

1 Mark N. Todzo, State Bar No. 168389
Victoria Hartanto, State Bar No. 259833
2 LEXINGTON LAW GROUP
503 Divisadero Street
3 San Francisco, CA 94117
Telephone: (415) 913-7800
4 Facsimile: (415) 759-4112
mtodzo@lexlawgroup.com
5 vhartanto@lexlawgroup.com

6 Rick Franco, State Bar No. 170970
Center for Environmental Health
7 2201 Broadway, Suite 302
Oakland, California 94612
8 Telephone: (510) 655-3900
Facsimile: (510) 655-9100
9 rick@ceh.org

10 Counsel for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH
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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF ALAMEDA
15

16
17 Coordination Proceeding Special Title:) Judicial Council Coordination Proceeding
18 PROPOSITION 65 COCAMIDE DEA CASES) Case No. 4765
19)

20 This Document Relates To:) **[PROPOSED] CONSENT**
21 *CEH v. Lake Consumer Products, Inc., et al.,*) **JUDGMENT AS TO WALGREEN**
22 *A.C.S.C. Case No. RG 13-693280*) **CO. AND DRUGSTORE.COM, INC.**
23)

24 **1. INTRODUCTION**

25 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
26 Environmental Health (“CEH”) and defendant Walgreen Co. and its wholly owned subsidiary,
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1 Drugstore.com (collectively, “Settling Defendants”). CEH and Settling Defendants are referred
2 to collectively as the “Parties.”

3 1.2 Each Settling Defendant is a corporation that employs ten (10) or more
4 persons and that manufactures, distributes and/or sells shampoo and liquid soaps that contain
5 coconut oil diethanolamine condensate (cocamide diethanolamine) (hereinafter, “cocamide
6 DEA”) in the State of California or has done so in the past.

7 1.3 On June 24, 2013 and September 12, 2013, CEH served 60-Day Notices of
8 Violation under Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986,
9 California Health & Safety Code §§ 25249.5, *et seq.*) (the “Notices”) to Settling Defendants, the
10 California Attorney General, the District Attorneys of every County in the State of California, and
11 the City Attorneys for every City in the State of California with a population greater than
12 750,000. The Notices allege violations of Proposition 65 with respect to the presence of
13 cocamide DEA in shampoo and/or liquid soaps manufactured, distributed and/or sold by Settling
14 Defendants.

15 1.4 On August 27, 2013, CEH filed the action entitled *CEH v. Lake Consumer*
16 *Products, Inc., et al.*, Case No. RG 13-693280, in the Superior Court of California for Alameda
17 County, naming Walgreen Co. as a defendant. On December 4, 2013, the *Lake* action was
18 coordinated with several other related Proposition 65 actions in the *Proposition 65 Cocamide*
19 *DEA Cases*, Case No. JCCP 4765, currently pending before this Court. On March 12, 2014, CEH
20 named Drugstore.com. as a defendant in *Lake* pursuant to California Code of Civil Procedure
21 §474.

22 1.5 For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
23 Court has jurisdiction over the allegations of violations contained in the operative Complaint
24 applicable to Settling Defendants (the “Complaint”) and personal jurisdiction over Settling
25 Defendants as to the acts alleged in the Complaint; (ii) that venue is proper in the County of
26 Alameda; and (iii) that this Court has jurisdiction to enter this Consent Judgment.

27 1.6 Nothing in this Consent Judgment is or shall be construed as an admission by
28 the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance

1 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
2 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
3 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
4 other legal proceeding. This Consent Judgment is the product of negotiation and compromise and
5 is accepted by the Parties for purposes of settling, compromising and resolving issues disputed in
6 this action.

7 **2. DEFINITIONS**

8 2.1 “Covered Products” means shampoo and liquid soaps.

9 2.2 “Effective Date” means the date on which this Consent Judgment is entered by
10 the Court.

11 **3. INJUNCTIVE RELIEF**

12 3.1 **Reformulation of Covered Products.** As of the Effective Date, Settling
13 Defendants shall not manufacture, distribute, sell or offer for sale any Covered Product that
14 contains cocamide DEA and that will be sold or offered for sale to California consumers. For
15 purposes of this Consent Judgment, a product “contains cocamide DEA” if cocamide DEA is an
16 intentionally added ingredient in the product and/or part of the product formulation.

17 3.2 **Grace Period for Products Manufactured Prior to the Effective Date.**
18 Liability for Covered Products that were manufactured and distributed for retail sale prior to the
19 Effective Date shall be subject to the release of liability pursuant to Section 7 of this Consent
20 Judgment, without regard to when such Covered Products were, or are in the future, sold to
21 consumers.

22 3.3 **Specification to and Certification from Suppliers.** No more than 30 days
23 after the Effective Date, Settling Defendants shall directly or through their supply chain issue
24 specifications to their suppliers of Covered Products requiring that Covered Products not contain
25 any cocamide DEA, and shall instruct each supplier to use reasonable efforts to eliminate
26 Covered Products containing cocamide DEA on a nationwide basis. Each Settling Defendant
27 shall obtain and maintain written certifications from its suppliers of Covered Products confirming
28 that all Covered Products received by that Settling Defendant do not contain any cocamide DEA.

1 A Settling Defendant shall not be deemed in violation of the requirements of this Section 3 for
2 any Covered Product to the extent it has relied on a written certification from its vendor that
3 supplied a Covered Product that such Covered Product does not contain any cocamide DEA.

4 **4. ENFORCEMENT**

5 4.1 CEH may, by motion or application for an order to show cause before the
6 Superior Court of Alameda County, enforce the terms and conditions contained in this Consent
7 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3
8 above, CEH shall provide Settling Defendants with a Notice of Violation and a copy of any test
9 results which purportedly support CEH's Notice of Violation. The Parties shall then meet and
10 confer regarding the basis for CEH's anticipated motion or application in an attempt to resolve it
11 informally, including providing Settling Defendants a reasonable opportunity of at least thirty
12 (30) days to cure any alleged violation. Should such attempts at informal resolution fail, CEH
13 may file its enforcement motion or application. The prevailing party on any motion to enforce
14 this Consent Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a
15 result of such motion or application. This Consent Judgment may only be enforced by the
16 Parties.

17 4.2 If, in response to a Notice of Violation, a Settling Defendant demonstrates that
18 it has relied on a written certification from its supplier that the Covered Product(s) identified in
19 the Notice of Violation do not contain any cocamide DEA, or were manufactured and delivered
20 for retail sale in California prior to the Effective Date, the Settling Defendant shall not be deemed
21 in violation of the requirements of Section 3. The Settling Defendant shall identify to CEH (by
22 proper name, address of principal place of business and telephone number) the supplier of each
23 Covered Product identified in the Notice of Violation and provide a copy of the certification.
24 Nothing in this Section 4 affects CEH's right to commence or prosecute an action under
25 Proposition 65 against any such supplier for any alleged violations of Proposition 65.

26 **5. PAYMENTS**

27 5.1 **Payments by Settling Defendants.** Within five (5) business days of the Effective
28 Date, Settling Defendants shall pay the total sum of \$30,000 as a settlement payment. The total

1 settlement amount for Settling Defendants shall be paid in four separate checks delivered to
2 Lexington Law Group at the address set forth in Section 8.1 below. The funds paid by Settling
3 Defendants shall be allocated between the following categories:

4 5.1.1 \$3,300 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
5 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
6 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard
7 Assessment). The civil penalty check shall be made payable to the Center For Environmental
8 Health.

9 5.1.2 \$4,500 as a payment in lieu of civil penalty to CEH pursuant to Health &
10 Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH will use
11 such funds to continue its work educating and protecting people from exposures to toxic
12 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
13 Judgment and to purchase and test Settling Defendants' products to confirm compliance. In
14 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
15 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
16 educate and protect people from exposures to toxic chemicals. The method of selection of such
17 groups can be found at the CEH web site at www.ceh.org/justicefund. The payment pursuant to
18 this Section shall be made payable to the Center For Environmental Health.

19 5.1.3 \$22,200 as reimbursement of a portion of CEH's reasonable attorneys' fees
20 and costs. A check for \$19,200 shall be made payable to the Lexington Law Group, and a check
21 for \$3,000 shall be made payable to the Center For Environmental Health.

22 **6. MODIFICATION**

23 6.1 **Written Consent.** This Consent Judgment may be modified from time to
24 time by express written agreement of the Parties with the approval of the Court, or by an order of
25 this Court upon motion and in accordance with law.

26 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
27 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
28 modify the Consent Judgment.

1 **7. CLAIMS COVERED AND RELEASED**

2 7.1 This Consent Judgment is a full, final and binding resolution between CEH on
3 behalf of itself and the public interest and Settling Defendants, and their parents, subsidiaries,
4 affiliated entities that are under common ownership, directors, officers, employees, and attorneys
5 (“Defendant Releasees”) of any violation of Proposition 65 that was or could have been asserted
6 in the Complaint against Settling Defendants and Defendant Releasees, based on failure to warn
7 about alleged exposure to cocamide DEA contained in Covered Products that were sold by
8 Settling Defendants prior to the Effective Date.

9 7.2 Compliance with the terms of this Consent Judgment by Settling Defendants
10 and the Defendant Releasees shall constitute compliance with Proposition 65 by Settling
11 Defendants and their Defendant Releasees with respect to any alleged failure to warn about
12 cocamide DEA in Covered Products manufactured, distributed, or sold by Settling Defendants
13 after the Effective Date.

14 7.3 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 Defendants and Defendant
16 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 Defendants are entitled to receive any notice under this Consent
26 Judgment, the notice shall be sent by first class and electronic mail to:

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Andrew J. Marks
Senior Attorney
Regulatory Law
Walgreen Co.
104 Wilmot Road, MS #1434
Deerfield, IL 60015
andrew.marks@walgreens.com

Renee D. Wasserman
Walter S. Chen
Rogers Joseph O'Donnell
311 California Street, 10th Floor
San Francisco, CA 94104
rwasserman@rjo.com
wchen@rjo.com

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. CEH shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendants 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 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.

10. ATTORNEYS' FEES

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 Defendants prevail on any motion application for an order to show cause or other proceeding, Settling Defendants may be awarded their reasonable attorneys' fees and costs as a result of such motion or application upon a finding by the Court that CEH's prosecution of the motion or application lacked substantial justification. For purposes of this Consent Judgment, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of

1 1986, Code of Civil Procedure §§ 2016, *et seq.*

2 10.2 Except as otherwise provided in this Consent Judgment, each Party shall bear
3 its own attorneys' fees and costs.

4 10.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
5 sanctions pursuant to law.

6 **11. OTHER TERMS**

7 11.1 The terms of this Consent Judgment shall be governed by the laws of the State
8 of California.

9 11.2 This Consent Judgment shall apply to and be binding upon CEH and Settling
10 Defendants, and their respective divisions, subdivisions, and subsidiaries, and the successors or
11 assigns of any of them.

12 11.3 This Consent Judgment contains the sole and entire agreement and
13 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
14 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
15 merged herein and therein. There are no warranties, representations, or other agreements between
16 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
17 implied, other than those specifically referred to in this Consent Judgment have been made by any
18 Party hereto. No other agreements not specifically contained or referenced herein, oral or
19 otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation,
20 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
21 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
22 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
23 whether or not similar, nor shall such waiver constitute a continuing waiver.

24 11.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
25 that Settling Defendants might have against any other party, whether or not that party is a Settling
26 Defendant.

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

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18 **IT IS SO STIPULATED:**

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20 **CENTER FOR ENVIRONMENTAL HEALTH**

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22 _____

23 Charlie Pizarro
24 Associate Director

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WALGREEN CO.

Robert A. Gas

Signature

Robert J. Gas

Printed Name

Casualty + Property Insurance Mgr.

Title

DRUGSTORE.COM

Robert A. Gas

Signature

Robert J. Gas

Printed Name

Casualty + Property Insurance Mgr.

Title

IT IS SO ORDERED:

Dated: _____, 2014

Judge of the Superior Court