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11

12
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**
) **JUDGMENT AS TO FISK**
) **INDUSTRIES, INC.**
21 *CEH v. Fantasia Industries Corporation, et al.,*)
)
22 A.C.S.C. Case No. RG 13-696756)
)
23 _____)

24 **1. INTRODUCTION**

25 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
26 Environmental Health (“CEH”) and defendant Fisk Industries, Inc. (“Settling Defendant”). CEH
27 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 August 7, 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 September 24, 2013, CEH filed the action entitled *CEH v. Fantasia*
13 *Industries Corporation, et al.*, Case No. RG 13-696756, in the Superior Court of California for
14 Alameda County. On March 26, 2014, CEH amended the complaint to name Settling Defendant
15 as a defendant pursuant to Cal. Code Civ. Proc. §474. On December 4, 2013, the *Fantasia* action
16 was coordinated with several other related Proposition 65 actions in the *Proposition 65 Cocamide*
17 *DEA Cases*, Case No. JCCP 4765, currently pending before this Court.

18 1.5 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 1.6 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.** No more than 30 days after the Effective Date,
14 Settling Defendant shall issue specifications to its suppliers of Covered Products requiring that
15 Covered Products not contain any cocamide DEA, and shall instruct each supplier to use
16 reasonable efforts to eliminate cocamide DEA as an ingredient in future-manufactured Covered
17 Products on a nationwide basis.

18 3.3 **Action Regarding Specific Products.**

19 3.3.1 On or before the Effective Date, Settling Defendant shall (i) cease shipping
20 the Big & Bold Hair Plump Volumizing Shampoo and the No Water Needed Shampoo containing
21 cocamide DEA (the “Section 3.3 Products”) to retailers located in California or to distributors
22 and/or customers who Defendant believes resell into California exclusively or primarily; , and
23 (ii) send instructions to its stores and/or customers that resell Big & Bold Hair Plump Volumizing
24 Shampoo and/or the No Water Needed Shampoo in California instructing them either to refrain
25 from selling Big & Bold Hair Plump Volumizing Shampoo and the No Water Needed Shampoo
26 containing cocamide DEA into California and to sell into California only those units of Big &
27 Bold Hair Plump Volumizing Shampoo and the No Water Needed Shampoo that have been
28 reformulated to exclude cocamide DEA..

1 3.3.2 Within sixty days of the Effective Date, Settling Defendant shall provide
2 CEH with written certification from Settling Defendant confirming compliance with the
3 requirements of this Section 3.3.

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 Defendant 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 Defendant a reasonable opportunity of at least thirty (30)
12 days to cure any alleged violation. Should such attempts at informal resolution fail, CEH may
13 file its enforcement motion or application. The prevailing party on any motion to enforce this
14 Consent Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a result
15 of such motion or application. This Consent Judgment may only be enforced by the Parties.

16 **5. PAYMENTS**

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

22 5.1.1 \$1,650 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
23 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
24 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard
25 Assessment). The civil penalty check shall be made payable to the Center For Environmental
26 Health.

27 5.1.2 \$2,250 as a payment in lieu of civil penalty to CEH pursuant to Health &
28 Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH will use

1 such funds to continue its work educating and protecting people from exposures to toxic
2 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
3 Judgment and to purchase and test Settling Defendant's products to confirm compliance. In
4 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
5 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
6 educate and protect people from exposures to toxic chemicals. The method of selection of such
7 groups can be found at the CEH web site at www.ceh.org/justicefund. The payment pursuant to
8 this Section shall be made payable to the Center For Environmental Health.

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

12 **6. MODIFICATION**

13 6.1 **Written Consent.** This Consent Judgment may be modified from time to
14 time by express written agreement of the Parties with the approval of the Court, or by an order of
15 this Court upon motion and in accordance with law.

16 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
17 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
18 modify the Consent Judgment.

19 **7. CLAIMS COVERED AND RELEASED**

20 7.1 This Consent Judgment is a full, final and binding resolution between CEH on
21 behalf of itself and the public interest and Settling Defendant, and its parents, subsidiaries,
22 affiliated entities that are under common ownership, directors, officers, employees, and attorneys
23 ("Defendant Releasees"), and each entity to whom they directly or indirectly distribute or sell
24 Covered Products, including but not limited to Beauty Palace, Hair Bunch Beauty and Lee
25 BeautyStores and distributors, wholesalers, customers, retailers, franchisees, cooperative
26 members, licensors and licensees ("Downstream Defendant Releasees") of any violation that was
27 or could have been asserted in the Complaint against Settling Defendant, Defendant Releasees,
28 and Downstream Defendant Releasees, based on (a) the presence of cocamide DEA in the

1 Covered Products that were sold by Settling Defendant prior to the Effective Date and/or (b)
2 failure to warn about alleged exposure to cocamide DEA contained in Covered Products that were
3 sold by Settling Defendant prior to the Effective Date.

4 7.2 Compliance with the terms of this Consent Judgment by Settling Defendant
5 and the Defendant Releasees shall constitute compliance with Proposition 65 by Settling
6 Defendant, its Defendant Releasees and their Downstream Defendant Releasees with respect to
7 any alleged failure to warn about cocamide DEA in Covered Products manufactured, distributed,
8 or sold by Settling Defendant after the Effective Date.

9 7.3 Nothing in this Section 7 affects CEH's right to commence or prosecute an
10 action under Proposition 65 against any person other than Settling Defendant, Defendant
11 Releasees, or Downstream Defendant Releasees.

12 **8. NOTICE**

13 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
14 notice shall be sent by first class and electronic mail to:

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

20 8.2 When Settling Defendant is entitled to receive any notice under this Consent
21 Judgment, the notice shall be sent by first class and electronic mail to:

22 Kieran G. Doyle
23 Cowan, Liebowitz & Latman, P.C.
24 1133 Avenue of the Americas
25 New York, NY 10036-6799
26 cgd@cll.com

27 8.3 Any Party may modify the person and address to whom the notice is to be sent
28 by sending the other Party notice by first class and electronic mail.

29 **9. COURT APPROVAL**

30 9.1 This Consent Judgment shall become effective upon entry by the Court. CEH
31 shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant

1 shall support entry of this Consent Judgment.

2 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
3 effect and shall never be introduced into evidence or otherwise used in any proceeding for any
4 purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

5 **10. ATTORNEYS' FEES**

6 10.1 Should CEH prevail on any motion, application for an order to show cause or
7 other proceeding to enforce a violation of this Consent Judgment, CEH shall be entitled to its
8 reasonable attorneys' fees and costs incurred as a result of such motion or application. Should
9 Settling Defendant prevail on any motion application for an order to show cause or other
10 proceeding, Settling Defendant may be awarded its reasonable attorneys' fees and costs as a result
11 of such motion or application upon a finding by the Court that CEH's prosecution of the motion
12 or application lacked substantial justification. For purposes of this Consent Judgment, the term
13 substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986,
14 Code of Civil Procedure §§ 2016, *et seq.*

15 10.2 Except as otherwise provided in this Consent Judgment, each Party shall bear
16 its own attorneys' fees and costs.

17 10.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
18 sanctions pursuant to law.

19 **11. OTHER TERMS**

20 11.1 The terms of this Consent Judgment shall be governed by the laws of the State
21 of California.

22 11.2 This Consent Judgment shall apply to and be binding upon CEH and Settling
23 Defendant, and its respective divisions, subdivisions, and subsidiaries, and the successors or
24 assigns of any of them.

25 11.3 This Consent Judgment contains the sole and entire agreement and
26 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
27 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
28 merged herein and therein. There are no warranties, representations, or other agreements between

1 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
2 implied, other than those specifically referred to in this Consent Judgment have been made by any
3 Party hereto. No other agreements not specifically contained or referenced herein, oral or
4 otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation,
5 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
6 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
7 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
8 whether or not similar, nor shall such waiver constitute a continuing waiver.

9 11.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
10 that Settling Defendant might have against any other party, whether or not that party is a Settling
11 Defendant.

12 11.5 This Court shall retain jurisdiction of this matter to implement or modify the
13 Consent Judgment.

14 11.6 The stipulations to this Consent Judgment may be executed in counterparts
15 and by means of facsimile or portable document format (pdf), which taken together shall be
16 deemed to constitute one document.

17 11.7 Each signatory to this Consent Judgment certifies that he or she is fully
18 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into
19 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
20 Party.

21 11.8 The Parties, including their counsel, have participated in the preparation of
22 this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.
23 This Consent Judgment was subject to revision and modification by the Parties and has been
24 accepted and approved as to its final form by all Parties and their counsel. Accordingly, any
25 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
26 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
27 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
28 be resolved against the drafting Party should not be employed in the interpretation of this Consent

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

2 **IT IS SO STIPULATED:**

3 **CENTER FOR ENVIRONMENTAL HEALTH**

4
5 

6 _____
7 Charlie Pizarro
8 Associate Director

9 **FISK INDUSTRIES, INC.**

10 _____
11 Signature

12 _____
13 Printed Name

14 _____
15 Title

16
17
18 **IT IS SO ORDERED:**

19 Dated: _____, 2014

20 _____
21 Judge of the Superior Court

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

2 **IT IS SO STIPULATED:**

3 **CENTER FOR ENVIRONMENTAL HEALTH**

4
5

6 _____
Charlie Pizarro
Associate Director

7
8

9 **FISK INDUSTRIES, INC.**

10

11 _____
ira adler
Signature

12
13

14 _____
Ira Adler
Printed Name

15

16 _____
Vice President
Title

17
18

19 **IT IS SO ORDERED:**

20

21 Dated: _____, 2014

22

Judge of the Superior Court

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