

1 Michael Freund SBN 99687
Law Office of Michael Freund
2 1915 Addison Street
Berkeley, CA 94704
3 Telephone: (510) 540-1992
Facsimile: (510) 540-5543
4

5 Attorney for Plaintiff
David Steinman
6

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
10

11 DAVID STEINMAN,

12 Plaintiff

13 v.

14 THE PROCTER AND GAMBLE
15 DISTRIBUTING LLC and DOES 1-100

16 Defendants..
17

Case No.

**[PROPOSED]
CONSENT JUDGMENT**

18 **I. INTRODUCTION**

19 1.1 On or about June 2, 2010, Plaintiff David Steinman (“Plaintiff”) as a private attorney
20 general and in the public interest filed a Complaint for Injunctive and Declaratory Relief and Civil
21 Penalties against Defendant The Procter & Gamble Distributing LLC (“Procter & Gamble”). The
22 Complaint alleges that Procter & Gamble violated Health and Safety Code section 25249.6 of the
23 Safe Drinking Water and Toxic Enforcement Act of 1986 (also known as “Proposition 65,”) through
24 the sale of hair care products under the name Herbal Essences and Head and Shoulders by failing to
25 provide a clear and reasonable warning.

26 1.2 The Complaint is based on allegations contained in Notices of Violation dated June
27 29, 2009, and December 1, 2009, and amended Notice of Violation dated March 29, 2010 served on
28

1 the California Attorney General, other public enforcers and Procter & Gamble. A true and correct
2 copy of the Notices of Violation is attached hereto as Exhibit A.

3 1.3 Plaintiff David Steinman is an individual interested in the enforcement of Proposition
4 65.

5 1.4 Defendant Procter & Gamble is a business entity that employs ten or more persons in
6 the course of doing business for purposes of Proposition 65.

7 1.5 The products that are covered by this Consent Judgment are different versions of hair
8 care products manufactured and/or distributed by Procter & Gamble as identified in Exhibit B to this
9 Consent Judgment (collectively “Covered Products”).

10 1.6 The Parties enter into this Consent Judgment in order to achieve a full settlement of
11 disputed claims between the Parties as alleged in the Complaint for the purpose of avoiding
12 prolonged litigation. Plaintiff David Steinman has diligently prosecuted this matter and is settling
13 this case in the public interest.

14 1.7 Procter & Gamble denies the material factual and legal allegations contained in
15 Plaintiff’s Notices and Complaint and maintains that all Covered Products that Procter & Gamble has
16 manufactured, distributed or offered for sale or use in California have been and are in compliance
17 with all laws, including Proposition 65. Nothing in the Consent Judgment shall be construed as an
18 admission by Procter & Gamble of any fact, issue of law or violation of law, nor shall compliance
19 with the Consent Judgment constitute or be construed as an admission by Procter & Gamble of any
20 fact, issue of law or violation of law, at any time, for any purpose. Nothing in the Consent Judgment
21 shall prejudice, waive or impair any right, remedy or defense that Procter & Gamble may have in any
22 other or further legal proceedings. Nothing in the Consent Judgment or any document referred to
23 herein, shall be construed as giving rise to any presumption or inference of admission or concession
24 by Procter & Gamble as to any fault, wrongdoing or liability whatsoever.

25 **II. JURISDICTION AND VENUE**

26 2.1 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
27 jurisdiction over the subject matter of this action and personal jurisdiction over the allegations of
28 violation contained in the Notices and Complaint and personal jurisdiction over the Parties as to the

1 acts alleged in the Complaint, that venue is proper in this Court, and that this Court has jurisdiction to
2 enter a Consent Judgment pursuant to the terms set forth herein.

3 **III. INJUNCTIVE RELIEF -REFORMULATION AND TESTING**

4 **3.1 Reformulation of Covered Products**

5 **3.1.1 Interim Reformulation Requirements:** As of July 1, 2010, Procter &
6 Gamble shall not manufacture for sale in California and for sale to a third party for retail sale in
7 California any Covered Products, except for Clairol Herbal Essences Body Envy shampoo, that
8 contain more than 10 parts per million (“ppm”) of 1,4-dioxane, allowing for normal analytical
9 variability as defined by the quality control methodology set forth in Exhibit C. To the extent P&G is
10 in compliance with the obligations imposed by Sections 3.2 and 3.3 of this Consent Judgment, no
11 Proposition 65 warning shall be required, except as specified therein.

12 **3.1.2 Final Reformulation Requirements:** As of January 31, 2011, Procter &
13 Gamble shall not manufacture for sale in California and for sale to a third party for retail sale in
14 California Clairol Herbal Essences Body Envy shampoo that contains more than 10 ppm of 1,4-
15 dioxane, allowing for normal analytical variability as defined by the quality control methodology set
16 forth in Exhibit C. To the extent P&G is in compliance with the obligations imposed by Sections 3.2
17 and 3.3 of this Consent Judgment, no Proposition 65 warning shall be required, except as specified
18 therein.

19 **3.2 Clear and Reasonable Warning**

20 **3.2.1** In the event that Procter & Gamble obtains information, through a source other
21 than the testing set out in section 3.3 of this Consent Judgment, that one or more lots of Covered
22 Products manufactured after January 31, 2011, for sale in California or for distribution to a third party
23 for retail sale in California contains more than 10 ppm of 1, 4-dioxane, Procter & Gamble shall have
24 thirty (30) days after receipt of the data, product specifications including product lot code
25 information, and analysis substantiating such levels in which to verify such information. Hereinafter,
26 this date shall be referred to as that “verification date.” If the information is demonstrated to be
27 accurate, through testing following the protocol specified in Exhibit C, Procter & Gamble shall take
28 steps to ensure that further production lots of said product(s) contain no more than 10 ppm of 1, 4-

1 dioxane, allowing for normal analytical variability as defined by the quality control methodology set
2 forth in Exhibit C. If Procter & Gamble cannot, within ninety (90) days of the verification date,
3 ensure the product contains no more than 10 ppm of 1,4-dioxane, allowing for normal analytical
4 variability as defined by the quality control methodology set forth in Exhibit C, then within 120 days
5 of the verification date, Procter & Gamble may elect either to discontinue the distribution for sale in
6 California of that specific product or to provide a clear and reasonable warning on any such lots in
7 Procter & Gamble's possession which are intended for sale within California with the following
8 language:

9 "WARNING: This product contains a chemical known to the State of California to cause
10 cancer."

11 In the event that this warning is required, the warning shall be prominently affixed to or
12 printed on the container, cap, label or unit package of Covered Products so as to be clearly
13 conspicuous, as compared with other statements or designs on the label as to render it likely to be
14 read and understood by an ordinary purchaser or user of the product.

15 3.3 **Testing**

16 3.3.1 Commencing July 1, 2010, Procter & Gamble shall, on a quarterly basis,
17 randomly select one sample of each Covered Product for testing to confirm that the product conforms
18 to the reformulation standard set out in section 3.1. If any sample yields a test result of greater than
19 10 ppm of 1,4-dioxane, then Procter & Gamble will retest the same product in duplicate to determine
20 the impact of normal analytical variability, and Procter & Gamble will also test two (2) additional
21 random samples of that specific Covered Product.

22 Procter & Gamble shall perform all testing pursuant to this Consent Judgment using the
23 protocol set out in Exhibit C to this document.

24 Procter & Gamble shall be required to conduct no further testing of a specific Covered
25 Product as long as that product meets the reformulation standard set out in section 3.1.1 for four
26 consecutive quarters.

27 3.3.2 If any Covered Product is found during the first four (4) consecutive quarters
28 to not meet the reformulation standards set out in section 3.1, Procter & Gamble shall continue to test

1 that specific Covered Product(s) for an additional four (4) consecutive quarters or until the specific
2 Covered Product meets the reformulation standard set out in Section 3.1 for four (4) consecutive
3 quarters, which ever occurs first.

4 If after eight (8) quarters of testing, any specific Covered Product fails to comply with the
5 reformulation standard set out in section 3.1. for four (4) consecutive quarters, then Procter &
6 Gamble shall, within sixty (60) days of the last test, provide the warning set out in section 3.2, above
7 or discontinue distribution for sale in California of that specific Covered Product.

8 Procter & Gamble shall retain copies of its test data obtained pursuant to sections 3.3.1 and
9 3.3.2 for a period of three years from the date testing commenced and shall provide all test data to
10 David Steinman upon written request and consummation of a satisfactory confidentiality agreement
11 that permits enforcement of this Consent Judgment and protects the information shared from non-
12 mandatory public disclosure.

13 **IV. PAYMENT**

14 In full and final satisfaction of David Steinman's costs of litigation, attorney's fees and all
15 other expenses, Procter & Gamble shall make a total payment of \$100,000.00, payable within
16 fifteen (15) business days of receiving the Notice of Entry of Consent Judgment. Said payments shall
17 be for the following:

18 A. \$72,144.00 payable to Freedom Press which includes:

19 i) further testing of consumer products for 1,4-dioxane, formaldehyde and other toxic
20 chemicals; and research into alternatives to the use of toxic chemicals, the and promotion of those
21 alternatives; and ii) reimbursement of out of pocket expenses of \$26,425.00. The Tax Identification
22 No. for Freedom Press is 95-4736088.

23 B. \$27,856.00 payable to Michael Freund as reimbursement of David Steinman's attorney's
24 fees and for reimbursement of costs advanced in this case.

25 Procter & Gamble's payments shall be mailed to the Law Office of Michael Freund.

26 **V. RELEASE AND CLAIMS COVERED**

27 This Consent Judgment entered by the Court is a final and binding resolution between and
28 among, David Steinman, his past or current agents, representatives, employees, attorneys, successors

1 and assigns, acting on behalf of the general public and the public interest pursuant to California
2 Health and Safety Code section 25249.7(d), and Procter & Gamble, and each of its parents,
3 subsidiaries, affiliates, divisions, subdivisions, distributors, wholesalers, customers, officers,
4 directors, shareholders, employees, agents, attorneys, successors and assigns, of any and all claims,
5 known or unknown, that have been or could have been asserted by David Steinman against Procter &
6 Gamble in the Complaint in regard to Covered Products, up to and including the date of entry of
7 Consent Judgment arising from the presence of 1,4-dioxane in Covered Products.

8 Except for such rights and obligations as have been created under this Consent Judgment,
9 Plaintiff David Steinman, on his own behalf and on behalf of his past or current agents,
10 representatives, employees, attorneys, successors and assigns, and in bringing an action “in the public
11 interest” pursuant to California Health and Safety Code Section 25249.7 (d) with respect to the
12 matters alleged in the this lawsuit, does hereby fully, completely, finally and forever release,
13 relinquish and discharge Procter & Gamble and its respective parents, subsidiaries, affiliates,
14 divisions, subdivisions, officers, directors, shareholders, employees, agents, attorneys, suppliers,
15 manufacturers, distributors, retailers, successors and assigns (“released parties”) from any and all
16 claims, actions, causes of action, demands, rights, debts, agreements, promises, liabilities, damages,
17 accountings, costs and expenses, whether known or unknown, suspected or unsuspected, of every
18 nature whatsoever, including Proposition 65 claims, which Plaintiff David Steinman has or may have
19 against the said released parties, arising directly or indirectly out of any fact or circumstance
20 occurring prior to the date upon which the Consent Judgment becomes final, relating to the Covered
21 Products as identified in the Notices of Violation dated June 20, 2009 and December 1, 2009 and
22 Amended Notice of Violation dated March 29, 2010, and the filed Complaint.

23 It is the intention of the Parties to this release that, upon entry of this Consent Judgment by the
24 Court, this Consent Judgment shall be effective as a full and final accord and satisfaction and Release
25 of every released claim up to and including the date of entry of the Consent Judgment. In furtherance
26 of this intention, Plaintiff acknowledges that he is familiar with California Civil Code section 1542,
27 which provides as follows:

28 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS

1 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
2 EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE
3 RELEASE, WHICH IF KNOWN BY HIM MUST HAVE
4 MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
5 DEBTOR.

6 David Steinman, on his own behalf and on behalf of his past or current agents,
7 representatives, employees, attorneys, successors and assigns, hereby waives and relinquishes all of
8 the rights and benefits that Plaintiff has, or may have, under California Civil Code section 1542 (as
9 well as any similar rights and benefits which they may have by virtue of any statute or rule of law in
10 any other state or territory of the United States). David Steinman hereby acknowledges that he may
11 hereafter discover facts in addition to, or different from, those which he now knows or believes to be
12 true with respect to the subject matter of this Consent Judgment and the Consent Judgment entered by
13 the Court and the released claims, but that notwithstanding the foregoing, it is David Steinman's
14 intention hereby to fully, finally, completely and forever settle and release each, every and all
15 released claims, and that in furtherance of such intention, the release herein given shall be and remain
16 in effect as a full and complete general release, notwithstanding the discovery or existence of any
17 such additional or different facts. David Steinman hereby warrants and represents to Procter &
18 Gamble that (a) he has not previously assigned any released claim, and (b) he has the right, ability
19 and power to release each released claim.

20 **VI. CONTINUING OBLIGATIONS**

21 Nothing herein shall be construed as diminishing Procter & Gamble's continuing obligations
22 to comply with Proposition 65. Further, in the event of any allegation of failure to comply, both
23 parties shall use best efforts to resolve such differences prior to seeking judicial intervention.

24 **VII. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

25 In the event that, after entry of this Consent Judgment in its entirety, any of the provisions
26 hereof are subsequently held by a court to be unenforceable, the validity of the enforceable provisions
27 shall not be adversely affected.

1 **VIII. ENFORCEMENT OF CONSENT JUDGMENT**

2 David Steinman may, by motion or as otherwise provided for enforcement of Judgments, seek
3 relief from this Superior Court of the State of California to enforce the terms and conditions
4 contained in this Consent Judgment after its entry by the Court.

5 **IX. APPLICATION OF CONSENT JUDGMENT**

6 This Consent Judgment entered by the Court shall apply to, be binding upon and inure to the
7 benefit of Procter & Gamble, its parents, subsidiaries, affiliates, divisions, subdivisions, officers,
8 directors, shareholders, employees, agents, attorneys, suppliers, manufacturers, successors and
9 assigns, and upon David Steinman on his own behalf and on behalf of the general public and the
10 public interest, as well as Mr. Steinman’s agents, representatives, employees, attorneys, successors
11 and assigns.

12 **X. MODIFICATION OF CONSENT JUDGMENT**

13 This Consent Judgment entered by the Court may be modified only upon written agreement of
14 the Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon a regularly-
15 noticed motion of any Party to the Consent Judgment as provided by law and upon entry of a
16 modified Consent Judgment by the Court.

17 **XI. RETENTION OF JURISDICTION**

18 This Court shall retain jurisdiction of this matter to enforce, modify or terminate the Consent
19 Judgment.

20 **XII. AUTHORITY TO STIPULATE TO THIS CONSENT JUDGMENT**

21 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the
22 Party he or she represents to enter into this Consent Judgment and to execute it on behalf of the party
23 represented and legally to bind that party.

24 **XIII. COURT APPROVAL**

25 This Consent Judgment shall be effective only after it has been executed by the Court.
26 Otherwise, it shall be of no force or effect and cannot be used in any proceeding for any purpose.

27 **XIV. EXECUTION IN COUNTERPARTS**

28 This Consent Judgment may be executed in counterparts and/or by facsimile, which taken

1 together shall be deemed to constitute one document.

2 **XV. NOTICES**

3 All notices required to be given to either Party to this Consent Judgment by the other shall be
4 sent, via either (a) first-class, registered, certified mail, return receipt requested, (ii) overnight courier,
5 or (iii) personal messenger to the following agents:

6 **FOR DAVID STEINMAN:**

7 David Steinman
8 120 N. Topanga Canyon, Suite 107,
9 Topanga, CA 90290.

10 Michael Bruce Freund
11 Law Offices of Michael Freund
12 1915 Addison Street Berkeley, CA 94704
13 Telephone: (510) 540-1992
14 Facsimile: (510) 540-5543

15 **FOR THE PROCTER & GAMBLE LLC:**
16 **TBA**

17 Carolyn Collins
18 NIXON PEABODY LLP
19 One Embarcadero Center, 18th Floor
20 San Francisco, CA 94111-3600
21 Telephone: (415) 984-8200
22 Facsimile: (415) 984-9300

23 **XVI. REPORTING REQUIREMENTS**

24 David Steinman agrees to comply with the reporting form requirements referenced in
25 California Health & Safety Code §25249.7(f).

26 **XVII. GOVERNING LAW**

27 The validity, construction and performance of this Consent Judgment shall be governed by the
28 laws of the State of California.

XVIII. DRAFTING

The terms of this Consent Judgment have been reviewed by the respective counsel for the
Parties to this Settlement prior to its signing, and each Party has had an opportunity to fully discuss
the terms with counsel. The Parties agree that, in any subsequent interpretation and construction of
this Consent Judgment entered thereon, the terms and provisions shall not be construed against either

1 Party.

2 **XIX. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

3 In the event a dispute arises with respect to either party's compliance with the terms of this
4 Consent Judgment entered by the Court, the Parties shall meet either in person or by telephone and
5 endeavor to resolve the dispute in an amicable manner. No action or motion may be filed in the
6 absence of such a good faith attempt to resolve the dispute beforehand. In the event an action or
7 motion is filed, however, the prevailing party may seek to recover costs and reasonable attorney's
8 fees. As used in the preceding sentence, the term "prevailing party" means a party who is successful
9 in obtaining relief more favorable to it than the relief that the other party was amenable to providing
10 during the parties' good faith attempt to resolve the dispute that is the subject of such enforcement
11 action.

12 **XX. ENTIRE AGREEMENT**

13 This Consent Judgment contains the sole and entire agreement and understanding of the
14 Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations,
15 commitments and understandings related hereto. No representations, oral or otherwise, express or
16 implied, other than those contained herein have been made by any party hereto. No other agreements
17 not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the
18 Parties.

19 **XXI. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
20 **CONSENT JUDGMENT**

21 This settlement has come before the Court upon the request of the Parties. The Parties request
22 the Court to fully review this settlement and, being fully informed regarding the matters which are the
23 subject of this action, to:

24 (1) Find that the terms and provisions of this Consent Judgment represent a fair and
25 equitable settlement of all matters raised by the allegations of the Complaint, that the matter has been
26 diligently prosecuted, and that the public interest is served by such settlement; and

27 (2) Make the findings pursuant to Health & Safety Code § 25249.7 (f) (4), approve the
28 Settlement and approve this Consent Judgment.

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:

THE PROCTER & GAMBLE DISTRIBUTING LLC

Dated: _____, 2010

Dated: _____, 2010

David Steinman

APPROVED AS TO FORM:

Dated: _____, 2010

NIXON PEABODY LLP

Carolyn Collins
Attorney for Defendant
The Procter & Gamble Distributing LLC

Dated: _____, 2010

LAW OFFICE OF MICHAEL FREUND

Michael Freund
Attorney for Plaintiff
David Steinman

IT IS SO ORDERED:

Dated: _____, 2010

JUDGE, SUPERIOR COURT

Exhibit B
COVERED PRODUCTS

Herbal Essences Products:

- Hello Hydration
- Hello Hydration 2in1
- Body Envy
- Body Envy 2in1
- Reconditioning Hyrdalicious
- Self Targeting Hydralicious
- Featherweight Hydralicious
- Long Term Relationship
- Color Me Happy
- Color Me Happy 2in1
- Drama Clean
- Dangerously Straight
- Dangerously Straight 2in1
- None of Your Frizzness
- Tousle Me Softly
- Totally Twisted
- Breaks Over
- Degunkify

Head & Shoulders Product:

- Extra Volume Shampoo (noticed as “advanced extra volume shampoo”)

EXHIBIT C

PROTOCOL

Summary of Method:

An aliquot of sample (~1 g) is accurately weighed into a vial with 5 mL water and one gram of sodium sulfate. Internal standard (5 µg 1,4-Dioxane-d8) is added. The vial is capped and heated at 95 °C for 60 minutes. A one mL aliquot of the headspace over the sample is analyzed by direct injection using the following GCMS conditions or equivalent.

GCMS Conditions

Instrument: Agilent 5973N

Column: 25 m x 0.20 mm HP-624, 1.12 micron film

Column Temp: 40 °C (hold 3 min) to 100 °C at 10 °C/min, then to 180 °C at 25 °C/min (hold 5 min)

Injector Temp: 220 °C

Mass Range: Selected ion monitoring: masses 43, 58 and 88 (dioxane): 64 and 96 (dioxane-d8); 1.72 cycles per second

Quality control shall include at a minimum

1. Calibration using a blank and 4 standards over the range of 0.5 to 10 micrograms of 1,4-dioxane with a regression fit R squared >0.995.
 2. A method blank analyzed just prior to the samples must be free of 1,4-dioxane (<1 ppm)
 3. Continuing calibration standards should be analyzed after every 10 or fewer samples, and the result must be within 10% of the initial calibration.
 4. With each batch of 20 or fewer samples, one of the samples must be analyzed in duplicate and as a spiked sample. QC limits for duplicates which exceed 5 ppm is <25% relative percent difference. QC limits for spiked samples is 75-125% recovery when the amount spiked is greater than or equal to the background in the unspiked sample.
-