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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF ALAMEDA

14 UNLIMITED CIVIL JURISDICTION

15 Coordination Proceeding
Special Title (Rule 3.350)

16 PROPOSITION 65 COCAMIDE DEA CASES

JUDICIAL COUNCIL COORDINATION
PROCEEDING NO: 4765

**[PROPOSED] CONSENT JUDGMENT AS
TO E.T. BROWNE DRUG COMPANY,
INC.**

*[Shefa LMV, LLC v. Target Corporation, et al.,
Los Angeles County Superior Court
No. BC520410]*

Action filed: October 11, 2013

1 **1. INTRODUCTION**

2 **1.1 Shefa LMV, LLC and E.T. Browne Drug Company, Inc.**

3 This Consent Judgment is entered into by and between plaintiff Shefa LMV, LLC
4 ("Plaintiff") and E.T. Browne Drug Company, Inc. ("Defendant"), with Plaintiff and Defendant
5 collectively referred to as the "Parties" and individually as a "Party." Plaintiff is an entity organized
6 in the State of California, which has asserted that it seeks to promote awareness of exposure to toxic
7 chemicals and to improve human health by reducing or eliminating hazardous substances contained
8 in consumer and commercial products. Plaintiff alleges that Defendant employs ten or more
9 persons and is a person in the course of doing business for purposes of the Safe Drinking Water and
10 Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.6, *et seq.* ("Proposition
11 65").

12 **1.2 General Allegations**

13 Plaintiff alleges that Defendant has manufactured, imported, distributed and/or sold
14 shampoo and shower gel products that contain coconut oil diethanolamine condensate (cocamide
15 diethanolamine) (referred to herein as "cocamide DEA") without the requisite Proposition 65
16 warnings. Cocamide DEA is listed as a carcinogen under Proposition 65.

17 **1.3 Notices of Violation**

18 On June 22, 2013, Plaintiff served Defendant and various public enforcement agencies with
19 a document entitled "60-Day Notice of Violation" (the "Original Notice") alleging that Defendant
20 was in violation of Proposition 65 for failing to warn consumers and customers of alleged exposures
21 to cocamide DEA in shampoos. No public enforcer has diligently prosecuted the allegations set
22 forth in the Original Notice.

23 On January 24, 2014, Plaintiff served Defendant and various public enforcement agencies
24 with a document entitled 60-Day Notice of Violation alleging that Defendant was in violation of
25 Proposition 65 for failing to warn consumers and customers of alleged exposures to cocamide DEA
26 in liquid soaps (the "Supplemental Notice"). The seventy-first day following the service of the
27 Supplemental Notice on Defendant and all California public enforcers required to be served under
28 Proposition 65 (i.e., California Attorney General, California District Attorneys of every County in

1 the State of California, and City Attorneys for every city in the State of California with a population
2 greater than 750,000), provided that no such public enforcer has, before that date, filed a
3 Proposition 65 enforcement action based on the allegations in the Supplemental Notice, is the
4 “Supplemental Notice Maturity Date.” The Original Notice and the Supplemental Notice are
5 referred to herein as the “Notices.”

6 **1.4 Product Description**

7 The products covered by this Consent Judgment are shampoo products including, but not
8 limited to, Palmer’s Coconut Oil Formula Shampoo with Vitamin E and Palmer’s Olive Oil
9 Formula Shampoo with Vitamin E, that are manufactured, imported, distributed and/or sold by
10 Defendant for sale in the State of California. The products covered by this Consent Judgment shall
11 additionally include liquid soaps on and after the Supplemental Notice Maturity Date. The products
12 covered by this Consent Judgment are referred to as the “Covered Products.”

13 **1.5 Complaint**

14 On September 4, 2013 Plaintiff, acting in the public interest under Cal. Health & Safety
15 Code § 25249.7(d), filed its original complaint against Defendant and Target Corporation in the
16 above-captioned action (“Action”). On October 11, 2013, Plaintiff filed its First Amended
17 Complaint alleging violations of Proposition 65 and Cal. Bus. & Prof. Code §§ 17200 *et seq.*
18 regarding alleged exposures to cocamide DEA in shampoo products. The First Amended
19 Complaint shall be deemed amended by this Consent Judgment upon the Supplemental Notice
20 Maturity Date to allege such claims as to all Covered Products.

21 **1.6 No Admission**

22 Defendant denies the material, factual and legal allegations contained in the Notices and
23 asserted in the Action and maintains that it has at all times been in compliance with all laws and all
24 products that it has sold, manufactured, imported and/or distributed in California, including the
25 Covered Products. Nothing in this Consent Judgment shall be construed as an admission by
26 Defendant of any fact, finding, issue of law or violation of law, nor shall compliance with this
27 Consent Judgment constitute or be construed as an admission by Defendant of any fact, finding,
28

1 issue of law or violation of law. However, this Section 1.6 shall not diminish or otherwise affect
2 Defendant's obligations, responsibilities and duties under this Consent Judgment.

3 **1.7 Consent to Jurisdiction**

4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
5 jurisdiction over Defendant as to the allegations contained in the Notice, that venue is proper in the
6 County of Los Angeles, and that this Court has jurisdiction to enter and enforce the provisions of
7 this Consent Judgment.

8 **1.8 Effective Date**

9 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date on
10 which the Court approves and enters judgment pursuant to the terms of this Consent Judgment.

11 **2. INJUNCTIVE RELIEF: WARNING OR REFORMULATION**

12 **2.1 Reformulation of Covered Products**

13 As of the Effective Date, Defendant shall not manufacture, distribute, sell or offer for sale
14 any Covered Product that contains cocamide DEA and that will be sold or offered for sale to
15 California consumers. For purposes of this Consent Judgment, a Covered Product "contains
16 cocamide DEA" if cocamide DEA is an intentionally added ingredient in the Covered Product.

17 **3. MONETARY PAYMENTS**

18 **3.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

19 Defendant shall pay a total civil penalty payment of \$10,000 within ten (10) days of the
20 Effective Date, as follows: the civil penalty shall be apportioned in accordance with California
21 Health & Safety Code § 25249.12 (c) and (d), with 75% of these funds remitted to the State of
22 California's Office of Environmental Health Hazard Assessment ("OEHHHA") and the remaining
23 25% of these funds remitted to Plaintiff, both pursuant to the procedures set forth in Section 3.3.

24 **3.2 Reimbursement of Plaintiff's Fees and Costs**

25 The Parties acknowledge that Plaintiff and its counsel offered to resolve this dispute without
26 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
27 issue to be resolved after the material terms of the agreement had been settled. Defendant expressed
28 a desire to resolve the fee and cost issue after the other settlement terms had been agreed. The

1 Parties then attempted to (and did) reach an accord on the compensation due to Plaintiff and its
2 counsel under general contract principles and the private attorney general doctrine codified at
3 California Code of Civil Procedure § 1021.5 for all work performed in this matter, except fees that
4 may be incurred on appeal. Under these legal principles, Defendant shall pay the amount of
5 \$12,000 for fees and costs incurred investigating, litigating and enforcing this matter, including the
6 fees and costs incurred (and yet to be incurred) negotiating, drafting and obtaining the Court's
7 approval of this Consent Judgment in the public interest.

8 **3.3 Payment Procedures**

9 All payments required by Sections 3.1 and 3.2 shall be within ten (10) days of the Effective
10 Date, in three checks made payable as follows:

- 11 (a) one check to "OEHHA" in the amount of \$7,500;
- 12 (b) one check to "Law Office of Daniel N. Greenbaum in Trust for Shefa LMV, LLC" in
13 the amount of \$2,500; and
- 14 (c) one check to "Law Office of Daniel N. Greenbaum" in the amount of \$12,000.

15 **3.4 Issuance of W-9 and 1099 Forms**

16 Plaintiff shall provide W-9 forms for all payees under this Consent Judgment prior to entry
17 of the Consent Judgment. After the settlement funds have been transmitted to Plaintiff's counsel,
18 Defendant shall issue separate 1099 forms, as follows:

- 19 (a) one 1099 form to the "Office of Environmental Health Hazard Assessment" (EIN:
20 68-0284486) in the amount of \$7,500;
- 21 (b) a second 1099 form in the amount of \$2,500 to "Shefa LMV, LLC," whose address
22 and tax identification number shall be furnished upon request; and
- 23 (c) a third 1099 to "Law Office of Daniel N. Greenbaum" (EIN: 45-3084082) in the
24 amount of \$12,500.

25 **3.5 Issuance of Payments.**

26 **3.5.1** All payments shall be delivered to the following payment address:

27 Daniel N. Greenbaum, Esq.
28 Law Office of Daniel N. Greenbaum
1467 South Holt Avenue #2
Los Angeles, CA 90035

1 **4. CLAIMS COVERED AND RELEASED**

2 **4.2 Plaintiff's Release of Defendant**

3 Plaintiff, on behalf of itself and its past and current agents, representatives, attorneys,
4 successors and assigns, and in the public interest, waives all right to participate in any action and
5 releases and discharges (a) Defendant and its parents, subsidiaries, affiliated entities that are under
6 common ownership, directors, officers, employees, divisions, partners, shareholders, attorneys and
7 their successors and assigns (collectively, the "Defendant Releasees"), and (b) each entity to whom
8 any Defendant Releasee directly or indirectly distributed or sold any Covered Products, including,
9 but not limited to, downstream distributors, wholesalers, customers, retailers (including but not
10 limited to Target Corporation), franchisees, cooperative members, licensors and licensees
11 (collectively, "Downstream Releasees"), with respect to all claims, including but not limited to
12 causes of action, suits, liabilities, demands, obligations, damages, costs, fines, penalties, fees
13 (including but not limited to expert fees, attorneys' fees and investigation fees) or losses
14 (collectively, "Claims") regarding any violation of Proposition 65 based on failure to warn about
15 alleged exposure to cocamide DEA, or alleged exposure to cocamide DEA, in any Covered
16 Products shipped, distributed or sold by Defendant prior to the Effective Date.

17 Compliance with the terms of this Consent Judgment by Defendant constitutes compliance
18 with Proposition 65 by any Defendant Releasee or Downstream Releasee with respect to any
19 alleged exposure to cocamide DEA from the Covered Products as set forth in the Notices and the
20 Action.

21 **4.3 Plaintiff's General Release of Defendant**

22 In addition, Plaintiff, on behalf of itself and its past and current agents, representatives,
23 attorneys, successors and assigns, in its individual capacity only and not in its representative
24 capacity, provides a release herein which shall be effective as a full and final accord and
25 satisfaction, and as a bar to all Claims under Proposition 65, Cal. Bus. & Prof. Code §§ 17200 *et*
26 *seq.*, and any other statutory or common law, whether known or unknown, suspected or
27 unsuspected, limited to and arising out of alleged exposure to, and/or failure to warn of alleged
28 exposure to, cocamide DEA or diethanolamine in the Covered Products manufactured, distributed

1 or sold by Defendant. It is possible that other Claims not known to the Parties arising out of the
2 facts alleged in the Notices or the Action will develop or be discovered. Plaintiff, on behalf of itself
3 and its past and current agents, representatives, attorneys, successors and assigns, and not in its
4 representative capacity, acknowledges that this Consent Judgment is expressly intended to cover
5 and include all such Claims, including all rights of action therefor. Plaintiff has full knowledge of
6 the contents of California Civil Code § 1542. Plaintiff acknowledges that the Claims released in
7 Sections 4.1 and 4.2 include unknown Claims, and Plaintiff nevertheless waives California Civil
8 Code § 1542 as to any such unknown Claims. California Civil Code § 1542 reads as follows:

9 “A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
10 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
11 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN
12 BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER
SETTLEMENT WITH THE DEBTOR.”

13 Plaintiff, on behalf of itself and its past and current agents, representatives, attorneys, and
14 successors and assigns, and not in its representative capacity, acknowledges and understands the
15 significance and consequences of this specific waiver of California Civil Code § 1542.

16 **4.4 Defendant’s Release of Plaintiff**

17 Defendant, on behalf of itself and its past and current agents, representatives, attorneys, and
18 successors and assignees, hereby waives any and all claims against Plaintiff and its attorneys and
19 other representatives, for any and all actions taken or statements made (or those that could have
20 been taken or made) by Plaintiff and its attorneys and other representatives, whether in the course of
21 investigating claims or of otherwise seeking to enforce Proposition 65 against it in this matter with
22 respect to the Covered Products.

23 **5. COURT APPROVAL**

24 This Consent Judgment is not effective until it is approved and entered by the Court and
25 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
26 after it has been fully executed by all Parties.

1 **6. SEVERABILITY**

2 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
3 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions
4 remaining shall not be adversely affected.

5 **7. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the State of California
7 and the obligations of Defendant hereunder as to the Covered Products apply only within the State
8 of California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
9 inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are
10 rendered inapplicable or no longer required as a result of any such repeal or preemption or rendered
11 inapplicable by reason of law generally as to the Covered Products, including, without limitation,
12 the removal of cocamide DEA from OEHHA’s list of Proposition 65 chemicals, then Defendant
13 shall notify Plaintiff and its counsel and shall have no further obligations pursuant to this Consent
14 Judgment with respect to, and to the extent that, any Covered Products are so affected.

15 **8. NOTICES**

16 Unless specified herein, all correspondence and notices required to be provided pursuant to
17 this Consent Judgment shall be in writing and (i) personally delivered, (ii) sent by first-class or by
18 registered or certified mail return receipt requested, or (iii) sent by overnight courier to one Party
19 from the other Party at the following addresses:

20 To Defendant:

21 Robert Neis
22 E.T. Browne Drug Company, Inc.
23 440 Sylvan Avenue
24 Englewood Cliffs, NJ 07632

20 To Plaintiff:

21 Daniel N. Greenbaum, Esq.
22 Law Office of Daniel N. Greenbaum
23 1467 South Holt Avenue #2
24 Los Angeles, CA 90035

25 With a copy to:

26 Sarah Esmaili, Esq.
27 Arnold & Porter LLP
28 Three Embarcadero Center, 10th Floor
 San Francisco, CA 94111

29 Any Party, from time to time, may specify in writing to the other Party a change of address to which
30 all notices and other communications shall be sent.

1 **9. COUNTERPARTS; FACSIMILE OR PDF SIGNATURES**

2 This Consent Judgment may be executed in counterparts and by facsimile or pdf signature,
3 each of which shall be deemed an original, and all of which, when taken together, shall constitute
4 one and the same document. A facsimile or .pdf signature shall be as valid as the original.

5 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

6 Plaintiff and its attorneys agree to comply with the reporting form requirements referenced
7 in California Health & Safety Code § 25249.7(f).

8 **11. ADDITIONAL POST-EXECUTION ACTIVITIES**

9 **11.1** The Parties acknowledge that, pursuant to California Health & Safety Code §
10 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment, and
11 Plaintiff shall draft and file such motion within fifteen days of the date this Consent Judgment is
12 fully executed by the Parties, and Defendant shall not oppose it.

13 **11.2** Within five business days of entry of this Consent Judgment, Plaintiff shall file a
14 request for dismissal without prejudice as to Defendant Target Corporation in the action entitled
15 *Shefa LMV, LLC v. Target Corporation, et al.*, Los Angeles County Superior Court No. BC520410.

16 **12. MODIFICATION**

17 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
18 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
19 of any Party and entry of a modified Consent Judgment by the Court.

20 **13. AUTHORIZATION**

21 The undersigned are authorized to execute this Consent Judgment and have read,
22 understood, and agree to all of the terms and conditions of this Consent Judgment.

23 **14. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
24 **CONSENT JUDGMENT**

25 **14.1** This Consent Judgment came before this Court upon the request of the Parties. The
26 Parties request the Court to review this Consent Judgment and to make the following findings
27 pursuant to Cal. Health & Safety Code § 25249.7(f)(4):
28

- 1 1. The injunctive relief required by the Consent Judgment complies with Cal.
2 Health & Safety Code § 25249.7;
3 2. The reimbursement of fees and costs to be paid pursuant to the Consent
4 Judgment is reasonable under California law; and
5 3. The civil penalty amount to be paid pursuant to Consent Judgment is
6 reasonable.

7 AGREED TO:

7 AGREED TO:

8
9 Date: 3/5/14

9 Date: March 3, 2014

10 By: 

10 By: 

11 Plaintiff, Shefa LMV, LLC

11 Defendant, E.T. BROWNE DRUG
12 COMPANY, INC.

12 Print: Alisa Fried

12 Print: Robert C. Neis

13 Its: Managing Member

13 Its:

ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between Shefa LMV, LLC and E.T. Browne Drug Company, Inc., the settlement is approved and the clerk is directed to enter judgment in accordance with the terms herein.

Dated: _____

Judge of the Superior Court