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ENDORSED
FILED
ALAMEDA COUNTY

AUG 15 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. RG-) **JUDGMENT AS TO MARIANNA**
20 14726964) **INDUSTRIES, INC.**

21 **1. INTRODUCTION**

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

1 1.3 On March 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 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. RG14-726964, 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 (the “Complaint”) and personal jurisdiction over Settling
16 Defendant as to the acts alleged in the Complaint; (ii) that venue is proper in the County of
17 Alameda; and (iii) that 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 30 days after the Effective Date, to
10 the extent Settling Defendant purchases Covered Products from any third party, Settling
11 Defendant shall issue specifications to its suppliers of Covered Products requiring that Covered
12 Products not contain any cocamide DEA, and shall instruct each supplier to use reasonable efforts
13 to eliminate Covered Products containing cocamide DEA on a nationwide basis.

14 3.3 **Action Regarding Covered Products In The Stream Of Commerce.**

15 3.3.1 On or before the Effective Date, Settling Defendant shall send instructions
16 to its direct customers that resell the Covered Products in California instructing them either to: (a)
17 return all of Settling Defendant’s Covered Products that contain cocamide DEA to Settling
18 Defendant for destruction; or (b) directly destroy all of Settling Defendant’s Covered Products
19 that contain cocamide DEA.

20 3.3.2 Any destruction of Covered Products shall be in compliance with all
21 applicable laws.

22 3.3.3 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 3.3.

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. This Consent Judgment may only be enforced by the
7 Parties.

8 **5. PAYMENTS**

9 **5.1 Payments by Settling Defendant.** Within five (5) business days of the Effective
10 Date, Settling Defendant shall pay the total sum of \$15,000 as a settlement payment. The total
11 settlement amount for Settling Defendant shall be paid in four separate checks delivered to
12 counsel for CEH at the address set forth in Section 8.1 below. The funds paid by Settling
13 Defendant shall be allocated between the following categories:

14 **5.1.1** \$1,650 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
15 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
16 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard
17 Assessment). The civil penalty check shall be made payable to the Center For Environmental
18 Health.

19 **5.1.2** \$2,250 as a payment in lieu of civil penalty to CEH pursuant to Health &
20 Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH will use
21 such funds to continue its work educating and protecting people from exposures to toxic
22 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
23 Judgment and to purchase and test Settling Defendant's products to confirm compliance. In
24 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
25 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
26 educate and protect people from exposures to toxic chemicals. The method of selection of such
27 groups can be found at the CEH web site at www.ceh.org/justicefund. The payment pursuant to
28 this Section shall be made payable to the Center For Environmental Health.

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

4 **6. MODIFICATION**

5 6.1 **Written Consent.** This Consent Judgment may be modified from time to
6 time by express written agreement of the Parties with the approval of the Court, or by an order of
7 this Court upon motion and in accordance with law.

8 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
9 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
10 modify the Consent Judgment.

11 **7. CLAIMS COVERED AND RELEASED**

12 7.1 This Consent Judgment is a full, final and binding resolution between CEH on
13 behalf of itself and the public interest and Settling Defendant, and its parents, subsidiaries,
14 affiliated entities that are under common ownership, directors, officers, employees, and attorneys
15 ("Defendant Releasees"), and each entity to whom they directly or indirectly distribute or sell
16 Covered Products, including but not limited to distributors, wholesalers, customers, retailers,
17 franchisees, cooperative members, licensors and licensees ("Downstream Defendant Releasees")
18 of any violation of Proposition 65 that was or could have been asserted in the Complaint against
19 Settling Defendant, Defendant Releasees, and Downstream Defendant Releasees, based on failure
20 to warn about alleged exposure to cocamide DEA contained in Covered Products that were sold
21 by Settling Defendant prior to the Effective Date.

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

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

1 Releasees, or Downstream Defendant Releasees.

2 **8. NOTICE**

3 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
4 notice shall be sent by first class and electronic mail to:

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

10 8.2 When Settling Defendant is entitled to receive any notice under this Consent
11 Judgment, the notice shall be sent by first class and electronic mail to:

12 Daniel C. Summerlin
13 Wood Rogers PLC
14 Wells Fargo Tower
15 10 S. Jefferson Street, Suite 1400
16 Roanoke, VA 24038
17 dsummerlin@woodsrogers.com

18 8.3 Any Party may modify the person and address to whom the notice is to be sent
19 by sending the other Party notice by first class and electronic mail.

20 **9. COURT APPROVAL**

21 9.1 This Consent Judgment shall become effective upon entry by the Court. CEH
22 shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant
23 shall support entry of this Consent Judgment.

24 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
25 effect and shall never be introduced into evidence or otherwise used in any proceeding for any
26 purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

27 **10. ATTORNEYS' FEES**

28 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 Defendant prevail on any motion application for an order to show cause or other

1 proceeding, Settling Defendant may be awarded its reasonable attorneys' fees and costs as a result
2 of such motion or application upon a finding by the Court that CEH's prosecution of the motion
3 or application lacked substantial justification. For purposes of this Consent Judgment, the term
4 substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986,
5 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 Defendant, and its 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 Defendant 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 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.
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22 **IT IS SO STIPULATED:**

23 **CENTER FOR ENVIRONMENTAL HEALTH**

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26 Charlie Pizarro
27 Associate Director
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MARIANNA INDUSTRIES, INC.

Robert Jaegly
Signature

ROBERT JAEGLY
Printed Name

PRESIDENT
Title

IT IS SO ORDERED:

Dated: AUG 15, 2014

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