



FILED
ALAMEDA COUNTY

OCT 23 2015 *BC*

CLERK OF THE SUPERIOR COURT
By *[Signature]* Deputy

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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:) **[PROPOSED] CONSENT**
20) **JUDGMENT AS TO NEST**
21) **FRAGRANCES, LLC**
22)
23) *Center for Environmental Health v. Noevir*
24) *U.S.A., Inc., et al., A.C.S.C. Case No. RG 14-*
25) *739157*
26)

27 **1. INTRODUCTION**

28 1.1 The parties to this Consent Judgment ("Parties") are the Center for
Environmental Health ("CEH") and defendant NEST Fragrances, LLC ("Settling Defendant").
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

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 March 18, 2015, 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 on a nationwide
15 basis.

16 3.3 **Action Regarding Specific Products.**

17 3.3.1 On or before the Effective Date, Settling Defendant shall cease selling the
18 Sprig Fragrances Body Wash in Anjou Pear & Sandalwood, SKU No. 8-14972-01355-1 (the
19 “Section 3.3 Product”). On or before the Effective Date, Settling Defendant shall also: (i) cease
20 shipping the Section 3.3 Product to any of its stores and/or customers that resell the Section 3.3
21 Product in California; and (ii) send instructions to its stores and/or customers that resell the
22 Section 3.3 Product in California instructing them either to: (a) return all the Section 3.3 Product
23 to Settling Defendant for destruction, or (b) directly destroy the Section 3.3 Product.

24 3.3.2 Any destruction of the Section 3.3 Product shall be in compliance with all
25 applicable laws.

26 3.3.3 Within sixty (60) days of the Effective Date, Settling Defendant shall
27 provide CEH with written certification from Settling Defendant confirming compliance with the
28 requirements of this Section 3.3.

1 **4. ENFORCEMENT**

2 4.1 CEH may, by motion or application for an order to show cause before the
3 Superior Court of Alameda County, enforce the terms and conditions contained in this Consent
4 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3
5 above, CEH shall provide Settling Defendant with a Notice of Violation and a copy of any test
6 results which purportedly support CEH's Notice of Violation. The Parties shall then meet and
7 confer regarding the basis for CEH's anticipated motion or application in an attempt to resolve it
8 informally, including providing Settling Defendant a reasonable opportunity of at least thirty (30)
9 days to cure any alleged violation. Should such attempts at informal resolution fail, CEH may
10 file its enforcement motion or application. This Consent Judgment may only be enforced by the
11 Parties.

12 **5. PAYMENTS**

13 5.1 **Payments by Settling Defendant.** Within five (5) business days of the Effective
14 Date, Settling Defendant shall pay the total sum of \$17,500 as a settlement payment. Each
15 settlement payment from Settling Defendant shall be paid in four separate checks delivered to
16 counsel for CEH at the address set forth in Section 8.1 below. The funds paid by Settling
17 Defendant shall be allocated between the following categories:

18 5.1.1 \$ 1,925 as a civil penalty pursuant to Health & Safety Code § 25249.7(b),
19 such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12
20 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard
21 Assessment). This check shall be made payable to the Center for Environmental Health.

22 5.1.2 \$2,625 as payment in lieu of civil penalty to CEH pursuant to Health &
23 Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH will use
24 such funds to continue its work educating and protecting people from exposures to toxic
25 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
26 Judgment and to purchase and test Settling Defendant's products to confirm compliance. In
27 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
28 percent (4%) of such funds to award grants to grassroots environmental justice groups working to

1 educate and protect people from exposures to toxic chemicals. The method of selection of such
2 groups can be found at the CEH web site at www.ceh.org/justicefund. This check shall be made
3 payable to the Center for Environmental Health.

4 5.1.3 \$12,950 as reimbursement of a portion of CEH's reasonable attorneys' fees
5 and costs. This check shall be made payable to the Lexington Law Group.

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.

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

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 Matthew R. Orr
15 Call & Jensen
16 610 Newport Center Drive, Suite 700
17 Newport Beach, CA 92660
18 morr@calljensen.com

19 8.3 Any Party may modify the person and address to whom the notice is to be sent
20 by sending the other Party notice by first class and electronic mail.

21 **9. COURT APPROVAL**

22 9.1 This Consent Judgment shall become effective upon entry by the Court. CEH
23 shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant
24 shall support entry of this Consent Judgment.

25 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
26 effect and shall never be introduced into evidence or otherwise used in any proceeding for any
27 purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

28 **10. ATTORNEYS' FEES**

 10.1 Should CEH prevail on any motion, application for an order to show cause, or
other proceeding to enforce a violation of this Consent Judgment, CEH shall be entitled to its
reasonable attorneys' fees and costs incurred as a result of such motion or application. Should

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

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

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

11 **11. OTHER TERMS**

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

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

17 11.3 This Consent Judgment contains the sole and entire agreement and
18 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
19 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
20 merged herein and therein. There are no warranties, representations, or other agreements between
21 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
22 implied, other than those specifically referred to in this Consent Judgment have been made by any
23 Party hereto. No other agreements not specifically contained or referenced herein, oral or
24 otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation,
25 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
26 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
27 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
28 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.

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1 IT IS SO STIPULATED:

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3 CENTER FOR ENVIRONMENTAL HEALTH

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Charlie Pizarro
Associate Director

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10 NEST FRAGRANCES, LLC

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Signature

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Printed Name

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Title

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21 IT IS SO ORDERED:

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Dated: _____, 2015

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Judge of the Superior Court

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IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

NEST FRAGRANCES, LLC

Nancy McKay
Signature

Nancy McKay
Printed Name

CEO 8.26.15
Title

IT IS SO ORDERED:

Dated: 10/23, 2015


Judge of the Superior Court