

1 LEXINGTON LAW GROUP
2 Mark N. Todzo, State Bar No. 168389
3 Lucas Williams, State Bar No. 264518
4 503 Divisadero Street
5 San Francisco, CA 94117
6 Telephone: (415) 913-7800
7 Facsimile: (415) 759-4112
8 mtodzo@lexlawgroup.com
9 lwilliams@lexlawgroup.com

10 Attorneys for Plaintiff
11 CENTER FOR ENVIRONMENTAL HEALTH

12 SUPERIOR COURT FOR THE STATE OF CALIFORNIA

13 FOR THE COUNTY OF ALAMEDA

14 CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG16837579
15)
16 Plaintiff,)
17)
18 v.)
19)
20 BEIERSDORF, INC.,) [PROPOSED] CONSENT
21) JUDGMENT AS TO BEIERSDORF,
22) INC.
23 Defendants.)
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1 INTRODUCTION

1.1. This Consent Judgment is entered into by Plaintiff Center for Environmental Health, a non-profit corporation (“CEH”), and Beiersdorf, Inc. (“Settling Defendant”) to settle claims asserted by CEH against Settling Defendant as set forth in the operative Complaint in the matter *Center For Environmental Health v. Beiersdorf, Inc.*, Alameda County Superior Court Case No. RG16837579 (the “Action”). CEH and Settling Defendant are referred to collectively as the “Parties.”

1 **1.2.** On November 12, 2015, CEH served a 60-Day Notice of Violation (the “Notice”)
2 relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986, California
3 Health & Safety Code § 25249.5, et seq. (“Proposition 65”) on Settling Defendant, the California
4 Attorney General, the District Attorneys of every County in the State of California, and the City
5 Attorneys for every City in the State of California with a population greater than 750,000. The
6 Notice alleges that Settling Defendant failed to provide clear and reasonable warnings regarding
7 exposures to lead and lead compounds (“Lead”) resulting from the use of Settling Defendant’s
8 topical skin care products containing zinc oxide as an active ingredient (“the Products”).

9 **1.3.** On November 2, 2016, CEH filed the operative Complaint in the Action
10 (“Complaint”), naming Settling Defendant as a defendant.

11 **1.4.** Settling Defendant is a corporation that employs ten (10) or more persons and that
12 manufactures, distributes and/or sells Covered Products (as defined herein) in the State of
13 California or has done so in the past.

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 Notice and Complaint
16 and personal jurisdiction over Settling Defendant as to the acts alleged in the Complaint; (ii)
17 venue is proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this
18 Consent Judgment as a full and final resolution of all claims which were or could have been
19 raised in the Complaint based on the facts alleged in the Notice and Complaint with respect to
20 Covered Products manufactured, distributed and/or sold by Settling Defendant.

21 **1.6.** The Parties enter into this Consent Judgment as a full and final settlement of all
22 claims that were or could have been raised in the Complaint arising out of the facts or conduct
23 related to Settling Defendant alleged therein and in the Notice. By execution of this Consent
24 Judgment and agreeing to comply with its terms, the Parties do not admit any fact, conclusion of
25 law, or violation of law, nor shall compliance with the Consent Judgment constitute or be
26 construed as an admission by the Parties of any fact, conclusion of law or violation of law.
27 Settling Defendant denies the material, factual and legal allegations in the Notice and Complaint

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1 and expressly denies any wrongdoing whatsoever. Except as specifically provided herein,
2 nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument,
3 or defense any of the Parties may have in this or any other pending or future legal proceedings.
4 This Consent Judgment is the product of negotiation and compromise and is accepted by the
5 Parties solely for purposes of settling, compromising and resolving issues disputed in this Action.

6 **2. DEFINITIONS**

7 **2.1.** “Covered Products” means topical skin care products containing zinc oxide as an
8 active ingredient that are manufactured, distributed and/or sold by Settling Defendant in
9 California.

10 **2.2.** “Effective Date” means the date on which the Court enters this Consent
11 Judgment.

12 **3. INJUNCTIVE RELIEF**

13 **3.1. Reformulation.** Within thirty (30) days of the Effective Date, Settling Defendant
14 shall not manufacture, ship, sell or offer for sale any Covered Products that are likely to be sold in
15 California unless such Products meet the ingredient and finished product standards set forth in
16 this section. All Lead concentration levels pursuant to this Section 3.1 shall be determined by use
17 of a test performed by an accredited laboratory using inductively coupled plasma mass
18 spectrometry (ICP-MS) equipment with a level of detection of at least ten parts per billion (10
19 ppb) that meets standard laboratory QA/QC requirements.

20 **3.1.1. Maximum Lead Level for Zinc Oxide.** The level of Lead in the zinc
21 oxide used in the Products shall not exceed 10 parts per million (10 ppm) by weight.

22 **3.1.2. Specification to Zinc Oxide Suppliers.** On or before the Effective Date,
23 Settling Defendant shall issue specifications to all of its zinc oxide suppliers informing them that
24 Settling Defendant will not accept any shipments of zinc oxide unless the level of Lead in the zinc
25 oxide does not exceed 10 parts per million (10 ppm) by weight. Settling Defendant shall obtain
26 and maintain written certification from its suppliers of zinc oxide confirming their compliance
27 with the Lead specification set forth in this Section 3.1.

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3.1.3. Good Faith Efforts to Pursue Further Lead Reduction. Settling

Defendant shall continue to take, or cause to be taken, good faith and commercially reasonable efforts to further reduce the Lead content of the Products by using the zinc oxide with the lowest lead specification that is formulated for use in cosmetic and/or topical drug products.

4. PAYMENTS

4.1. Settling Defendant shall initially pay to CEH the total sum of \$66,250, which shall be allocated as follows:

4.1.1. \$8,707 as a civil penalty pursuant to California Health & Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with California Health & Safety Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of Environmental Health Hazard Assessment). The OEHHA portion of the civil penalty payment in the amount of \$6,530.25 shall be made payable to OEHHA and associated with taxpayer identification number 68-0284486. This payment shall be delivered as follows:

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

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

The CEH portion of the civil penalty payment in the amount of \$2,176.75 shall be made payable to the Center for Environmental Health and associated with taxpayer identification number 94-3251981.

4.1.2. \$6,530 as an Additional Settlement Payment (“ASP”) in lieu of civil penalty to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of

1 Regulations, Title 11, § 3204. CEH intends to place these funds in CEH's Toxics and Youth
2 Fund and use them to support CEH programs and activities that seek to educate the public about
3 Lead and other toxic chemicals in consumer products that are marketed to youth, expand its use
4 of social media to communicate with youth in California about the risks of exposures to Lead and
5 other toxic chemicals in the products they use and about ways to reduce those exposures, work
6 with industries that market products to youth to reduce exposure to Lead and other toxic
7 chemicals, and thereby reduce the public health impacts and risks of exposure to Lead and other
8 toxic chemicals in consumer products that are marketed to youth in California. CEH shall obtain
9 and maintain adequate records to document that ASPs are spent on these activities and CEH
10 agrees to provide such documentation to the Attorney General within thirty days of any request
11 from the Attorney General. The payment pursuant to this Section shall be made payable to the
12 Center for Environmental Health and associated with taxpayer identification number 94-
13 3251981.

14 **4.1.3.** \$51,013 as a reimbursement of a portion of CEH's reasonable attorneys'
15 fees and costs. This amount shall be divided into two checks: (1) a check for \$42,996 shall be
16 made payable to Lexington Law Group; and (2) a check for \$8,017 shall be made payable to the
17 Center for Environmental Health.

18 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in four (5)
19 separate checks, all to be delivered within ten (10) days following the Effective Date. The
20 payments required pursuant to Sections 4.1.1 and 4.1.3 shall each be made payable as set forth in
21 those sections. All checks shall be delivered to Mark Todzo at Lexington Law Group at the
22 address set forth in Section 8.1.2.

23 **5. ENFORCEMENT OF CONSENT JUDGMENT**

24 **5.1.** CEH may, by motion or application for an order to show cause before the Superior
25 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.
26 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH
27 shall provide Settling Defendant with a Notice of Violation and a copy of any test results which
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1 purportedly support CEH's Notice of Violation. For purposes of this Section 5.1, the Parties
2 agree that the only Lead contributing to the total amount of Lead in the Products results from the
3 inclusion of the zinc oxide in the Products. The Parties shall then meet and confer regarding the
4 basis for CEH's anticipated motion or application in an attempt to resolve it informally, including
5 providing Settling Defendant a reasonable opportunity of at least thirty (30) days to cure any
6 alleged violation. Should such attempts at informal resolution fail, CEH may file its enforcement
7 motion or application. The prevailing party on any motion to enforce this Consent Judgment
8 shall be entitled to its reasonable attorney's fees and costs incurred as a result of such motion or
9 application. This Consent Judgment may only be enforced by the Parties.

10 **6. MODIFICATION OF CONSENT JUDGMENT**

11 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
12 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

13 **7. CLAIMS COVERED AND RELEASE**

14 **7.1.** This Consent Judgment is a full, final and binding resolution between CEH acting
15 in the public interest and Settling Defendant and Settling Defendant's parents, officers, directors,
16 shareholders, divisions, subdivisions, subsidiaries, and their respective successors and assigns
17 ("Defendant Releasees") and all entities to whom they distribute or sell or have distributed or sold
18 Covered Products including, but not limited to, distributors, wholesalers, customers, retailers,
19 franchisees, cooperative members, and licensees ("Downstream Defendant Releasees"), of all
20 claims alleged in the Complaint in this Action arising from any violation of Proposition 65 that
21 have been or could have been asserted in the public interest against Settling Defendant and
22 Downstream Defendant Releasees, regarding the failure to warn about exposures to Lead in the
23 Covered Products manufactured, distributed, or sold by Settling Defendant prior to the Effective
24 Date.

25 **7.2.** CEH, for itself and on behalf of the public interest, releases, waives, and forever
26 discharges any and all claims alleged in the Complaint against Settling Defendant and
27 Downstream Defendant Releasees arising from any violation of Proposition 65 that have been or
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1 could have been asserted regarding the failure to warn about exposure to Lead in connection with
2 Covered Products manufactured, distributed, or sold by Settling Defendant prior to the Effective
3 Date.

4 **7.3.** Compliance with the terms of this Consent Judgment by Settling Defendant and
5 the Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Settling
6 Defendant and Downstream Defendant Releasees with respect to any alleged failure to warn
7 about Lead in Covered Products manufactured, distributed or sold by Settling Defendant after the
8 Effective Date.

9 **8. PROVISION OF NOTICE**

10 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
11 notice shall be sent by first class and electronic mail as follows:

12 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
13 receive notices pursuant to this Consent Judgment shall be:

14 Greg Sperla
15 Greenberg Traurig, LLP
16 1201 K Street, Suite 1100
17 Sacramento, CA 95814
18 sperlag@gtlaw.com

19 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
20 this Consent Judgment shall be:

21 Mark Todzo
22 Lexington Law Group
23 503 Divisadero Street
24 San Francisco, CA 94117
25 mtodzo@lexlawgroup.com

26 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by
27 sending the other Parties notice by first class and electronic mail.

28 **9. COURT APPROVAL**

9.1. This Consent Judgment shall become effective on the Effective Date, provided
however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
Settling Defendant shall support approval of such Motion.

1 **9.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or
2 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
3 purpose.

4 **10. GOVERNING LAW AND CONSTRUCTION**

5 **10.1.** The terms and obligations arising from this Consent Judgment shall be construed
6 and enforced in accordance with the laws of the State of California.

7 **11. ENTIRE AGREEMENT**

8 **11.1.** No supplementation, modification, waiver or termination of this Consent Judgment
9 shall be binding unless executed in writing by the Party to be bound thereby.

10 **11.2.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
11 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
12 such waiver constitute a continuing waiver.

13 **12. RETENTION OF JURISDICTION**

14 **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the
15 Consent Judgment.

16 **13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

17 **13.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized
18 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
19 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

20 **14. NO EFFECT ON OTHER SETTLEMENTS**

21 **14.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
22 against another entity on terms that are different from those contained in this Consent Judgment.

23 **15. EXECUTION IN COUNTERPARTS**

24 **15.1.** The stipulations to this Consent Judgment may be executed in counterparts and by
25 means of facsimile, which taken together shall be deemed to constitute one document.

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IT IS SO STIPULATED:
CENTER FOR ENVIRONMENTAL HEALTH



Charlie Pizarro
Associate Director

BEIERSDORF, INC.

Graeme Fleckney
Vice President of Finance

IT IS SO ORDERED:

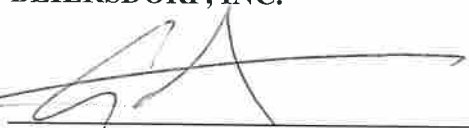
Dated: _____, 2016

Judge of the Superior Court

1 **IT IS SO STIPULATED:**
2 **CENTER FOR ENVIRONMENTAL HEALTH**

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5 _____
6 Charlie Pizarro
7 Associate Director

8 **BEIERSDORF, INC.**

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10 _____
11 Graeme Fleckney
12 Vice President of Finance

13 **IT IS SO ORDERED:**

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16 Dated: _____, 2016

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18 Judge of the Superior Court
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