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

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.*, A.C.S.C.) **JUDGMENT AS TO PETER**
18 Case No. RG 13-707833) **THOMAS ROTH LABS, LLC**

20 **1. INTRODUCTION**

21 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
22 Environmental Health (“CEH”) and defendant Peter Thomas Roth Labs, LLC (“Settling
23 Defendant”). CEH and Settling Defendant are referred to collectively as the “Parties.”

24 1.2 Settling Defendant is a corporation that employs ten (10) or more persons and
25 that manufactures, distributes and/or sells shampoo and liquid soaps that contain coconut oil
26 diethanolamine condensate (cocamide diethanolamine) (hereinafter, “cocamide DEA”) in the
27 State of California or has done so in the past.

1 1.3 On September 12, 2013, CEH served a 60-Day Notice of Violation under
2 Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
3 & Safety Code §§ 25249.5, *et seq.*) (the “Notice”) to Settling Defendant, the California Attorney
4 General, the District Attorneys of every County in the State of California, and the City Attorneys
5 for every City in the State of California with a population greater than 750,000. The Notice
6 alleges violations of Proposition 65 with respect to the presence of cocamide DEA in shampoo
7 and liquid soaps manufactured, distributed and/or sold by Settling Defendant.

8 1.4 On December 23, 2013, CEH filed the action entitled *CEH v. Mudlark Papers,*
9 *Inc. et al.*, Case No. RG 13-707833, in the Superior Court of California for Alameda County. On
10 October 18, 2013, CEH named Settling Defendant as a defendant in that action pursuant to
11 California Code of Civil Procedure §474. On April 1, 2014, the *Mudlark* action was coordinated
12 with several other related Proposition 65 actions in the *Proposition 65 Cocamide DEA Cases,*
13 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 shampoo and liquid soaps.

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 manufacture, distribute, sell or offer for sale any Covered Product that
6 contains cocamide DEA and that Settling Defendant knows or has reason to believe will be sold
7 or offered for sale to California consumers. For purposes of this Consent Judgment, a product
8 “contains cocamide DEA” if cocamide DEA is an intentionally added ingredient in the product
9 and/or part of the product formulation.

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

15 3.3 **Action Regarding Specific Products.**

16 3.3.1 On or before the Effective Date, Settling Defendant shall cease selling the
17 Mega-Rich™ Shampoo, SKU No. 6-70367-63801-9 (the “Section 3.3 Product”), in California.
18 On or before the Effective Date, Settling Defendant shall also cease shipping the Section 3.3
19 Product to any of its stores and/or customers that it knows or has reason to believe resell the
20 Section 3.3 Product in California.

21 3.3.2 Any destruction of Section 3.3 Product by Settling Defendant shall be in
22 compliance with all applicable laws.

23 3.3.3 Within sixty days of the Effective Date, Settling Defendant shall provide
24 CEH with written certification from Settling Defendant confirming compliance with the
25 requirements of this Section 3.3.

26 **4. ENFORCEMENT**

27 4.1 CEH may, by motion or application for an order to show cause before the
28 Superior Court of Alameda County, enforce the terms and conditions contained in this Consent

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

10 **5. PAYMENTS**

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

16 5.1.1 \$1,650 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
17 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
18 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard
19 Assessment). The civil penalty check shall be made payable to the Center For Environmental
20 Health.

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

1 groups can be found at the CEH web site at www.ceh.org/justicefund. The payment pursuant to
2 this Section shall be made payable to the Center For Environmental Health.

3 5.1.3 \$11,100 as reimbursement of a portion of CEH's reasonable attorneys' fees
4 and costs. A check for \$9,600 shall be made payable to the Lexington Law Group, and a check
5 for \$1,500 shall be made payable to the Center For Environmental Health.

6 **6. MODIFICATION**

7 6.1 **Written Consent.** This Consent Judgment may be modified from time to
8 time by express written agreement of the Parties with the approval of the Court, or by an order of
9 this Court upon motion and in accordance with law.

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

13 **7. CLAIMS COVERED AND RELEASED**

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

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 in California.

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 Daniel J. Herling
15 Mintz Levin Cohn Ferris Glovsky and Popeo PC
16 44 Montgomery Street, 36th Floor
17 San Francisco, CA 94104
18 DJHerling@mintz.com

19 Brad M. Scheller
20 Mintz Levin Cohn Ferris Glovsky and Popeo PC
21 666 Third Avenue
22 New York, NY 10017
23 BMScheller@mintz.com

24 8.3 Any Party may modify the person and address to whom the notice is to be sent
25 by sending the other Party notice by first class and electronic mail.

26 **9. COURT APPROVAL**

27 9.1 This Consent Judgment shall become effective upon entry by the Court. CEH
28 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.

1 **10. OTHER TERMS**

2 10.1 The terms of this Consent Judgment shall be governed by the laws of the State
3 of California.

4 10.2 This Consent Judgment shall apply to and be binding upon CEH and Settling
5 Defendant, and its respective divisions, subdivisions, and subsidiaries, and the successors or
6 assigns of any of them.

7 10.3 This Consent Judgment contains the sole and entire agreement and
8 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
9 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
10 merged herein and therein. There are no warranties, representations, or other agreements between
11 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
12 implied, other than those specifically referred to in this Consent Judgment have been made by any
13 Party hereto. No other agreements not specifically contained or referenced herein, oral or
14 otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation,
15 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
16 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
17 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
18 whether or not similar, nor shall such waiver constitute a continuing waiver.

19 10.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
20 that Settling Defendant might have against any other party, whether or not that party is a Settling
21 Defendant.

22 10.5 This Court shall retain jurisdiction of this matter to implement or modify the
23 Consent Judgment.

24 10.6 The stipulations to this Consent Judgment may be executed in counterparts
25 and by means of facsimile or portable document format (pdf), which taken together shall be
26 deemed to constitute one document.

27 10.7 Each signatory to this Consent Judgment certifies that he or she is fully
28 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into

1 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
2 Party.

3 10.8 The Parties, including their counsel, have participated in the preparation of
4 this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.
5 This Consent Judgment was subject to revision and modification by the Parties and has been
6 accepted and approved as to its final form by all Parties and their counsel. Accordingly, any
7 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
8 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
9 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
10 be resolved against the drafting Party should not be employed in the interpretation of this Consent
11 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

12 10.9 Except as otherwise provided in this Consent Judgment, each Party shall bear
13 its own attorneys' fees and costs.

14 **IT IS SO STIPULATED:**

15 **CENTER FOR ENVIRONMENTAL HEALTH**

16 

17 _____
18 Charlie Pizarro
19 Associate Director

20 **PETER THOMAS ROTH LABS, LLC**

21 _____
22 Signature

23 _____
24 Printed Name

25 _____
26 _____
27 Title

28

1 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
2 Party.

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13 its own attorneys' fees and costs.

14 **IT IS SO STIPULATED:**
15 **CENTER FOR ENVIRONMENTAL HEALTH**

16
17
18 _____
19 Charlie Pizarro
20 Associate Director

21 **PETER THOMAS ROTH LABS, LLC**

22 _____
23 

24 Signature

25 _____
26 *WARREN D. ROTH*

27 Printed Name

28 _____
29 *Managing Director*

30 Title

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IT IS SO ORDERED:

Dated: _____, 2014

Judge of the Superior Court