

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

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17 Coordination Proceeding Special Title:
18 PROPOSITION 65 COCAMIDE DEA CASES

Judicial Council Coordination
Proceeding
No. 4765

19
20 This Document Relates To:
21 *Center for Environmental Health v. Alberto*
22 *Culver, et al.*, Case No. RG 13-697455

**[PROPOSED] CONSENT
JUDGMENT RE: MCBRIDE
RESEARCH LABORATORIES, INC.**

Dept: 17
Judge: Hon. George C. Hernandez, Jr.

23
24 **1. INTRODUCTION**

25 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
26 Environmental Health (“CEH”) and defendant McBride Research Laboratories, Inc. (“Settling
27 Defendant”). 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 and liquid soaps that contain coconut oil
3 diethanolamine condensate (cocamide diethanolamine) (hereinafter, “cocamide DEA”) in the
4 State of California 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 State of California with a population greater than 750,000. The Notice alleges violations
10 of Proposition 65 with respect to the presence of cocamide DEA in shampoo and liquid soaps
11 manufactured, distributed and/or sold by Settling Defendant.

12 1.4 Settling Defendant asserts that, after receiving the notice, Settling Defendant
13 contacted its customers to inform them that they should stop selling the Covered Products in
14 California and should return any unsold Covered Products to Settling Defendant.

15 1.5 On September 30, 2013, CEH filed the action entitled *CEH v. Alberto-Culver*
16 *USA, Inc., et al.*, Case No. RG 13-697455, in the Superior Court of California for Alameda
17 County, naming Settling Defendant as a defendant in that action.

18 1.6 For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
19 Court has jurisdiction over the allegations of violations contained in the operative Complaint
20 applicable to Settling Defendant (the “Complaint”) and personal jurisdiction over Settling
21 Defendant as to the acts alleged in the Complaint; (ii) that venue is proper in the County of
22 Alameda; and (iii) that this Court has jurisdiction to enter this Consent Judgment.

23 1.7 Nothing in this Consent Judgment is or shall be construed as an admission by
24 the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance
25 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
26 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
27 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
28 other legal proceeding. This Consent Judgment is the product of negotiation and compromise and

1 is accepted by the Parties for purposes of settling, compromising and resolving issues disputed in
2 this action.

3 **2. DEFINITIONS**

4 2.1 “Covered Products” means shampoo and liquid soaps.

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

7 **3. INJUNCTIVE RELIEF**

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

13 3.2 **Specification to Suppliers.** To the extent it has not already done so, no more
14 than 30 days after the Effective Date, Settling Defendant shall issue specifications to its suppliers
15 of Covered Products requiring that Covered Products not contain any cocamide DEA in
16 California, and shall instruct each supplier to use reasonable efforts to eliminate Covered
17 Products containing cocamide DEA throughout the United States.

18 3.3 **Grace Period for Products Manufactured Prior to Manufacturing Date.**
19 Liability for Covered Products that were manufactured and distributed by Defendant prior to the
20 Effective Date shall be subject to the release of liability pursuant to Section 7 of this Consent
21 Judgment, without regard to when such Covered Products were, or are in the future, sold to
22 consumers.

23 **4. ENFORCEMENT**

24 4.1 CEH may, by motion or application for an order to show cause before the
25 Superior Court of Alameda County, enforce the terms and conditions contained in this Consent
26 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3
27 above, CEH shall provide Settling Defendant with a Notice of Violation and a copy of any test
28 results which purportedly support CEH’s Notice of Violation. The Parties shall then meet and

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1 confer regarding the basis for CEH's anticipated motion or application in an attempt to resolve it
2 informally, including providing Settling Defendant a reasonable opportunity of at least thirty (30)
3 days to cure any alleged violation. Should such attempts at informal resolution fail, CEH may
4 file its enforcement motion or application. The prevailing party on any motion to enforce this
5 Consent Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a result
6 of such motion or application. This Consent Judgment may only be enforced by the Parties.

7 **5. PAYMENTS**

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

13 5.1.1 \$1,650 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
14 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
15 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard
16 Assessment). The civil penalty check shall be made payable to the Center For Environmental
17 Health.

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

28 5.1.3 \$11,100 as reimbursement of a portion of CEH's reasonable attorneys' fees

1 and costs. A check for \$9,600 shall be made payable to the Lexington Law Group, and a check
2 for \$1,500 shall be made payable to the Center For Environmental Health.

3 **6. MODIFICATION**

4 6.1 **Written Consent.** This Consent Judgment may be modified from time to
5 time by express written agreement of the Parties with the approval of the Court, or by an order of
6 this Court upon motion and in accordance with law, including for example in the event that there
7 is a change in the law with respect to Proposition 65 or with respect to the status of cocamide
8 DEA as a listed chemical.

9 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
10 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
11 modify the Consent Judgment.

12 **7. CLAIMS COVERED AND RELEASED**

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

24 7.2 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.

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1 7.3 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 David W. Grace
15 Loeb & Loeb LLP
16 10100 Santa Monica Blvd., Ste. 2200
17 Los Angeles, CA 90067
18 dgrace@loeb.com

19 8.3 Any Party may modify the person and address to whom the notice is to be sent
20 by sending the other Party notice by first class and electronic mail.

21 **9. COURT APPROVAL**

22 9.1 This Consent Judgment shall become effective upon entry by the Court. CEH
23 shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant
24 shall support entry of this Consent Judgment.

25 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
26 effect and shall never be introduced into evidence or otherwise used in any proceeding for any
27 purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

28 **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

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

7 10.2 Except as otherwise provided in this Consent Judgment, each Party shall bear
8 its own attorneys' fees and costs.

9 10.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
10 sanctions pursuant to law.

11 **11. OTHER TERMS**

12 11.1 The terms of this Consent Judgment shall be governed by the laws of the State
13 of California.

14 11.2 This Consent Judgment shall apply to and be binding upon CEH and Settling
15 Defendant, and its respective divisions, subdivisions, and subsidiaries, and the successors or
16 assigns of any of them.

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

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1 11.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
2 that Settling Defendant might have against any other party, whether or not that party is a Settling
3 Defendant.

4 11.5 This Court shall retain jurisdiction of this matter to implement or modify the
5 Consent Judgment.


6 11.6 The stipulations to this Consent Judgment may be executed in counterparts
7 and by means of facsimile or portable document format (pdf), which taken together shall be
8 deemed to constitute one document.

9 11.7 Each signatory to this Consent Judgment certifies that he or she is fully
10 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into
11 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
12 Party.

13 11.8 The Parties, including their counsel, have participated in the preparation of
14 this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.
15 This Consent Judgment was subject to revision and modification by the Parties and has been
16 accepted and approved as to its final form by all Parties and their counsel. Accordingly, any
17 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
18 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
19 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
20 be resolved against the drafting Party should not be employed in the interpretation of this Consent
21 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

22
23 **IT IS SO STIPULATED:**

24 **CENTER FOR ENVIRONMENTAL HEALTH**

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26 _____
27 Charlie Pizarro
28 Associate Director

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MCBRIDE RESEARCH LABORATORIES, INC.

Cornell McBride Jr.
Signature

Cornell McBride Jr.
Printed Name

President
Title

IT IS SO ORDERED:

Dated: _____, 2013

Judge of the Superior Court