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12 CENTER FOR ENVIRONMENTAL HEALTH

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF ALAMEDA

15 Coordination Proceeding Special Title:) Judicial Council Coordination Proceeding
16 PROPOSITION 65 COCAMIDE DEA CASES) Case No. 4765
17 _____)
18 This Document Relates To:) **[PROPOSED] CONSENT**
19 *Center for Environmental Health v. Biopelle,*) **JUDGMENT AS TO H&M HENNES**
20 *Inc., et al.,* Case No. RG14-726964) **& MAURITZ, L.P.**
21 _____)

22 **1. INTRODUCTION**

23 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
24 Environmental Health (“CEH”) and defendant H&M Hennes & Mauritz, L.P. (“Settling
25 Defendant”). CEH and Settling Defendant are referred to collectively as the “Parties.”

26 1.2 On January 3, 2014, CEH served a 60-Day Notice of Violation under
27 Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
28 & Safety Code §§ 25249.5, *et seq.*) (the “Notice”) to Settling Defendant, the California Attorney
General, the District Attorneys of every County in the State of California, and the City Attorneys

1 for every City in the State of California with a population greater than 750,000. The Notice
2 alleges violations of Proposition 65 with respect to the presence of coconut oil diethanolamine
3 condensate (cocamide diethanolamine) (hereinafter, “cocamide DEA”) in shampoo and liquid
4 soaps manufactured, distributed and/or sold by Settling Defendant.

5 1.3 On May 28, 2014, CEH filed the action entitled *CEH v. Biopelle, Inc.*, Case
6 No. RG14-726964, in the Superior Court of California for Alameda County, against Settling
7 Defendant. On July 7, 2014, the *Biopelle* action was coordinated with several other related
8 Proposition 65 actions in the *Proposition 65 Cocamide DEA Cases*, Case No. JCCP 4765,
9 currently pending before this Court.

10 1.4 For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
11 Court has jurisdiction over the allegations of violations contained in the operative Complaint
12 applicable to Settling Defendant (the “Complaint”) and personal jurisdiction over Settling
13 Defendant as to the acts alleged in the Complaint; (ii) that venue is proper in the County of
14 Alameda; and (iii) that this Court has jurisdiction to enter this Consent Judgment.

15 1.5 Nothing in this Consent Judgment is or shall be construed as an admission by
16 the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance
17 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
18 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
19 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
20 other legal proceeding. This Consent Judgment is the product of negotiation and compromise and
21 is accepted by the Parties for purposes of settling, compromising and resolving issues disputed in
22 this action.

23 **2. DEFINITIONS**

24 2.1 “Covered Products” means shampoo and liquid soaps.

25 2.2 “Effective Date” means the date on which this Consent Judgment is entered by
26 the Court.

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1 **3. INJUNCTIVE RELIEF**

2 3.1 **Reformulation of Covered Products.** On or before the Effective Date,
3 Settling Defendant shall not manufacture, distribute, sell or offer for sale any Covered Product
4 that contains cocamide DEA and that will be sold or offered for sale to California consumers. For
5 purposes of this Consent Judgment, a product “contains cocamide DEA” if cocamide DEA is an
6 intentionally added ingredient in the product and/or part of the product formulation.

7 3.2 **Specification to Suppliers.** No more than 30 days after the Effective Date, to
8 the extent it has not already done so, Settling Defendant shall issue specifications to its suppliers
9 of Covered Products requiring that Covered Products not contain any cocamide DEA, and shall
10 instruct each supplier to use reasonable efforts to eliminate Covered Products containing
11 cocamide DEA on a nationwide basis.

12 3.3 **Action Regarding Specific Products.**

13 3.3.1 On or before the Effective Date, to the extent it has not already done so,
14 Settling Defendant shall cease selling the Shower Gel with Argan Oil, Item No. 40765-7-2111-
15 92-0167739-002 (the “Section 3.3 Product”) in California. Settling Defendant has demonstrated
16 its compliance with this Section to CEH’s satisfaction.

17 **4. ENFORCEMENT**

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

1 **5. PAYMENTS**

2 **5.1 Payments by Settling Defendant.** Within five (5) business days of the Effective
3 Date, Settling Defendant shall pay the total sum of \$15,000 as a settlement payment. The total
4 settlement amount for Settling Defendant shall be paid in four separate checks delivered to
5 counsel for CEH at the address set forth in Section 8.1 below. The funds paid by Settling
6 Defendant shall be allocated between the following categories:

7 5.1.1 \$1,650 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
8 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
9 (25% to CEH and 75% to the State of California’s Office of Environmental Health Hazard
10 Assessment). The civil penalty check shall be made payable to the Center For Environmental
11 Health.

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

22 5.1.3 \$11,100 as reimbursement of a portion of CEH’s reasonable attorneys’ fees
23 and costs. A check for \$9,600 shall be made payable to the Lexington Law Group, and a check
24 for \$1,500 shall be made payable to the Center For Environmental Health.

25 **6. MODIFICATION**

26 **6.1 Written Consent.** This Consent Judgment may be modified from time to
27 time by express written agreement of the Parties with the approval of the Court, or by an order of
28 this Court upon motion and in accordance with law.

1 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
2 attempt in good faith to meet and confer in writing with all affected Parties prior to filing a
3 motion to modify the Consent Judgment. In the event that Settling Defendant contends that
4 Proposition 65 is repealed, preempted or is otherwise rendered inapplicable by reason of law, or
5 as to the Covered Products, Settling Defendant may provide written notice to CEH. The parties
6 will thereafter meet and confer in good faith and, if they cannot agree as to the continuing
7 applicability of Proposition 65, any dispute hereunder will be submitted to the Court.

8 **7. CLAIMS COVERED AND RELEASED**

9 7.1 This Consent Judgment is a full, final and binding resolution between CEH on
10 behalf of itself and the public interest and Settling Defendant, and its parents, subsidiaries,
11 affiliated entities that are under common ownership, directors, officers, employees, and attorneys
12 (“Defendant Releasees”), and each entity to whom they directly or indirectly distribute or sell
13 Covered Products, including but not limited to distributors, wholesalers, customers, retailers,
14 franchisees, cooperative members, licensors and licensees (“Downstream Defendant Releasees”)
15 of any violation of Proposition 65 that was or could have been asserted in the Complaint against
16 Settling Defendant, Defendant Releasees, and Downstream Defendant Releasees, based on failure
17 to warn about alleged exposure to cocamide DEA contained in Covered Products that were sold
18 by Settling Defendant prior to the Effective Date.

19 7.2 Compliance with the terms of this Consent Judgment by Settling Defendant
20 and the Defendant Releasees shall constitute compliance with Proposition 65 by Settling
21 Defendant, its Defendant Releasees and their Downstream Defendant Releasees with respect to
22 any alleged failure to warn about cocamide DEA in Covered Products manufactured, distributed,
23 or sold by Settling Defendant after the Effective Date.

24 7.3 Nothing in this Section 7 affects CEH’s right to commence or prosecute an
25 action under Proposition 65 against any person other than Settling Defendant, Defendant
26 Releasees, or Downstream Defendant Releasees.

27 **8. NOTICE**

28 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the

1 notice shall be sent by first class and electronic mail to:

2 Mark Todzo
3 Lexington Law Group
4 503 Divisadero Street
5 San Francisco, CA 94117
6 mtodzo@lexlawgroup.com

7 8.2 When Settling Defendant is entitled to receive any notice under this Consent
8 Judgment, the notice shall be sent by first class and electronic mail to:

9 Staci Jennifer Riordan
10 Fox Rothschild LLP
11 1800 Century Park East, Suite 300
12 Los Angeles, CA 90067-1506
13 SRiordan@foxrothschild.com

14 8.3 Any Party may modify the person and address to whom the notice is to be sent
15 by sending the other Party written notice by first class and electronic mail.

16 **9. COURT APPROVAL**

17 9.1 This Consent Judgment shall become effective upon entry by the Court. CEH
18 shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant
19 shall support entry of this Consent Judgment.

20 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
21 effect and shall never be introduced into evidence or otherwise used in any proceeding for any
22 purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

23 **10. ATTORNEYS' FEES**

24 10.1 Should either Party prevail on any motion, application for an order to show
25 cause or other proceeding to enforce a violation of this Consent Judgment, the prevailing party
26 shall be entitled to its reasonable attorneys' fees and costs incurred as a result of such motion or
27 application.

28 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.

1 **11. OTHER TERMS**

2 11.1 The terms of this Consent Judgment shall be governed by the laws of the State
3 of California.

4 11.2 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 11.3 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 11.4 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 11.5 This Court shall retain jurisdiction of this matter to implement or modify the
23 Consent Judgment.

24 11.6 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 11.7 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 11.8 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.

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13 **IT IS SO STIPULATED:**

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15 **CENTER FOR ENVIRONMENTAL HEALTH**

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Charlie Pizarro
Associate Director

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H&M HENNES & MAURITZ, L.P.

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Signature

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Printed Name

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Title

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15 **CENTER FOR ENVIRONMENTAL HEALTH**

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18 _____
Charlie Pizarro
Associate Director

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20 **H&M HENNES & MAURITZ, L.P.**

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Signature

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24 **Hank Rouda**

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Printed Name

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27 **Authorized Signatory**

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IT IS SO ORDERED:

Dated: _____, 2014

Judge of the Superior Court