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CENTER FOR ENVIRONMENTAL HEALTH

FILED
ALAMEDA COUNTY

JUL 25 2019

CLERK OF THE SUPERIOR COURT

By Venus L. King
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,)
a non-profit corporation,)
)
Plaintiff,)
)
v.)
)
XTTRIUM LABORATORIES, INC., *et al.*,)
)
Defendant.)

Case No. RG19011555

~~[PROPOSED]~~ CONSENT
JUDGMENT AS TO XTTRIUM
LABORATORIES, INC.

1 **1. INTRODUCTION**

2 1.1 The parties to this Consent Judgment are the Plaintiff Center for
3 Environmental Health (“CEH”) and Defendant Xttrium Laboratories, Inc. (“Xttrium”) (“Settling
4 Defendant”). CEH and Settling Defendant are referred to collectively as the “Parties.”

5 1.2 Settling Defendant is a corporation that employs ten (10) or more persons and
6 manufactures, distributes, and/or sells antiseptic skin cleansers that contain coconut oil
7 diethanolamine condensate (cocamide diethanolamine) (hereinafter, “cocamide DEA”) in the
8 State of California or has done so in the past.

9 1.3 On May 25, 2018, CEH sent a 60-Day Notice of Violation under Proposition
10 65 (the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety
11 Code §§ 25249.5, *et seq.*) to Settling Defendant, the California Attorney General, the District
12 Attorneys of every County in the State of California, and the City Attorneys for every City in the
13 State of California with a population greater than 750,000 (the “Notice”). The Notice alleges
14 violations of Proposition 65 with respect to cocamide DEA in antiseptic skin cleansers
15 manufactured, distributed and/or sold by Settling Defendant and Cardinal Health, Inc., The
16 Harvard Drug Group, LLC, CVS Pharmacy, Inc., McKesson Corporation and Rite Aid
17 Corporation.

18 1.4 On March 19, 2019, CEH filed the action entitled *CEH v. Xttrium*
19 *Laboratories, Inc.*, Case No. RG19011555 naming Settling Defendant as a defendant.

20 1.5 Xttrium manufactures each of the Covered Products. Xttrium has explored the
21 possibility of reformulating its antiseptic skin cleansers to remove cocamide DEA as an
22 ingredient. However, Xttrium asserts that doing so would require submitting the Covered
23 Products to a lengthy and expensive approval process with the United States Food & Drug
24 Administration. Moreover, based on Xttrium’s research, such reformulation would ultimately
25 result in a less effective product. Xttrium has been providing a Proposition 65 warning for the
26 Covered Products for many years, although the warning was set forth on the interior of a peel-
27 back label, which CEH contends is not clear and reasonable.

28

1 1.6 For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
2 Court has jurisdiction over the allegations of violations contained in the Complaint and personal
3 jurisdiction over Settling Defendant as to the acts alleged in the Complaint; (ii) that venue is
4 proper in the County of Alameda; and (iii) that this Court has jurisdiction to enter this Consent
5 Judgment.

6 1.7 Nothing in this Consent Judgment is or shall be construed as an admission by
7 the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance
8 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
9 conclusion of law, issue of law, or violation of law, and all such allegations are specifically
10 denied. Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy,
11 argument or defense the Parties may have in any other legal proceeding. This Consent Judgment
12 is the product of negotiation and compromise and is accepted by the Parties for purposes of
13 settling, compromising and resolving issues disputed in this action.

14 **2. DEFINITIONS**

15 2.1 “Covered Products” means antiseptic skin cleansers containing cocamide DEA
16 manufactured by Xttrium for retail sale.

17 2.2 “Effective Date” means the date on which this Consent Judgment is entered by
18 the Court.

19 **3. INJUNCTIVE RELIEF**

20 3.1 **Clear and Reasonable Warnings for Covered Products.** For all Covered
21 Products manufactured more than 180 days after the Effective Date, Settling Defendant shall
22 provide a clear and reasonable warning on the outer packaging of each Covered Product that
23 contains Cocamide DEA as an ingredient. The warning shall be prominently placed on the outer
24 label with such conspicuousness as compared with other words, statements and designs on the
25 label so as to render the warning likely to be read and understood by an ordinary individual under
26 customary conditions of purchase and use.

27 3.2 **Warning Language:** The warning required by Section 3.1 shall be in one of
28 the following two forms:



WARNING

This product can expose you to cocamide DEA, which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.

Or



WARNING

This product can expose you to coconut oil diethanolamine condensate, which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.

The symbol shall be no smaller than the height of the word “**WARNING**,” and may appear above the language or to the left of it. If the label for the product is not printed using the color yellow, the warning symbol may be printed in black and white.

4. ENFORCEMENT

4.1 The Parties may, by motion or application for an order to show cause before the Superior Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH shall provide Settling Defendant with a notice setting forth the factual basis for the alleged violation of Section 3. The Parties shall then meet and confer regarding the basis for CEH’s anticipated motion or application in an attempt to resolve it informally. Should such attempts at informal resolution fail, CEH may file its enforcement motion or application. This Consent Judgment may only be enforced by the Parties.

5. PAYMENTS

5.1 **Payments by Settling Defendant.** Within five (5) days of the Effective Date, Settling Defendant shall pay the total sum of \$65,000 as a settlement payment.

5.2 **Allocation of Payments.** The total Settlement Payment shall be paid in five (5) separate checks in the amounts specified below and delivered as set forth below. Any failure by

1 Settling Defendant to comply with the payment terms herein shall be subject to a stipulated late
2 fee to be paid by Settling Defendant in the amount of \$100 for each day the full payment is not
3 received after the applicable payment due date set forth in Section 5.1. The late fees required
4 under this Section shall be recoverable, together with reasonable attorneys' fees and costs, in an
5 enforcement proceeding brought pursuant to Section 4 of this Consent Judgment. The Settlement
6 Payment paid by Settling Defendant shall be allocated as set forth below between the following
7 categories and made payable as follows:

8 5.2.1 Settling Defendant shall pay \$8,860 as a civil penalty ("Civil Penalty")
9 pursuant to Health & Safety Code §25249.7(b). The Civil Penalty payment shall be apportioned
10 in accordance with Health & Safety Code §25249.12 (25% to CEH and 75% to the State of
11 California's Office of Environmental Health Hazard Assessment ("OEHHA")). Accordingly,
12 Settling Defendant shall pay the OEHHA portion of the Civil Penalty payment for \$6,645 by
13 check made payable to OEHHA and associated with taxpayer identification number 68-0284486.
14 This payment shall be delivered as follows:

15 For United States Postal Service Delivery:

16 Attn: Mike Gyurics
17 Fiscal Operations Branch Chief
18 Office of Environmental Health Hazard Assessment
19 P.O. Box 4010, MS #19B
20 Sacramento, CA 95812-4010

21 For Non-United States Postal Service Delivery:

22 Attn: Mike Gyurics
23 Fiscal Operations Branch Chief
24 Office of Environmental Health Hazard Assessment
25 1001 I Street, MS #19B
26 Sacramento, CA 95814

27 Settling Defendant shall pay the CEH portion of the Civil Penalty payment for \$2,215 by check
28 made payable to the Center for Environmental Health and associated with taxpayer identification
number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero
Street, San Francisco, CA 94117.

 5.2.2 Settling Defendant shall pay \$6,640 as an Additional Settlement Payment

1 (“ASP”) to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of
 2 Regulations, Title 11, § 3204. CEH intends to place these funds in CEH’s Toxics and Youth
 3 Fund and use them to support CEH programs and activities that seek to educate the public about
 4 cocamide DEA and other toxic chemicals in consumer products, work with industries to reduce
 5 exposure to cocamide DEA and other toxic chemicals, and thereby reduce the public health
 6 impacts and risks of exposure to cocamide DEA and other toxic chemicals in consumer
 7 products. CEH shall obtain and maintain adequate records to document that ASPs are spent on
 8 these activities, and CEH agrees to provide such documentation to the Attorney General within
 9 thirty days of any request from the Attorney General. The payment pursuant to this Section shall
 10 be made payable to the Center for Environmental Health and associated with taxpayer
 11 identification number 94-3251981. This payment shall be delivered to Lexington Law Group,
 12 503 Divisadero Street, San Francisco, CA 94117.

13 5.2.3 Settling Defendant shall pay \$49,500 as a reimbursement of a portion of
 14 CEH’s reasonable attorneys’ fees and costs. The attorneys’ fees and cost reimbursement shall be
 15 made in two separate checks as follows: (a) \$42,000 payable to the Lexington Law Group and
 16 associated with taxpayer identification number 94-3317175; and (b) \$7,500 payable to the Center
 17 For Environmental Health and associated with taxpayer identification number 94-3251981. Both
 18 of these payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San
 19 Francisco, CA 94117.

20 5.2.4 To summarize, Settling Defendant shall deliver checks made out to the
 21 payees and in the amounts set forth below:

22 Payee	Type	Amount	Deliver To
23 OEHHA	Penalty	\$6,645	OEHHA per Section 5.2.1
24 Center For Environmental Health	Penalty	\$2,215	LLG
25 Center For Environmental Health	ASP	\$6,640	LLG
26 Lexington Law Group	Fee and Cost	\$42,000	LLG
27 Center For Environmental Health	Fee and Cost	\$7,500	LLG

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2 **6. MODIFICATION**

3 6.1 **Written Consent.** This Consent Judgment may be modified from time to
4 time only by: (1) express written agreement of the Parties; or (2) by an order of this Court upon
5 motion and in accordance with law. Any modification to the Consent Judgment requires the
6 approval of the Court and prior notice to the Attorney General's Office.

7 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
8 notify the other affected Party or Parties in writing, and the affected Parties shall thereafter
9 attempt in good faith to meet and confer concerning the proposed modification. If the affected
10 Parties are unable to resolve their dispute informally within sixty (60) days after the date of the
11 written notification, or such other period as the affected Parties shall agree in writing, the Party
12 that issued the written notification to seek the modification may bring a motion or proceeding to
13 seek judicial relief as to the requested modification.

14 6.3 **Non-Exclusive Grounds for Modification.** Settling Defendant may move to
15 modify this Consent Judgment to substitute any term that Plaintiff agrees to in a future consent
16 judgment applicable to cocamide DEA in antiseptic skin cleanser products that are manufactured,
17 sold, or distributed for sale in California by any competitor of Defendant, and Plaintiff agrees not
18 to oppose any such motion except for good cause shown. Furthermore, if a court of competent
19 jurisdiction or an agency of the federal government, including but not limited to the U.S. Food
20 and Drug Administration, states through any communication with the force of law, final
21 regulation, or other legally binding act, that federal law has preemptive effect on any of the
22 requirements of this Consent Judgment, including but not limited to precluding Settling
23 Defendant from providing the warning set forth in this Consent Judgment or restricting the
24 manner in which such warnings are given, then Settling Defendant may move to modify this
25 Consent Judgment to bring it into compliance with or avoid conflict with federal law, but the
26 modification shall not be granted unless this Court concludes, in a final judgment or order, that
27 such modification is necessary to bring this Consent Judgment into compliance with or avoid
28 conflict with federal law. Likewise, if Proposition 65 or its implementing regulations are changed

1 from their terms as they exist on the Effective Date to establish that warnings for cocamide DEA
2 in some or all of the Covered Products are not required, then Settling Defendant may move to
3 modify this Consent Judgment to relieve Settling Defendant of its obligations with respect to such
4 portion of the Covered Products as is appropriate.

5 **7. CLAIMS COVERED AND RELEASED**

6 7.1 Provided that Settling Defendant complies in full with its obligations under
7 Section 5 of this Consent Judgment, this Consent Judgment is a full, final and binding resolution
8 between CEH on behalf of itself and the public interest and Settling Defendant, and its parents,
9 subsidiaries, affiliated entities that are under common ownership and their predecessors,
10 successors and assigns, directors, shareholders, officers, employees, and attorneys (“Defendant
11 Releasees”), and all entities to whom they directly or indirectly provide, distribute, or sell
12 Covered Products, including but not limited to distributors, wholesalers, customers, retailers,
13 franchisees, cooperative members, licensors and licensees, such as Cardinal Health, Inc., The
14 Harvard Drug Group, LLC, CVS Pharmacy, Inc., McKesson Corporation and Rite Aid
15 Corporation (individually or collectively “Downstream Releasees”) of any violation or claimed
16 violation of Proposition 65 that was or could have been asserted in the Complaint against Settling
17 Defendant, Defendant Releasees, and Downstream Releasees, based on failure to warn about
18 alleged exposure to cocamide DEA contained in Covered Products that were manufactured, sold,
19 or distributed prior to the Effective Date.

20 7.2 Provided that Settling Defendant complies in full with its obligations under
21 Section 5 of this Consent Judgment, CEH, for itself, its agents, successors, and assigns, releases,
22 waives, and forever discharges any and all claims against Settling Defendant, Defendant Releasees,
23 and Downstream Releasees arising from any violation of Proposition 65 that have been or could
24 have been asserted by CEH individually or in the public interest regarding the failure to warn about
25 exposure to cocamide DEA arising in connection with Covered Products manufactured, distributed,
26 or sold by Settling Defendant prior to the Effective Date.

27 7.3 Provided that Settling Defendant complies in full with its obligations under
28 Section 5 of this Consent Judgment, CEH, in its individual capacity only and not in its

1 representative capacity, also provides a release to Settling Defendant, Defendant Releasees, and
2 Downstream Releasees which shall be effective as a full and final accord and satisfaction, as a bar
3 to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses,
4 claims, liabilities, and demands of CEH of any nature, character, or kind, whether known or
5 unknown, suspected or unsuspected, arising out of alleged or actual exposures to cocamide DEA
6 in the Covered Products manufactured, distributed, or sold by Settling Defendant prior to the
7 Effective Date.

8 7.4 Provided that Settling Defendant complies in full with its obligations under
9 Section 5 of this Consent Judgment, compliance with the terms of this Consent Judgment by
10 Settling Defendant and the Defendant Releasees shall constitute compliance with Proposition 65
11 by Settling Defendant, their Defendant Releasees and their Downstream Releasees with respect to
12 any alleged failure to warn about cocamide DEA in Covered Products manufactured, sold, or
13 distributed after the Effective Date.

14 7.5 Nothing in this Section 7 affects CEH's right to commence or prosecute an
15 action under Proposition 65 against any person other than Settling Defendant, Defendant
16 Releasees, or Downstream Releasees.

17 **8. NOTICE**

18 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
19 notice shall be sent by first class and electronic mail to:

20 Mark Todzo
21 Lexington Law Group
22 503 Divisadero Street
23 San Francisco, CA 94117
24 mtodzo@lexlawgroup.com

25 8.2 When Settling Defendant is entitled to receive any notice under this Consent
26 Judgment, the notice shall be sent by first class and electronic mail to:

27 Trenton H. Norris
28 Arnold & Porter
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
Trent.Norris@arnoldporter.com

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

9. COURT APPROVAL

9.1 This Consent Judgment shall become effective upon entry by the Court. The Parties acknowledge that, pursuant to California Health and Safety Code section 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment, which motion CEH shall draft and file and Settling Defendant shall support, appearing at the hearing if so requested. If any third party objection to the motion for approval is filed, CEH and Settling Defendant agree to work together to file a response and appear at any hearing. If such objection is overruled by the Court and then subsequently appealed by the third party, CEH and Settling Defendant agree to work together to file a response and appear at any hearing.

9.2 If the Court does not approve the Consent Judgment, the Parties agree to meet and confer as to whether to modify the language or appeal the ruling. If the Parties do not jointly agree on a course of action to take, then the case shall proceed in its normal course on the Court's trial calendar. If the Court's approval is ultimately overturned by an appellate court following an appeal by a third party, the Parties shall meet and confer as to whether to modify the terms of this Consent Judgment. If the parties do not jointly agree on a course of action to take then the case shall proceed in its normal course on the Court's trial calendar. In the event that this Consent Judgment is entered by the Court and subsequently overturned by any appellate court, then any monies that have been provided to CEH or its counsel under this Consent Judgment shall be refunded within 30 days of the appellate decision becoming final and the Parties shall reasonably cooperate to obtain a timely refund of monies paid to OEHHA under this Consent Judgment.

9.3 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 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.

1 **10. ATTORNEYS' FEES**

2 10.1 The prevailing Party on any motion, application for an order to show cause or
3 other proceeding to enforce a violation of this Consent Judgment, shall be entitled to its
4 reasonable attorneys' fees and costs incurred as a result of such motion or application.

5 10.2 Except as otherwise provided in this Consent Judgment, each Party shall bear
6 its own attorneys' fees and costs.

7 **11. OTHER TERMS**

8 11.1 The terms of this Consent Judgment shall be governed by the laws of the State
9 of California.

10 11.2 This Consent Judgment shall apply to and be binding upon CEH and Settling
11 Defendant, and their respective divisions, subdivisions, and subsidiaries, and the successors or
12 assigns of any of them.

13 11.3 This Consent Judgment contains the sole and entire agreement and
14 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
15 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
16 merged herein and therein. There are no warranties, representations, or other agreements between
17 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
18 implied, other than those specifically referred to in this Consent Judgment have been made by any
19 Party hereto. No other agreements not specifically contained or referenced herein, oral or
20 otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation,
21 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
22 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
23 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
24 whether or not similar, nor shall such waiver constitute a continuing waiver.

25 11.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
26 that Settling Defendant might have against any other party.

27 11.5 This Court shall retain jurisdiction of this matter to implement or modify the
28 Consent Judgment.

1 11.6 The stipulations to this Consent Judgment may be executed in counterparts
2 and by means of facsimile or portable document format (pdf), which taken together shall be
3 deemed to constitute one document.

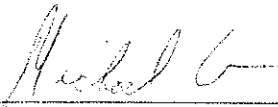
4 11.7 Each signatory to this Consent Judgment certifies that he or she is fully
5 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into
6 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
7 Party.

8 11.8 CEH agrees to comply with the reporting form requirements referenced in
9 Health and Safety Code section 25249.7(f).

10 11.9 The Parties, including their counsel, have participated in the preparation of
11 this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.
12 This Consent Judgment was subject to revision and modification by the Parties and has been
13 accepted and approved as to its final form by all Parties and their counsel. Accordingly, any
14 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
15 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
16 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
17 be resolved against the drafting Party should not be employed in the interpretation of this Consent
18 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

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20 **IT IS SO STIPULATED:**

21 **CENTER FOR ENVIRONMENTAL HEALTH**

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23 
24 _____
25 Michael Green
26 Director

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XTTRIUM LABORATORIES, INC.

cm
Signature

Madeleine Creevy
Printed Name

executive Vice President
Title

IT IS SO ORDERED:

Dated: July 25, ²⁰¹⁹2018

NOËL WISE
Judge of the Superior Court