

1 LEXINGTON LAW GROUP
2 Mark N. Todzo, State Bar No. 168389
3 Howard Hirsch, State Bar No. 213209
4 Abigail Blodgett, State Bar No. 278813
5 503 Divisadero Street
6 San Francisco, CA 94117
7 Telephone: (415) 913-7800
8 Facsimile: (415) 759-4112
9 mtodzo@lexlawgroup.com
10 hhirsch@lexlawgroup.com
11 ablodgett@lexlawgroup.com

12 Counsel for Plaintiff
13 CENTER FOR ENVIRONMENTAL HEALTH

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

16 Coordination Proceeding Special Title:) Judicial Council Coordination
17 PROPOSITION 65 COCAMIDE DEA CASES) Proceeding
18) Case No. 4765

19 This Document Relates To:)

20 *Center for Environmental Health v. Biopelle,*
21 *Inc., et al., A.C.S.C. Case No. RG 14-726964*)

22) **[PROPOSED] CONSENT**
23) **JUDGMENT AS TO CBI**
24) **LABORATORIES, INC.**

25 **1. INTRODUCTION**

26 1.1 The parties to this Consent Judgment (“Parties”) are the Center for
27 Environmental Health (“CEH”) and defendant CBI Laboratories, Inc. (“Settling Defendant”).
28 CEH and Settling Defendant are referred to collectively as the “Parties.”

1.2 Settling Defendant is a corporation that employs ten (10) or more persons and
that manufactures, distributes, and/or sells shampoo and liquid soaps that contain coconut oil
diethanolamine condensate (cocamide diethanolamine) (hereinafter, “cocamide DEA”).

1 1.3 On April 24, 2015, 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.*) (“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 that are manufactured, distributed, and/or sold by Settling Defendant.

8 1.4 On May 28, 2014, CEH filed the action entitled *CEH v. Biopelle, Inc., et al.*,
9 Case No. RG 14-726964, in the Superior Court of California for Alameda County. On July 7,
10 2014, the *Biopelle* action was coordinated with several other related Proposition 65 actions in the
11 *Proposition 65 Cocamide DEA Cases*, Case No. JCCP 4765, currently pending before this Court.
12 On July 7, 2015, CEH named Settling Defendant as a defendant in that action pursuant to
13 California Code of Civil Procedure § 474.

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 (“Complaint”) and personal jurisdiction over Settling Defendant
17 as to the acts alleged in the Complaint; (ii) venue is proper in the County of Alameda; and (iii)
18 this Court has jurisdiction to enter this Consent Judgment. The Parties agree that the stipulation
19 to jurisdiction and venue contained in this paragraph may not be used for any other purpose other
20 than entry and enforcement of this Consent Judgment, and that by entering into this Consent
21 Judgment, Settling Defendant is not admitting that this Court or any other Court in California can
22 properly exercise jurisdiction over Settling Defendant for any other purpose.

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

1 other legal proceeding. This Consent Judgment is the product of negotiation and compromise and
2 is accepted by the Parties for purposes of settling, compromising, and resolving issues disputed in
3 this action.

4 1.7 To the extent that CEH has entered into other consent decrees or agreements
5 relating to Covered Products or similar products, CEH represents and warrants to the best of its
6 knowledge that none of these consent decrees or agreements have released Settling Defendant
7 from any of the conduct that forms the basis of the action as alleged in paragraph 1.4.

8 **2. DEFINITIONS**

9 2.1 “Contract Manufactured Covered Product” means a Covered Product that does
10 not bear the name, brand or trademark of Settling Defendant.

11 2.2 “Covered Product” means shampoo or liquid soap (including but not limited to
12 lotions and crèmes).

13 2.3 “Effective Date” means the date on which this Consent Judgment is entered
14 by the Court.

15 2.4 “Private Label Covered Product” means a Covered Product other than a
16 Contract Manufactured Covered Product.

17 2.5 For purposes of this Consent Judgment, a product “contains cocamide DEA” if
18 cocamide DEA is an intentionally added ingredient in the product and/or part of the product
19 formulation.

20 **3. INJUNCTIVE RELIEF**

21 **3.1 Private Label Covered Products.**

22 3.1.1 **Reformulation.** As of the Effective Date, Settling Defendant shall not
23 manufacture, distribute, sell, or offer for sale any Private Label Covered Product that contains
24 cocamide DEA and that Settling Defendant knows or should know will be sold or offered for sale
25 to California consumers.

26 3.1.2 **Specification to Suppliers.** No more than thirty (30) days after the
27

28

1 Effective Date, Settling Defendant shall issue specifications to its suppliers which, in the six (6)
2 months prior to the Effective Date, supplied Settling Defendant with materials containing
3 cocamide DEA that were used in the manufacture of Private Label Covered Products. Such
4 specifications may be made by Settling Defendant to its suppliers via a letter which states that the
5 suppliers shall use reasonable means to eliminate cocamide DEA on a nationwide basis, and such
6 letter shall be deemed compliant with this section.

7 **3.2 Contract Manufactured Covered Products.**

8 **3.2.1 Reformulation.** As of the Effective Date, Settling Defendant shall not
9 manufacture, distribute, or sell any Contract Manufactured Covered Product that contains
10 cocamide DEA unless: (a) the customer on whose behalf Settling Defendant is manufacturing,
11 distributing or selling the Contract Manufactured Covered Product requests the use of cocamide
12 DEA as an intentionally added ingredient; and (b) Settling Defendant notifies its immediate
13 downstream customer in writing that the Contract Manufactured Covered Product contains
14 cocamide DEA and cannot legally be sold in California without providing a clear and reasonable
15 warning as required by Proposition 65.

16 **3.2.2 Specification to Suppliers.** No more than thirty (30) days after the
17 Effective Date, Settling Defendant shall issue specifications to its suppliers which, in the six (6)
18 months prior to the Effective Date, supplied Settling Defendant with materials containing
19 cocamide DEA that were used in the manufacture of any Contract Manufactured Covered
20 Product. Such specifications may be made by Settling Defendant to its suppliers via a letter
21 which states that the suppliers shall use reasonable means to eliminate cocamide DEA on a
22 nationwide basis, and such letter shall be deemed compliant with this section.

23 **3.3 Action Regarding Specific Products.**

24 **3.3.1** On or before the Effective Date, Settling Defendant shall cease selling the
25 Credentials Almond Bath & Shower Creme (the "Section 3.3 Product"). On or before the
26 Effective Date, Settling Defendant shall also: (i) cease shipping the Section 3.3 Product to any of
27 its immediate downstream customers that it knows resell the Section 3.3 Product in California;

1 and (ii) send instructions to its immediate downstream customers that it knows resell the Section
2 3.3 Product in California instructing them to not sell any Section 3.3 Product to California
3 consumers.

4 3.3.2 Within sixty (60) days of the Effective Date, Settling Defendant shall
5 provide 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.** On or before July 1, 2016, Settling Defendant
20 shall pay the total sum of \$27,500 as a settlement payment. Any failure by Settling Defendant to
21 comply with the payment terms herein shall be subject to a stipulated late fee to be paid by
22 Settling Defendant in the amount of \$100 for each day the full payment is not received after the
23 applicable date set forth herein. The funds paid by Settling Defendant shall be paid in five (5)
24 separate checks and allocated between the following categories:

25 5.1.1 \$3,020 as a civil penalty pursuant to Health & Safety Code § 25249.7(b).
26 The civil penalty payment shall be apportioned in accordance with Health & Safety Code §
27 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health
28

1 Hazard Assessment (“OEHHA”). Accordingly, the OEHHA portion of the civil penalty
2 payment in the amount of \$2,265 shall be made payable to OEHHA and associated with taxpayer
3 identification number 68-0284486. This payment shall be delivered as follows:

4 For United States Postal Service Delivery:

5 Attn: Mike Gyurics
6 Fiscal Operations Branch Chief
7 Office of Environmental Health Hazard Assessment
8 P.O. Box 4010, MS #19B
9 Sacramento, CA 95812-4010

10 For Non-United States Postal Service Delivery:

11 Attn: Mike Gyurics
12 Fiscal Operations Branch Chief
13 Office of Environmental Health Hazard Assessment
14 1001 I Street, MS #19B
15 Sacramento, CA 95814

16 The CEH portion of the civil penalty payment in the amount of \$755 shall be made
17 payable to the Center For Environmental Health and associated with taxpayer identification
18 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero
19 Street, San Francisco, CA 94117.

20 5.1.2 \$4,125 as payment in lieu of civil penalty to CEH pursuant to Health &
21 Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH will use
22 such funds to continue its work educating and protecting people from exposures to toxic
23 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
24 Judgment and to purchase and test Settling Defendant’s products to confirm compliance. In
25 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
26 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
27 educate and protect people from exposures to toxic chemicals. The method of selection of such
28 groups can be found at the CEH web site at www.ceh.org/justicefund. This check shall be made
payable to the Center for Environmental Health and shall be delivered to Lexington Law Group,
503 Divisadero Street, San Francisco, CA 94117.

5.1.3 \$20,355 as reimbursement of a portion of CEH’s reasonable attorneys’ fees

1 and costs. A check for \$17,600 shall be made payable to the Lexington Law Group, and a check
2 for \$2,755 shall be made payable to the Center for Environmental Health. These payments shall
3 be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

4 **6. MODIFICATION**

5 6.1 **Written Consent.** This Consent Judgment may be modified from time to
6 time by express written agreement of the Parties with the approval of the Court, or by an order of
7 this Court upon motion and in accordance with law.

8 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
9 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
10 modify the Consent Judgment.

11 **7. CLAIMS COVERED AND RELEASED**

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

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

28

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 Fred M. Blum
15 Sean G. Herman
16 Bassi, Edlin, Huie & Blum LLP
17 500 Washington Street, Suite 700
18 San Francisco, CA 94111
19 fblum@behblaw.com
20 sherman@behblaw.com

21 8.3 Any Party may modify the person and address to whom the notice is to be sent
22 by sending the other Party notice by first class and electronic mail.

23 **9. COURT APPROVAL**

24 9.1 This Consent Judgment shall become effective upon entry by the Court. CEH
25 shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant
26 shall support entry of this Consent Judgment.

27 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
28 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.

10. ATTORNEYS’ FEES

10.1 Should CEH prevail on any motion, application for an order to show cause, or

1 other proceeding to enforce a violation of this Consent Judgment, CEH shall be entitled to its
2 reasonable attorneys' fees and costs incurred as a result of such motion or application. Should
3 Settling Defendant prevail on any motion, application for an order to show cause, or other
4 proceeding, Settling Defendant may be awarded its reasonable attorneys' fees and costs as a result
5 of such motion or application.

6 10.2 Except as otherwise provided in this Consent Judgment, each Party shall bear
7 its own attorneys' fees and costs.

8 10.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
9 sanctions pursuant to law.

10 **11. OTHER TERMS**

11 11.1 The terms of this Consent Judgment shall be governed by the laws of the State
12 of California.

13 11.2 This Consent Judgment shall apply to and be binding upon CEH and Settling
14 Defendant, and its respective divisions, subdivisions, and subsidiaries, and the successors or
15 assigns of any of them.

16 11.3 This Consent Judgment contains the sole and entire agreement and
17 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
18 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
19 merged herein and therein. There are no warranties, representations, or other agreements between
20 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
21 implied, other than those specifically referred to in this Consent Judgment have been made by any
22 Party hereto. No other agreements not specifically contained or referenced herein, oral or
23 otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation,
24 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
25 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
26 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
27 whether or not similar, nor shall such waiver constitute a continuing waiver.

1 11.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
2 that Settling Defendant might have against any other party, whether or not that party is a settling
3 defendant.


4 11.5 This Court shall retain jurisdiction of this matter to implement or modify the
5 Consent Judgment.

6 11.6 The stipulations to this Consent Judgment may be executed in counterparts
7 and by means of facsimile or portable document format (pdf), which taken together shall be
8 deemed to constitute one document.

9 11.7 Each signatory to this Consent Judgment certifies that he or she is fully
10 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into
11 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
12 Party.

13 11.8 The Parties, including their counsel, have participated in the preparation of
14 this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.
15 This Consent Judgment was subject to revision and modification by the Parties and has been
16 accepted and approved as to its final form by all Parties and their counsel. Accordingly, any
17 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
18 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
19 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
20 be resolved against the drafting Party should not be employed in the interpretation of this Consent
21 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

22
23 **IT IS SO STIPULATED:**
24 **CENTER FOR ENVIRONMENTAL HEALTH**

25
26 
27 _____
Charlie Pizarro
Associate Director

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CBI LABORATORIES, INC.



Signature

David Pair

Printed Name

Chief Operating Officer

Title

IT IS SO ORDERED:

Dated: _____, 2016

Judge of the Superior Court