein
17 780 West 8 Mile Road
18 Ferndale, Michigan 48220
19 EMilstein@biopelle.com

20 and

21 David W. Warren
22 Joelson Rosenberg PLC
23 30665 Northwestern Highway, Ste. 200
24 Farmington Hills MI 48334
25 dwwarren@joelsonrosenberg.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.

9.2 If this Consent Judgment is not entered by the Court within one year of the
date it is fully executed by the Parties, it shall be of no force or effect and shall never be

1 introduced into evidence or otherwise used in any proceeding for any purpose other than to allow
2 the Court to determine if there was a material breach of Section 9.1.

3 **10. ATTORNEYS' FEES**

4 10.1 The prevailing Party on any motion, application for an order to show cause or
5 other proceeding to enforce a violation of this Consent Judgment, shall be entitled to its
6 reasonable attorneys' fees and costs incurred as a result of such motion or application.

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

9 **11. OTHER TERMS**

10 11.1 The terms of this Consent Judgment shall be governed by the laws of the State
11 of California.

12 11.2 This Consent Judgment shall apply to and be binding upon CEH and Settling
13 Defendant, and its respective divisions, subdivisions, and subsidiaries, and the successors or
14 assigns of any of them.

15 11.3 This Consent Judgment contains the sole and entire agreement and
16 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
17 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
18 merged herein and therein. There are no warranties, representations, or other agreements between
19 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
20 implied, other than those specifically referred to in this Consent Judgment have been made by any
21 Party hereto. No other agreements not specifically contained or referenced herein, oral or
22 otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation,
23 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
24 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
25 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
26 whether or not similar, nor shall such waiver constitute a continuing waiver.

27 11.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
28 that Settling Defendant might have against any other party, whether or not that party is a Settling

1 Defendant.

2 11.5 This Court shall retain jurisdiction of this matter to implement or modify the
3 Consent Judgment.

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

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

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

22 **CENTER FOR ENVIRONMENTAL HEALTH**

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26 Charlie Pizarro
Associate Director

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BIOPELLE, INC.



Signature

MARK DIEKMANN

Printed Name

SECRETARY AND TREASURER

Title

IT IS SO ORDERED:

Dated: OCT 24, 2014

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

EXHIBIT A

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AFA Cream Cleanser

Lot 674
Lot 674A
Lot 871
Lot 1021
Lot 1082
Lot 1123
Lot 1209
Lot 1250
Lot 9042
Lot 9052
Lot 13011
Lot 13034
Lot 13052
Lot 016108
Lot 020108
8001
8005
14012
14002
F60903C

Biopelle Cream Cleanser

Lot 1295
Lot 1295A
Lot 8808
Lot 13029
Lot 13081