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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 _____)
17 This Document Relates To:) **[PROPOSED] CONSENT**
18 *Center for Environmental Health v. Noevir*) **JUDGMENT AS TO BIRCHBOX,**
19 *U.S.A., Inc., et al., A.C.S.C. Case No. RG 14-*) **INC.**
739157)

20
21 **1. INTRODUCTION**

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

1 diethanolamine condensate (cocamide diethanolamine) (hereinafter, “cocamide DEA”) in the
2 State of California or has done so in the past.

3 1.3 On October 31, 2014, CEH served a 60-Day Notice of Violation under
4 Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
5 & Safety Code § 25249.5, *et seq.*) (“Notice”) to Settling Defendant, the California Attorney
6 General, the District Attorneys of every County in the State of California, and the City Attorneys
7 for every City in the State of California with a population greater than 750,000. The Notice
8 alleges violations of Proposition 65 with respect to the presence of cocamide DEA in shampoo
9 and liquid soaps that are manufactured, distributed, and/or sold by Settling Defendant.

10 1.4 On September 3, 2014, CEH filed the action entitled *CEH v. Noevir U.S.A.,*
11 *Inc., et al.*, Case No. RG 14-739157, in the Superior Court of California for Alameda County. On
12 October 6, 2014, the *Noevir* action was coordinated with several other related Proposition 65
13 actions in the *Proposition 65 Cocamide DEA Cases*, Case No. JCCP 4765, currently pending
14 before this Court. On June 16, 2015, CEH named Settling Defendant as a defendant in the action
15 pursuant to California Code of Civil Procedure § 474.

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

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

1 **2. DEFINITIONS**

2 2.1 “Covered Products” means shampoo and liquid soaps.

3 2.2 “Effective Date” means the date on which this Consent Judgment is entered by
4 the Court.

5 **3. INJUNCTIVE RELIEF**

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

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

15 3.3 **Action Regarding Specific Products.**

16 3.3.1 On or before the Effective Date, Settling Defendant shall cease selling the
17 following products: (i) the Arangara Bagno Doccia Rigenerante Shower Gel in Lemon & Peach,
18 SKU No. AMCESLP003; (ii) the Arangara Bagno Doccia Rigenerante Shower Gel in Tangerine
19 & Peach, SKU No. AMCESMF003; (iii) the Arangara Bagno Doccia Rigenerante Shower Gel in
20 Olive & Rose, SKU No. AMCESOR003; (iv) the Arangara Bagno Doccia Rigenerante Shower
21 Gel in Orange & Lavender, SKU No. AMCESAL003; and (v) the Beaver Professional Nutritive
22 Moisturizing Shampoo, SKU No. 6-943074-187571 (the “Section 3.3 Products”). On or before
23 the Effective Date, Settling Defendant shall also: (i) cease shipping the Section 3.3 Products to
24 any of its stores and/or customers that resell the Section 3.3 Products in California; and (ii) send
25 instructions to its stores and/or customers that resell the Section 3.3 Products in California
26 instructing them either to: (a) return all the Section 3.3 Products to Settling Defendant for
27 destruction, or (b) directly destroy the Section 3.3 Products.

28

1 3.3.2 Any destruction of the Section 3.3 Products shall be in compliance with all
2 applicable laws.

3 3.3.3 Within sixty (60) days of the Effective Date, Settling Defendant shall
4 provide CEH with written certification from Settling Defendant confirming compliance with the
5 requirements of this Section 3.3.

6 **4. ENFORCEMENT**

7 4.1 CEH may, by motion or application for an order to show cause before the
8 Superior Court of Alameda County, enforce the terms and conditions contained in this Consent
9 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3
10 above, CEH shall provide Settling Defendant with a Notice of Violation and a copy of any test
11 results which purportedly support CEH's Notice of Violation. The Parties shall then meet and
12 confer regarding the basis for CEH's anticipated motion or application in an attempt to resolve it
13 informally, including providing Settling Defendant a reasonable opportunity of at least thirty (30)
14 days to cure any alleged violation. Should such attempts at informal resolution fail, CEH may
15 file its enforcement motion or application. This Consent Judgment may only be enforced by the
16 Parties.

17 **5. PAYMENTS**

18 5.1 **Payments by Settling Defendant.** Within five (5) business days of the
19 Effective Date, Settling Defendant shall pay the total sum of \$37,500 as a settlement payment.
20 Each settlement payment from Settling Defendant shall be paid in four separate checks delivered
21 to counsel for CEH at the address set forth in Section 8.1 below. The funds paid by Settling
22 Defendant shall be allocated between the following categories:

23 5.1.1 \$4,125 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
24 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
25 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard
26 Assessment). This check shall be made payable to the Center for Environmental Health.

27 5.1.2 \$5,625 as 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. This check shall be made
8 payable to the Center for Environmental Health.

9 5.1.3 \$27,750 as reimbursement of a portion of CEH's reasonable attorneys' fees
10 and costs. This check shall be made payable to the Lexington Law Group.

11 **6. MODIFICATION**

12 6.1 **Written Consent.** This Consent Judgment may be modified from time to
13 time by express written agreement of the Parties with the approval of the Court, or by an order of
14 this Court upon motion and in accordance with law.

15 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
16 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
17 modify the Consent Judgment.

18 **7. CLAIMS COVERED AND RELEASED**

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

1 Date.

2 7.2 Compliance with the terms of this Consent Judgment by Settling Defendant
3 and Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant,
4 Defendant Releasees, and Downstream Defendant Releasees with respect to any alleged failure to
5 warn about cocamide DEA in Covered Products manufactured, distributed, or sold by Settling
6 Defendant after the Effective Date.

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

10 **8. NOTICE**

11 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
12 notice shall be sent by first class and electronic mail to:

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

18 8.2 When Settling Defendant is entitled to receive any notice under this Consent
19 Judgment, the notice shall be sent by first class and electronic mail to:

20 Ronie M. Schmelz
21 Tucker Ellis LLP
22 515 South Flower Street, 42nd Floor
23 Los Angeles, CA 90017
24 ronie.schmelz@tuckerellis.com

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

27 **9. COURT APPROVAL**

28 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.

1 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
2 effect and shall never be introduced into evidence or otherwise used in any proceeding for any
3 purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

4 **10. ATTORNEYS' FEES**

5 10.1 Should CEH prevail on any motion, application for an order to show cause, or
6 other proceeding to enforce a violation of this Consent Judgment, CEH shall be entitled to its
7 reasonable attorneys' fees and costs incurred as a result of such motion or application. Should
8 Settling Defendant prevail on any motion application for an order to show cause or other
9 proceeding, Settling Defendant may be awarded its reasonable attorneys' fees and costs as a result
10 of such motion or application upon a finding by the Court that CEH's prosecution of the motion
11 or application lacked substantial justification. For purposes of this Consent Judgment, the term
12 substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986,
13 Code of Civil Procedure §§ 2016, *et seq.*

14 10.2 Except as otherwise provided in this Consent Judgment, each Party shall bear
15 its own attorneys' fees and costs.

16 10.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
17 sanctions pursuant to law.

18 **11. OTHER TERMS**

19 11.1 The terms of this Consent Judgment shall be governed by the laws of the State
20 of California.

21 11.2 This Consent Judgment shall apply to and be binding upon CEH and Settling
22 Defendant, and its respective divisions, subdivisions, and subsidiaries, and the successors or
23 assigns of any of them.

24 11.3 This Consent Judgment contains the sole and entire agreement and
25 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
26 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
27 merged herein and therein. There are no warranties, representations, or other agreements between
28 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or

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

8 11.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
9 that Settling Defendant might have against any other party, whether or not that party is a settling
10 defendant.

11 11.5 This Court shall retain jurisdiction of this matter to implement or modify the
12 Consent Judgment.

13 11.6 The stipulations to this Consent Judgment may be executed in counterparts
14 and by means of facsimile or portable document format (pdf), which taken together shall be
15 deemed to constitute one document.

16 11.7 Each signatory to this Consent Judgment certifies that he or she is fully
17 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into
18 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
19 Party.

20 11.8 The Parties, including their counsel, have participated in the preparation of
21 this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.
22 This Consent Judgment was subject to revision and modification by the Parties and has been
23 accepted and approved as to its final form by all Parties and their counsel. Accordingly, any
24 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
25 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
26 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
27 be resolved against the drafting Party should not be employed in the interpretation of this Consent
28 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

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IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH



Charlie Pizarro
Associate Director

BIRCHBOX, INC.

Signature

Printed Name

Title

IT IS SO ORDERED:

Dated: _____, 2015

Judge of the Superior Court

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IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

BIRCHBOX, INC.



Signature

CRAIG ABUZZO

Printed Name

GENERAL COUNSEL

Title

IT IS SO ORDERED:

Dated: _____, 2015

Judge of the Superior Court