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CENTER FOR ENVIRONMENTAL HEALTH
11

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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF ALAMEDA
15

16
17 CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 13-697455
a non-profit corporation,)
18)
Plaintiff,) [PROPOSED] CONSENT
19 vs.) JUDGMENT AS TO AVLON
ALBERTO-CULVER USA, INC., *et al.*) INDUSTRIES, INC.
20)
21 Defendant.)
22)
23

24 **1. INTRODUCTION**

25 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
26 Environmental Health (“CEH”) and defendant Avlon Industries, Inc. (“Settling Defendant”).
27 CEH and Settling Defendant are referred to collectively as the “Parties.”
28

1 1.2 Settling Defendant is a corporation that employs ten (10) or more persons and
2 that manufactures, distributes and/or sells shampoo that contains coconut oil diethanolamine
3 condensate (cocamide diethanolamine) (hereinafter, “cocamide DEA”) in the State of California
4 or has done so in the past.

5 1.3 On July 19, 2013, CEH served a 60-Day Notice of Violation under Proposition
6 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety
7 Code §§ 25249.5, *et seq.*) (the “Notice”) to Settling Defendant, the California Attorney General,
8 the District Attorneys of every County in the State of California, and the City Attorneys for every
9 City in the State of California with a population greater than 750,000. The Notice alleges
10 violations of Proposition 65 with respect to the presence of cocamide DEA in shampoo
11 manufactured, distributed and/or sold by Settling Defendant.

12 1.4 On September 30, 2013, CEH filed the action entitled *CEH v. Alberto-Culver*
13 *USA, Inc., et al.*, Case No. RG 13-697455, in the Superior Court of California for Alameda
14 County.

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.
28

1 **2. DEFINITIONS**

2 2.1 “Covered Products” means shampoo.

3 2.2 “Effective Date” means the date on which this Consent Judgment is entered by
4 the Court.

5 **3. INJUNCTIVE RELIEF**

6 3.1 **Reformulation of Covered Products.** By the 180th day after the Effective
7 Date, Settling Defendant shall not manufacture, distribute, sell or offer for sale any Covered
8 Product that contains cocamide DEA and that will be sold or offered for sale to California
9 consumers. For purposes of this Consent Judgment, a product “contains cocamide DEA” if
10 cocamide DEA is an intentionally added ingredient in the product and/or part of the product
11 formulation.

12 3.2 **Warnings for Covered Products.**

13 3.2.1 **Interim Warning Option.** As of the Effective Date, no Covered
14 Product that contains cocamide DEA shall be manufactured, distributed for sale in California by
15 Settling Defendant without a Clear and Reasonable Warning that complies with the provisions of
16 Section 3.3.2.

17 3.2.2 **Proposition 65 Warnings.** A Clear and Reasonable Warning under
18 this Consent Judgment shall state:

19 WARNING: This product contains cocamide DEA, a chemical known to
20 the State of California to cause cancer.

21 This statement shall be prominently displayed on the principal display panel of the label or the
22 packaging of the Covered Product in such a manner that it is likely to be read and understood by
23 an ordinary individual prior to sale.

24 3.3 **Grace Period for Products Manufactured Prior to the Effective Date.**

25 Subject to Section 3.2, liability for Covered Products that were manufactured and distributed for
26 retail sale prior to the Effective Date shall be subject to the release of liability pursuant to Section
27 7 of this Consent Judgment, without regard to when such Covered Products were, or are in the
28 future, sold to consumers.

1 **4. ENFORCEMENT**

2 4.1 CEH may, by motion or application for an order to show cause before the
3 Superior Court of Alameda County, enforce the terms and conditions contained in this Consent
4 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3
5 above, CEH shall provide Settling Defendant with a Notice of Violation and a copy of any test
6 results which purportedly support CEH’s Notice of Violation. The Parties shall then meet and
7 confer regarding the basis for CEH’s anticipated motion or application in an attempt to resolve it
8 informally, including providing Settling Defendant a reasonable opportunity of at least thirty (30)
9 days to cure any alleged violation. Should such attempts at informal resolution fail, CEH may
10 file its enforcement motion or application. The prevailing party on any motion to enforce this
11 Consent Judgment shall be entitled to its reasonable attorney’s fees and costs incurred as a result
12 of such motion or application. This Consent Judgment may only be enforced by the Parties.

13 **5. PAYMENTS**

14 5.1 **Payments by Settling Defendant.** Within five (5) business days of the Effective
15 Date, Settling Defendant shall pay the total sum of \$15,000 as a settlement payment. The total
16 settlement amount for Settling Defendant shall be paid in four separate checks delivered to
17 counsel for CEH at the address set forth in Section 8.1 below. The funds paid by Settling
18 Defendant shall be allocated between the following categories:

19 5.1.1 \$1,650 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
20 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
21 (25% to CEH and 75% to the State of California’s Office of Environmental Health Hazard
22 Assessment). The civil penalty check shall be made payable to the Center For Environmental
23 Health.

24 5.1.2 \$2,250 as a payment in lieu of civil penalty to CEH pursuant to Health &
25 Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH will use
26 such funds to continue its work educating and protecting people from exposures to toxic
27 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
28 Judgment and to purchase and test Settling Defendant’s products to confirm compliance. In

1 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
2 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
3 educate and protect people from exposures to toxic chemicals. The method of selection of such
4 groups can be found at the CEH web site at www.ceh.org/justicefund. The payment pursuant to
5 this Section shall be made payable to the Center For Environmental Health.

6 5.1.3 \$11,100 as reimbursement of a portion of CEH's reasonable attorneys' fees
7 and costs. A check for \$9,600 shall be made payable to the Lexington Law Group, and a check
8 for \$1,500 shall be made payable to the Center For Environmental Health.

9 **6. MODIFICATION**

10 6.1 **Written Consent.** This Consent Judgment may be modified from time to
11 time by express written agreement of the Parties with the approval of the Court, or by an order of
12 this Court upon motion and in accordance with law.

13 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
14 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
15 modify the Consent Judgment.

16 **7. CLAIMS COVERED AND RELEASED**

17 7.1 This Consent Judgment is a full, final and binding resolution between CEH on
18 behalf of itself and the public interest and Settling Defendant, and its parents, subsidiaries,
19 affiliated entities that are under common ownership, directors, officers, employees, and attorneys,
20 and Settling Defendant's sales outlets in California, including J. C. Penney Corporation, Inc.,
21 Beauty Systems Group, Universal Beauty Supply, Professional Salon Concepts, Heavenly Touch,
22 Ulta, Premier Salons/Macy's, and Nexcom ("Defendant Releasees") of any violation of
23 Proposition 65 that was or could have been asserted in the Complaint against Settling Defendant
24 and Defendant Releasees, based on failure to warn about alleged exposure to cocamide DEA
25 contained in Covered Products that were sold by Settling Defendant prior to the Effective Date.

26 7.2 Compliance with the terms of this Consent Judgment by Settling Defendant
27 and the Defendant Releasees shall constitute compliance with Proposition 65 by Settling
28 Defendant and its Defendant Releasees with respect to any alleged failure to warn about

1 cocamide DEA in Covered Products manufactured, distributed, or sold by Settling Defendant
2 after the Effective Date.

3 7.3 Nothing in this Section 7 affects CEH's right to commence or prosecute an
4 action under Proposition 65 against any person other than Settling Defendant and Defendant
5 Releasees.

6 **8. NOTICE**

7 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
8 notice shall be sent by first class and electronic mail to:

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

14 8.2 When Settling Defendant is entitled to receive any notice under this Consent
15 Judgment, the notice shall be sent by first class and electronic mail to:

16 Ludwig E. Kolman
17 Vedder Price
18 222 North LaSalle Street
19 Chicago, IL 60601
20 lkolman@vedderprice.com

21 8.3 Any Party may modify the person and address to whom the notice is to be sent
22 by sending the other Party notice by first class and electronic mail.

23 **9. COURT APPROVAL**

24 9.1 This Consent Judgment shall become effective upon entry by the Court. CEH
25 shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant
26 shall support entry of this Consent Judgment.

27 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
28 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

1 other proceeding to enforce a violation of this Consent Judgment, CEH shall be entitled to its
2 reasonable attorneys' fees and costs incurred as a result of such motion or application. Should
3 Settling Defendant prevail on any motion application for an order to show cause or other
4 proceeding, Settling Defendant shall be awarded its reasonable attorneys' fees and costs as a
5 result of such motion or application upon a finding by the Court that CEH's prosecution of the
6 motion or application lacked substantial justification. For purposes of this Consent Judgment, the
7 term substantial justification shall carry the same meaning as used in the Civil Discovery Act of
8 1986, Code of Civil Procedure §§ 2016, *et seq.*

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

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

13 **11. OTHER TERMS**

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

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

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

1 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
2 whether or not similar, nor shall such waiver constitute a continuing waiver.

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

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

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

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

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


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3 **IT IS SO STIPULATED:**

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5 **CENTER FOR ENVIRONMENTAL HEALTH**

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8 Charlie Pizarro
Associate Director

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AVLON INDUSTRIES, INC.

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13

14 _____
Signature

15

16 _____
Printed Name

17

18 _____
Title

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IT IS SO ORDERED:

22

23 Dated: _____, 2013

24

Judge of the Superior Court

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1 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

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3 **IT IS SO STIPULATED:**

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5 **CENTER FOR ENVIRONMENTAL HEALTH**

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8 _____
Charlie Pizarro
Associate Director

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11 **AVLON INDUSTRIES, INC.**

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13 
14 _____
Signature

14

15 *ALI W. SYED*
16 _____
Printed Name

15

17 *President*
18 _____
Title

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23 **IT IS SO ORDERED:**

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25 Dated: _____, 2013

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Judge of the Superior Court