

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

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

12 Coordination Proceeding Special Title:) Judicial Council Coordination Proceeding
13 PROPOSITION 65 COCAMIDE DEA CASES) Case No. 4765
14 _____)
15 This Document Relates To:) **[PROPOSED] CONSENT**
16 *CEH v. Alberto-Culver USA, Inc., et al., A.C.S.C.*) **JUDGMENT AS TO ULTA SALON,**
17 Case No. RG 13-697455) **COSMETIC & FRAGRANCE, INC.**
18 _____)

20 **1. INTRODUCTION**

21 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
22 Environmental Health (“CEH”) and defendant Ulta Salon, Cosmetics & Fragrance, Inc.
23 (collectively, “Settling Defendant”). CEH and Settling Defendant are referred to collectively as
24 the “Parties.”

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

1 1.3 On July 26, 2013, CEH served a 60-Day Notice of Violation under Proposition
2 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety
3 Code §§ 25249.5, *et seq.*) (the “Notice”) to Settling Defendant, the California Attorney General,
4 the District Attorneys of every County in the State of California, and the City Attorneys for every
5 City in the State of California with a population greater than 750,000. The Notice alleges
6 violations of Proposition 65 with respect to the presence of cocamide DEA in shampoo and/or
7 liquid soaps manufactured, distributed and/or sold by Settling Defendant.

8 1.4 On September 30, 2013, CEH filed the action entitled *CEH v. Alberto-Culver*
9 *USA, Inc., et al.*, Case No. RG 13-697455, in the Superior Court of California for Alameda
10 County. On October 8, 2013, CEH named Settling Defendant as a defendant in that action
11 pursuant to California Code of Civil Procedure § 474. On December 4, 2013, the *Alberto-Culver*
12 action was coordinated with several other related Proposition 65 actions in the *Proposition 65*
13 *Cocamide DEA Cases*, Case No. JCCP 4765, currently pending before this Court.

14 1.5 For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
15 Court has jurisdiction over the allegations of violations contained in the operative Complaint
16 applicable to Settling Defendant (the “Complaint”) and personal jurisdiction over Settling
17 Defendant as to the acts alleged in the Complaint; (ii) that venue is proper in the County of
18 Alameda; and (iii) that this Court has jurisdiction to enter this Consent Judgment.

19 1.6 Nothing in this Consent Judgment is or shall be construed as an admission by
20 the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance
21 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
22 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
23 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
24 other legal proceeding. This Consent Judgment is the product of negotiation and compromise and
25 is accepted by the Parties for purposes of settling, compromising and resolving issues disputed in
26 this action.

27 **2. DEFINITIONS**

28 2.1 “Covered Products” means products manufactured by Perfect Plus, Inc.

1 2.2 “Effective Date” means the date on which this Consent Judgment is entered by
2 the Court.

3 **3. INJUNCTIVE RELIEF**

4 3.1 **Reformulation of Covered Products.** As of the Effective Date, Settling
5 Defendant shall not distribute, sell or offer for sale any Covered Product that contains cocamide
6 DEA and that will be sold or offered for sale to California consumers. For purposes of this
7 Consent Judgment, a product “contains cocamide DEA” if cocamide DEA is an intentionally
8 added ingredient in the product and/or part of the product formulation.

9 3.2 **Specification to Suppliers.** No more than thirty (30) days after the Effective
10 Date, Settling Defendant shall issue specifications to its suppliers of Covered Products requiring
11 that Covered Products not contain any cocamide DEA, and shall instruct each supplier to use
12 reasonable efforts to eliminate Covered Products containing cocamide DEA on a nationwide
13 basis.

14 **4. ENFORCEMENT**

15 4.1 CEH may, by motion or application for an order to show cause before the
16 Superior Court of Alameda County, enforce the terms and conditions contained in this Consent
17 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3
18 above, CEH shall provide Settling Defendant with a Notice of Violation and a copy of any test
19 results which purportedly support CEH’s Notice of Violation. The Parties shall then meet and
20 confer regarding the basis for CEH’s anticipated motion or application in an attempt to resolve it
21 informally, including providing Settling Defendant a reasonable opportunity of at least thirty (30)
22 days to cure any alleged violation. Should such attempts at informal resolution fail, CEH may
23 file its enforcement motion or application. This Consent Judgment may only be enforced by the
24 Parties.

25 **5. PAYMENTS**

26 5.1 **Payments by Settling Defendant.** Within five (5) business days of the Effective
27 Date, Settling Defendant shall pay the total sum of \$15,000 as a settlement payment. The total
28 settlement amount for Settling Defendant shall be paid in three separate checks delivered to

1 Lexington Law Group at the address set forth in Section 8.1 below. The funds paid by Settling
2 Defendant shall be allocated between the following categories:

3 5.1.1 \$1,650 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
4 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
5 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard
6 Assessment). The civil penalty check shall be made payable to the Center For Environmental
7 Health.

8 5.1.2 \$2,250 as a payment in lieu of civil penalty to CEH pursuant to Health &
9 Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH will use
10 such funds to continue its work educating and protecting people from exposures to toxic
11 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
12 Judgment and to purchase and test Settling Defendant's products to confirm compliance. In
13 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
14 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
15 educate and protect people from exposures to toxic chemicals. The method of selection of such
16 groups can be found at the CEH web site at www.ceh.org/justicefund. The payment pursuant to
17 this Section shall be made payable to the Center For Environmental Health.

18 5.1.3 \$11,100 as reimbursement of a portion of CEH's reasonable attorneys' fees
19 and costs. A check for \$9,600 shall be made payable to the Lexington Law Group, and a check
20 for \$1,500 shall be made payable to the Center For Environmental Health.

21 **6. MODIFICATION**

22 6.1 **Written Consent.** This Consent Judgment may be modified from time to
23 time by express written agreement of the Parties with the approval of the Court, or by an order of
24 this Court upon motion and in accordance with law.

25 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
26 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
27 modify the Consent Judgment.

28

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 Defendant, and its parents, subsidiaries, and
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 Defendant 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 Defendant prior to the Effective Date.

9 7.2 Compliance with the terms of this Consent Judgment by Settling Defendant
10 and the Defendant Releasees shall constitute compliance with Proposition 65 by Settling
11 Defendant and its Defendant Releasees with respect to any alleged failure to warn about
12 cocamide DEA in Covered Products manufactured, distributed, or sold by Settling Defendant
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 Defendant 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 Defendant is entitled to receive any notice under this Consent
26 Judgment, the notice shall be sent by first class and electronic mail to:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Lisa Bond, Esq.
Richards Watson Gershon
355 South Grand Avenue, Suite 4000
Los Angeles, CA 90071
lbond@rwglaw.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 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 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 Defendant prevail on any motion, application for an order to show cause or other proceeding, Settling Defendant shall be awarded its reasonable attorneys' fees and costs as a result of such motion or application.

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

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

11. OTHER TERMS

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

1 11.2 This Consent Judgment shall apply to and be binding upon CEH and Settling
2 Defendant, and their respective divisions, subdivisions, and subsidiaries, and the successors or
3 assigns of any of them.

4 11.3 This Consent Judgment contains the sole and entire agreement and
5 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
6 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
7 merged herein and therein. There are no warranties, representations, or other agreements between
8 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
9 implied, other than those specifically referred to in this Consent Judgment have been made by any
10 Party hereto. No other agreements not specifically contained or referenced herein, oral or
11 otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation,
12 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
13 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
14 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
15 whether or not similar, nor shall such waiver constitute a continuing waiver.

16 11.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
17 that Settling Defendant might have against any other party, whether or not that party is a settling
18 defendant.

19 11.5 This Court shall retain jurisdiction of this matter to implement or modify the
20 Consent Judgment.

21 11.6 The stipulations to this Consent Judgment may be executed in counterparts
22 and by means of facsimile or portable document format (pdf), which taken together shall be
23 deemed to constitute one document.

24 11.7 Each signatory to this Consent Judgment certifies that he or she is fully
25 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into
26 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
27 Party.


28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH



Charlie Pizarro
Associate Director

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ULTA SALON, COSMETICS & FRAGRANCE, INC.



Signature

ROBERT S. GUTTMAN

Printed Name

SVP, GENERAL Counsel & Secretary

Title

IT IS SO ORDERED:

Dated: _____, 2014

Judge of the Superior Court