

1 Mark N. Todzo, State Bar No. 168389
2 Howard Hirsch, State Bar No. 213209
3 LEXINGTON LAW GROUP
4 503 Divisadero Street
5 San Francisco, CA 94117
6 Telephone: (415) 913-7800
7 Facsimile: (415) 759-4112
8 mtodzo@lexlawgroup.com
9 hhirsch@lexlawgroup.com

6 Counsel for Plaintiff
7 CENTER FOR ENVIRONMENTAL HEALTH

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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA

12
13 Coordination Proceeding Special Title:) Judicial Council Coordination
14 PROPOSITION 65 COCAMIDE DEA CASES) Proceeding
15 _____) Case No. 4765

16 This Document Relates To:) **[PROPOSED] CONSENT**
17 *CEH v. Lake Consumer Products, Inc., et al.,*) **JUDGMENT AS TO TOPCO**
18 A.C.S.C. Case No. RG 13-693280) **ASSOCIATES, LLC**

19
20 **1. INTRODUCTION**

21 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
22 Environmental Health (“CEH”) and defendant Topco Associates, LLC (“Settling Defendant”).
23 CEH and Settling Defendant are referred to collectively as the “Parties.”

24 1.2 Settling Defendant is a corporation that employs ten (10) or more persons and
25 that manufactures, distributes, and/or sells shampoo and liquid soaps such as hand soap, body
26 wash, and/or bubble bath that contain coconut oil diethanolamine condensate (cocamide
27 diethanolamine) (hereinafter, “cocamide DEA”) in the State of California or has done so in the
28

1 past.

2 1.3 On June 24, 2013, CEH served a 60-Day Notice of Violation under
3 Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
4 & Safety Code §§ 25249.5, *et seq.*) (“Notice”) to Settling Defendant, the California Attorney
5 General, the District Attorneys of every County in the State of California, and the City Attorneys
6 for every City in the State of California with a population greater than 750,000. The Notice
7 alleges violations of Proposition 65 with respect to the presence of cocamide DEA in shampoo
8 manufactured, distributed, and/or sold by Settling Defendant.

9 1.4 On August 27, 2013, CEH filed the action entitled *CEH v. Lake Consumer*
10 *Products, Inc., et al.*, Case No. RG 13-693280, in the Superior Court of California for Alameda
11 County. On September 4, 2013, CEH named Settling Defendant as a defendant in that action
12 pursuant to California Code of Civil Procedure §474. On December 4, 2013, the *Lake* action was
13 coordinated with several other related Proposition 65 actions in the *Proposition 65 Cocamide*
14 *DEA Cases*, Case No. JCCP 4765, currently pending before this Court.

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

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

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1 **2. DEFINITIONS**

2 2.1 “Covered Products” means shampoo and liquid soaps such as hand soap, body
3 wash, and bubble bath.

4 2.2 “Effective Date” means the date on which this Consent Judgment is entered by
5 the Court.

6 **3. INJUNCTIVE RELIEF**

7 3.1 **Reformulation of Covered Products.** As of the Effective Date, Settling
8 Defendant shall not manufacture, distribute, sell, or offer for sale any Covered Product that
9 contains cocamide DEA and that will be sold or offered for sale to California consumers. For
10 purposes of this Consent Judgment, a product “contains cocamide DEA” if cocamide DEA is an
11 intentionally added ingredient in the product and/or part of the product formulation.

12 3.2 **Specification to Suppliers.** No more than 30 days after the Effective Date,
13 Settling Defendant shall issue specifications to its suppliers of Covered Products requiring that
14 Covered Products not contain any cocamide DEA, and shall instruct each supplier to use
15 reasonable efforts to eliminate Covered Products containing cocamide DEA on a nationwide
16 basis.

17 **4. ENFORCEMENT**

18 4.1 The Parties may, by motion or application for an order to show cause before
19 the Superior Court of Alameda County, enforce the terms and conditions contained in this
20 Consent Judgment. Prior to CEH bringing any motion or application to enforce the requirements
21 of Section 3 above, CEH shall provide Settling Defendant with a Notice of Violation and a copy
22 of any test results which purportedly support CEH’s Notice of Violation. The Parties shall then
23 meet and confer regarding the basis for CEH’s anticipated motion or application in an attempt to
24 resolve it informally, including providing Settling Defendant a reasonable opportunity of at least
25 thirty (30) days to cure any alleged violation. Similarly, Prior to any party bringing any motion or
26 application to enforce any provisions of this Consent Judgment, the Parties shall meet and confer
27 regarding the bases for the party’s anticipated motion or application in an attempt to resolve it
28 informally, including providing the alleged violating party a reasonable opportunity of at least

1 thirty (30) days to cure any alleged violation. Should a party's attempt at informal resolution fail,
2 the party may file its enforcement motion or application. This Consent Judgment may only be
3 enforced by the Parties.

4 **5. PAYMENTS**

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

10 5.1.1 \$1,650 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
11 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
12 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard
13 Assessment). The civil penalty check shall be made payable to the Center for Environmental
14 Health.

15 5.1.2 \$2,250 as a payment in lieu of civil penalty to CEH pursuant to Health &
16 Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH will use
17 such funds to continue its work educating and protecting people from exposures to toxic
18 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
19 Judgment and to purchase and test Settling Defendant's products to confirm compliance. In
20 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
21 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
22 educate and protect people from exposures to toxic chemicals. The method of selection of such
23 groups can be found at the CEH web site at www.ceh.org/justicefund. The payment pursuant to
24 this Section shall be made payable to the Center for Environmental Health.

25 5.1.3 \$11,100 as reimbursement of a portion of CEH's reasonable attorneys' fees
26 and costs. A check for \$9,600 shall be made payable to the Lexington Law Group, and a check
27 for \$1,500 shall be made payable to the Center for Environmental Health.

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1 **6. MODIFICATION**

2 6.1 **Written Consent.** This Consent Judgment may be modified from time to
3 time by express written agreement of the Parties with the approval of the Court, or by an order of
4 this Court upon motion and in accordance with law.

5 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
6 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
7 modify the Consent Judgment.

8 **7. CLAIMS COVERED AND RELEASED**

9 7.1 This Consent Judgment is a full, final, and binding resolution between CEH on
10 behalf of itself and the public interest and Settling Defendant, and its parents, subsidiaries, and
11 affiliated entities that are under common ownership, directors, officers, employees, and attorneys
12 (“Defendant Releasees”), and each entity to whom they directly or indirectly distribute or sell
13 Covered Products, including but not limited to distributors, wholesalers, customers, and retailers,
14 including, specifically, Save Mart Supermarkets, franchisees, cooperative members, licensors,
15 and licensees (“Downstream Defendant Releasees”) of any violation of Proposition 65 that was or
16 could have been asserted in the Complaint against Settling Defendant, Defendant Releasees, and
17 Downstream Defendant Releasees, based on failure to warn about alleged exposure to cocamide
18 DEA contained in Covered Products that were sold by Settling Defendant prior to the Effective
19 Date.

20 7.2 CEH, acting on its own behalf and in the public interest, releases Defendant
21 Releasees and Downstream Defendant Releasees from all claims for violations of Proposition 65
22 through the Effective Date based on unwarned exposures to cocamide DEA in the Covered
23 Products, as set forth in the Notice.

24 7.3 Compliance with the terms of this Consent Judgment by Settling Defendant
25 and the Defendant Releasees shall constitute compliance with Proposition 65 by Settling
26 Defendant, its Defendant Releasees, and their Downstream Defendant Releasees with respect to
27 any alleged failure to warn about cocamide DEA in Covered Products manufactured, distributed,
28 or sold by Settling Defendant after the Effective Date.

1 7.4 Nothing in this Section 7 affects CEH's right to commence or prosecute an
2 action under Proposition 65 against any person other than Settling Defendant, Defendant
3 Releasees, or Downstream Defendant Releasees.

4 **8. NOTICE**

5 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
6 notice shall be sent by first class and electronic mail to:

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

12 8.2 When Settling Defendant is entitled to receive any notice under this Consent
13 Judgment, the notice shall be sent by first class and electronic mail to:

14 General Counsel
15 Topco Associates, LLC
16 150 Northwest Point Boulevard
17 Elk Grove Village, IL 60007-1015

18 With a copy to:

19 Edward P. Sangster
20 Daniel W. Fox
21 K&L Gates LLP
22 Four Embarcadero Center, Suite 1200
23 San Francisco, CA 94111
24 ed.sangster@klgates.com
25 daniel.fox@klgates.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, it shall be of no force or

1 effect and shall never be introduced into evidence or otherwise used in any proceeding for any
2 purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

3 **10. ATTORNEYS' FEES**

4 10.1 In the event any motion, application or other action is brought to enforce a
5 violation of this Consent Judgment, the party prevailing on such motion, application, or other
6 action shall be entitled to its reasonable attorneys' fees and costs incurred as a result of such
7 motion, application, or other action.

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

10 10.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
11 sanctions pursuant to law.

12 **11. OTHER TERMS**

13 11.1 The terms of this Consent Judgment shall be governed by the laws of the State
14 of California.

15 11.2 This Consent Judgment shall apply to and be binding upon CEH and Settling
16 Defendant, and its respective divisions, subdivisions, and subsidiaries, and the successors or
17 assigns of any of them.

18 11.3 This Consent Judgment contains the sole and entire agreement and
19 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
20 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
21 merged herein and therein. There are no warranties, representations, or other agreements between
22 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
23 implied, other than those specifically referred to in this Consent Judgment have been made by any
24 Party hereto. No other agreements not specifically contained or referenced herein, oral or
25 otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation,
26 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
27 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
28 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof

1 whether or not similar, nor shall such waiver constitute a continuing waiver.

2 11.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
3 that Settling Defendant might have against any other party, whether or not that party is a Settling
4 Defendant.

5 11.5 This Court shall retain jurisdiction of this matter to implement or modify the
6 Consent Judgment.

7 11.6 The stipulations to this Consent Judgment may be executed in counterparts
8 and by means of facsimile or portable document format (pdf), which taken together shall be
9 deemed to constitute one document.

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

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

23 **IT IS SO STIPULATED:**

24 **CENTER FOR ENVIRONMENTAL HEALTH**

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Charlie Pizarro
Associate Director

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TOPCO ASSOCIATES, LLC


Signature

Andrew V. Broccoli
Printed Name

SR VP
Title

IT IS SO ORDERED:

Dated: _____, 2014

Judge of the Superior Court