

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. Mudlark Papers Inc., et al.*, Case No. RG) **JUDGMENT AS TO BOOTS RETAIL**
18 13-707833) **USA INC.**
19 _____)

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23 **1. INTRODUCTION**

24 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
25 Environmental Health (“CEH”) and defendant Boots Retail USA Inc. (“Settling Defendant”).
26 CEH and Settling Defendant are referred to collectively as the “Parties.”
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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 August 2, 2013, CEH served a 60-Day Notice of Violation under
6 Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
7 & Safety Code §§ 25249.5, *et seq.*) (the “Notice”) to Settling Defendant, the California Attorney
8 General, the District Attorneys of every County in the State of California, and the City Attorneys
9 for every City in the State of California with a population greater than 750,000. The Notice
10 alleges violations of Proposition 65 with respect to the presence of cocamide DEA in shampoo
11 and liquid soaps manufactured, distributed and/or sold by Settling Defendant.

12 1.4 On December 23, 2013, CEH filed the action entitled *CEH v. Mudlark Papers*
13 *Inc., et al.*, Case No. RG 13-707833, in the Superior Court of California for Alameda County,
14 naming Settling Defendant as a defendant in that action. On April 1, 2014, the *Mudlark Papers*
15 action was coordinated with several other related Proposition 65 actions in the *Proposition 65*
16 *Cocamide DEA Cases*, Case No. JCCP 4765, currently pending before this Court.

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

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

1 this action.

2 **2. DEFINITIONS**

3 2.1 “Covered Products” means shampoo and liquid soaps.

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, to
13 the extent it has not already done so, Settling Defendant shall issue specifications to its suppliers
14 of Covered Products requiring that Covered Products not contain any cocamide DEA, and shall
15 instruct each supplier to use reasonable efforts to eliminate Covered Products containing
16 cocamide DEA on a nationwide basis.

17 3.3 **Action Regarding Specific Products.**

18 3.3.1 On or before the Effective Date, Settling Defendant shall cease selling the
19 following specific products in California: (i) Boots Extracts Mango Body Wash, SKU No. 5-
20 000167-129618; and (ii) Champneys Spa Treatment Citrus Blush Shower Gel, SKU No. 5-
21 045097-666772 (the “Section 3.3 Products”). On or before the Effective Date, to the extent it has
22 not already done so, Settling Defendant shall also: (i) cease shipping the Section 3.3 Products to
23 any of its stores and/or customers that resell the Section 3.3 Products in California, and (ii) send
24 instructions to its stores and/or customers that resell the Section 3.3 Products in California
25 instructing them either to: (a) return all the Section 3.3 Products to Settling Defendant for
26 destruction; or (b) directly destroy the Section 3.3 Products.

27 3.3.2 Any destruction of Section 3.3 Products shall be in compliance with all
28 applicable laws.

1 3.3.3 The obligations of Section 3.3.1 and 3.3.2 shall not apply to the Section 3.3
2 Product to the extent the Section 3.3 Product has been reformulated such that it no longer contains
3 cocamide DEA.

4 3.3.4 Within sixty days of the Effective Date, Settling Defendant shall provide
5 CEH with written certification from Settling Defendant confirming compliance with the
6 requirements of this Section 3.3.

7 **4. ENFORCEMENT**

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

18 **5. PAYMENTS**

19 5.1 **Payments by Settling Defendant.** Within five (5) business days of the Effective
20 Date, Settling Defendant shall pay the total sum of \$25,000 as a settlement payment. The total
21 settlement amount for Settling Defendant shall be paid in four separate checks delivered to the
22 offices of the Lexington Law Group (Attn: Mark Todzo), 503 Divisadero Street, San Francisco,
23 California 94117. The funds paid by Settling Defendant shall be allocated between the following
24 categories:

25 5.1.1 \$2,750 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
26 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
27 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard
28 Assessment). The civil penalty check shall be made payable to the Center For Environmental

1 Health.

2 5.1.2 \$3,750 as a payment in lieu of civil penalty to CEH pursuant to Health &
3 Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH will use
4 such funds to continue its work educating and protecting people from exposures to toxic
5 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
6 Judgment and to purchase and test Settling Defendant’s products to confirm compliance. In
7 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
8 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
9 educate and protect people from exposures to toxic chemicals. The method of selection of such
10 groups can be found at the CEH web site at www.ceh.org/justicefund. The payment pursuant to
11 this Section shall be made payable to the Center For Environmental Health.

12 5.1.3 \$18,500 as reimbursement of a portion of CEH’s reasonable attorneys’ fees
13 and costs. A check for \$16,000 shall be made payable to the Lexington Law Group, and a check
14 for \$2,500 shall be made payable to the Center For Environmental Health.

15 **6. MODIFICATION**

16 6.1 **Written Consent.** This Consent Judgment may be modified from time to
17 time by express written agreement of the Parties with the approval of the Court, or by an order of
18 this Court upon motion and in accordance with law.

19 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
20 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
21 modify the Consent Judgment.

22 **7. CLAIMS COVERED AND RELEASED**

23 7.1 This Consent Judgment is a full, final, and binding resolution between CEH on
24 behalf of itself and the public interest and Settling Defendant, and its parents, shareholders,
25 divisions, subsidiaries, affiliated entities that are under common ownership, directors, officers,
26 employees, and attorneys (“Defendant Releasees”), and each entity to whom they directly or
27 indirectly distribute or sell Covered Products, including but not limited to distributors,
28 wholesalers, customers, retailers , including but not limited to Target Corporation, franchisees,

1 cooperative members, licensors, and licensees (“Downstream Defendant Releasees”) of any
2 violation of Proposition 65 that was or could have been asserted in the Complaint against Settling
3 Defendant, Defendant Releasees, and Downstream Defendant Releasees, based on failure to warn
4 about alleged exposure to cocamide DEA contained in Covered Products that were sold by
5 Settling Defendant prior to the Effective Date.

6 7.2 Compliance with the terms of this Consent Judgment by Settling Defendant
7 and Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant,
8 Defendant Releasees, and Downstream Defendant Releasees with respect to any alleged failure to
9 warn about cocamide DEA in Covered Products manufactured, distributed, or sold by Settling
10 Defendant after the Effective Date.

11 7.3 Nothing in this Section 7 affects CEH’s right to commence or prosecute an
12 action under Proposition 65 against any person other than Settling Defendant, Defendant
13 Releasees, or Downstream Defendant Releasees.

14 **8. NOTICE**

15 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
16 notice shall be sent by first class and electronic mail to:

17 Mark Todzo
18 Lexington Law Group
19 503 Divisadero Street
20 San Francisco, CA 94117
21 mtodzo@lexlawgroup.com

22 8.2 When Settling Defendant is entitled to receive any notice under this Consent
23 Judgment, the notice shall be sent by first class and electronic mail to:

24 Anthony J. Cortez
25 Greenberg Traurig, LLP
26 1201 K Street, Suite 1100
27 Sacramento, CA 95814
28 cortezan@gtlaw.com

29 8.3 Any Party may modify the person and address to whom the notice is to be sent
30 by sending the other Party notice by first class and electronic mail.

1 **9. COURT APPROVAL**

2 9.1 This Consent Judgment shall become effective upon entry by the Court. CEH
3 shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant
4 shall support entry of this Consent Judgment.

5 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
6 effect and shall never be introduced into evidence or otherwise used in any proceeding for any
7 purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

8 **10. ATTORNEYS' FEES**

9 10.1 Should CEH prevail on any motion, application for an order to show cause or
10 other proceeding to enforce a violation of this Consent Judgment, CEH shall be entitled to its
11 reasonable attorneys' fees and costs incurred as a result of such motion or application. Should
12 Settling Defendant prevail on any motion application for an order to show cause or other
13 proceeding, Settling Defendant may be awarded its reasonable attorneys' fees and costs as a result
14 of such motion or application upon a finding by the Court that CEH's prosecution of the motion
15 or application lacked substantial justification. For purposes of this Consent Judgment, the term
16 substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986,
17 Code of Civil Procedure §§ 2016, *et seq.*

18 10.2 Except as otherwise provided in this Consent Judgment, each Party shall bear
19 its own attorneys' fees and costs.

20 10.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
21 sanctions pursuant to law.

22 **11. OTHER TERMS**

23 11.1 The terms of this Consent Judgment shall be governed by the laws of the State
24 of California.

25 11.2 This Consent Judgment shall apply to and be binding upon CEH and Settling
26 Defendant, and its respective divisions, subdivisions, and subsidiaries, and the successors or
27 assigns of any of them.

28 11.3 This Consent Judgment contains the sole and entire agreement and

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

12 11.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
13 that Settling Defendant might have against any other party, whether or not that party is a Settling
14 Defendant.

15 11.5 This Court shall retain jurisdiction of this matter to implement or modify the
16 Consent Judgment.

17 11.6 The stipulations to this Consent Judgment may be executed in counterparts
18 and by means of facsimile or portable document format (pdf), which taken together shall be
19 deemed to constitute one document.

20 11.7 Each signatory to this Consent Judgment certifies that he or she is fully
21 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into
22 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
23 Party.

24 11.8 The Parties, including their counsel, have participated in the preparation of
25 this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.
26 This Consent Judgment was subject to revision and modification by the Parties and has been
27 accepted and approved as to its final form by all Parties and their counsel. Accordingly, any
28 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any

1 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
2 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
3 be resolved against the drafting Party should not be employed in the interpretation of this Consent
4 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

5

6 **IT IS SO STIPULATED:**

7 **CENTER FOR ENVIRONMENTAL HEALTH**

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9



10

Charlie Pizarro
Associate Director

11

12 **BOOTS RETAIL USA INC.**

13

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Signature

15

16

17

Printed Name

18

19

Title

20

21

22 **IT IS SO ORDERED:**

23

24

Dated: _____, 2014

25

Judge of the Superior Court

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1 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
2 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
3 be resolved against the drafting Party should not be employed in the interpretation of this Consent
4 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.
5

6 **IT IS SO STIPULATED:**

7 **CENTER FOR ENVIRONMENTAL HEALTH**

8
9
10 _____
Charlie Pizarro
Associate Director

11
12 **BOOTS RETAIL USA INC.**

13
14 
15 _____
Signature

Date: July 10, 2014

16 GORDON FARQUHAR
17 Printed Name

18
19 MANAGING DIRECTOR
20 Title

21
22 **IT IS SO ORDERED:**

23
24 Dated: _____, 2014

25 _____
Judge of the Superior Court