



7344869

FILED
ALAMEDA COUNTY

FEB 23 2010

CLERK OF THE SUPERIOR COURT

By: [Signature] Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

DERMAQUEST, INC.,

Defendant.

Case No. R.G. 10497526

**[PROPOSED] FINAL JUDGMENT
INCLUDING PERMANENT
INJUNCTION**

The People of the State of California ("California"), plaintiff, appearing through Edmund G. Brown Jr., Attorney General of California, by Deputy Attorney General Jonathan M. Eisenberg, and DermaQuest, Inc. dba DermaQuest Skin Therapy ("DermaQuest"), defendant, appearing through its counsel, Pillsbury Winthrop Shaw Pittman LLP, by Roxane A. Polidora, have consented to the entry of this Final Judgment Including Permanent Injunction (hereinafter, the "Judgment").

This Judgment is entered without any taking of evidence or proof, and without any adjudication of any issue of fact or law. This Judgment does not constitute evidence of or any admission by DermaQuest regarding any issue of fact or law alleged in the complaint in this matter. This Judgment and the accompanying stipulation for entry of final judgment constitute the complete, final, and exclusive agreement between California and DermaQuest resolving this

FINAL JUDGMENT INCLUDING PERMANENT INJUNCTION

ORIGINAL

RECEIVED
FEB - 5 2010

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

1 matter, and supersede any prior oral or written agreement between these parties.

2 California and DermaQuest having approved this Judgment as to form and content and
3 having waived their rights of appeal,

4 **IT IS HEREBY ORDERED THAT:**

5 1. This Court has jurisdiction over California and DermaQuest and the subject matter
6 of this lawsuit, and venue for this matter is proper in this Court.

7 2. This Judgment's injunctive provisions, stated in paragraph 3, *infra*, shall apply to
8 and cover:

9 a. DermaQuest, as well as its agents, employees, officers, directors, owners,
10 representatives, partners, successors, assigns, and all entities or persons acting in
11 concert with them and/or under DermaQuest's direct or indirect control
12 (collectively, the "Enjoined Parties"); and

13 b. All articles, articles of commerce, articles of consumption, articles of merchandise,
14 articles of produce, articles of trade, articles of use, commodities, commodities of
15 commerce, commodities of merchandise, commodities of produce, goods,
16 merchandise, produce, products, or transportation:

17 i. Developed, manufactured, packaged, marketed, or distributed by the
18 Enjoined Parties, individually, collectively, or in any subset of the
19 collective group; and/or

20 ii. Bearing (by the Enjoined Parties, individually, collectively, or in any
21 subset of the collective group under), or being marketed by the Enjoined
22 Parties, individually, collectively, or in any subset of the collective group
23 under, the brand name or trademark DERMAQUEST, DERMAQUEST
24 SKIN THERAPY, DERMAMINERALS, BUILDABLE COVERAGE,
25 BREATHABLE COVERAGE, ON-THE-GO FINISHING POWDER, or
26 any brand name or trademark including the term "derma" (collectively, the
27 "Subject DermaQuest Products").

28 3. Under Business & Professions Code sections 16750, 16754.5, and 17203, the

1 Enjoined Parties (individually, collectively, or in any subset of the collective group), are
2 permanently enjoined and restrained from:

- 3 a. Making with any third party, including but not limited to an independent
4 contractor of any type, any contract, obligation, or agreement, oral or written, to
5 “increase the price of merchandise or any commodity” (Bus. & Prof. Code
6 §16720(a)), relating to one or more of the Subject DermaQuest Products.
- 7 b. Making with any third party, including but not limited to an independent
8 contractor of any type, any agreement or contract, oral or written, “to fix at any
9 standard or figure, whereby its price to the public or consumer shall be in any
10 manner controlled or established, any article or commodity of merchandise,
11 produce, or commerce intended for sale, barter, use or consumption in this State”
12 (Bus. & Prof. Code §16720(d)), relating to one or more of the Subject DermaQuest
13 Products.
- 14 c. For any of the Subject DermaQuest products, “[m]ak[ing] or enter[ing] into or
15 execut[ing] or carry[ing] out any contracts, obligations, or agreements of any kind
16 or description [including oral or written], by which [any Enjoined DermaQuest
17 Entity and any third party, including but not limited to an independent contractor
18 of any type] do all or any or any combination of the following:
- 19 i. Bind themselves not to sell, dispose of or transport any article or any
20 commodity or any article of trade, use, merchandise, commerce or
21 consumption below a common standard figure, or fixed value[;]
- 22 ii. Agree in any manner to keep the price of such article, commodity or
23 transportation at a fixed or graduated figure[;]
- 24 iii. Establish or settle the price of any article, commodity or transportation
25 between them or themselves and others, so as directly or indirectly to
26 preclude a free and unrestricted competition among themselves, or any
27 purchasers or consumers in the sale or transportation of any such article or
28 commodity[; and/or]

1 iv. Agree to pool, combine or directly or indirectly unite any interests that they
2 may have connected with the sale or transportation of any such article or
3 commodity, that its price might in any manner be affected.” (Bus. & Prof.
4 Code §16720(e).)

5 4. To ensure compliance with this Judgment’s injunctive provisions, stated in
6 paragraph 3, *supra*, DermaQuest shall do the following:

- 7 a. Within ten calendar days of the entry of this Judgment, DermaQuest shall provide
8 a copy of this Judgment to each current DermaQuest director and officer, as well
9 as any current DermaQuest employee whose job responsibilities have ever
10 included calculating, determining, establishing, estimating, monitoring, or setting
11 retail prices for any DermaQuest products. Thereafter, within two weeks of the
12 provision of said copies of this Judgment to the above-mentioned people, a
13 DermaQuest director, officer, or attorney shall prepare a declaration under penalty
14 of perjury under the laws of the State of California stating, “DermaQuest has
15 complied in full with the requirements of paragraph 4(a) of the final judgment in
16 People v. DermaQuest, Inc.” (with no other verbiage contradicting same), and
17 shall have that declaration delivered (by personal messenger or U.S. mail) to
18 Jonathan M. Eisenberg, c/o Office of the Attorney General, 300 South Spring St.,
19 Ste. 1702, Los Angeles, CA 90013.
- 20 b. Within two weeks of the entry of this Judgment, DermaQuest shall send written
21 correspondence to each entity that, since January 1, 2007, made any agreement
22 with DermaQuest to maintain in any manner resale prices established or set by
23 DermaQuest for any DermaQuest products, with each piece of said
24 correspondence stating, “This letter is to inform you that DermaQuest is
25 immediately, unilaterally disavowing all parts of DermaQuest’s distributor or
26 resale agreement with you that purportedly obligated you to maintain certain resale
27 prices for DermaQuest products. As far as DermaQuest is concerned, you do not
28 have an agreement with DermaQuest to maintain any resale prices for DermaQuest

1 products” (with no other verbiage contradicting same). Each piece of said
2 correspondence shall be on DermaQuest letterhead, signed by a director or officer
3 of DermaQuest, addressed to the last known U.S. mail address of the recipient
4 entity, and delivered by U.S. mail, return receipt requested. Thereafter, within two
5 weeks of the delivery of all said pieces of correspondence to the above-mentioned
6 entities, as confirmed by the return receipts (to be maintained by DermaQuest), a
7 DermaQuest director, officer, or attorney shall do the following:

- 8 i. Prepare a declaration under penalty of perjury under the laws of the State
9 of California stating, “DermaQuest has complied in full with the
10 requirements of paragraph 4(b) of the final judgment in People v.
11 DermaQuest, Inc.” (with no other verbiage contradicting same); and
- 12 ii. Have that declaration delivered (by personal messenger or U.S. mail) to
13 Jonathan M. Eisenberg, Deputy Attorney General, c/o Office of the
14 Attorney General, 300 South Spring St., Ste. 1702, Los Angeles, CA
15 90013.

16 5. Upon entry of this Judgment, DermaQuest shall pay to California the sum of
17 \$70,000 as civil penalties under Business & Professions Code section 17206. Said civil penalties
18 shall be paid by DermaQuest in equal installments of \$17,500 due on March 31, 2010, June 30,
19 2010, September 30, 2010 and December 31, 2010; however, nothing in the foregoing shall limit
20 DermaQuest’s ability to pay said civil penalties prior to these dates.

21 6. Upon entry of this Judgment, DermaQuest shall pay to California the sum of
22 \$50,000 for the costs of the investigation in this matter, attorney fees, and other expenses, under
23 Business & Professions Code section 16750. Said costs, attorney fees, and other expenses shall
24 be paid by DermaQuest in equal installments of \$12,500 due on March 30, 2010, June 30, 2010,
25 September 30, 2010 and December 31, 2010; however, nothing in the foregoing shall limit
26 DermaQuest’s ability to pay said costs, attorney fees and other expenses prior to these dates.
27 These attorney-fees/costs payments are designated for the exclusive use of the Office of the
28 Attorney General for the investigation and prosecution of antitrust violations, and for consumer

1 education and outreach.

2 7. The sums of money described in paragraphs 5 and 6, *supra*, shall be paid by
3 certified checks made payable to "California Attorney General's Office" and delivered promptly
4 (by personal messenger or overnight courier) to Jonathan M. Eisenberg, Deputy Attorney
5 General, c/o Office of the Attorney General, 300 South Spring St., Ste. 1702, Los Angeles, CA
6 90013.

7 8. The payments required by this Judgment are not dischargeable in bankruptcy.

8 9. This Judgment fully and finally resolves only those matters specifically set forth in
9 the allegations of the complaint in this lawsuit, for conduct that occurred before entry of this
10 Judgment.

11 10. Nothing in this Judgment shall be construed to relieve DermaQuest of its
12 obligations to comply, or to prohibit DermaQuest from complying, with all applicable local, state,
13 and federal laws, regulations, or rules, or to permit DermaQuest to engage in any acts or practices
14 prohibited by any applicable local, state, or federal law, regulation, or rule.

15 11. This Court shall retain jurisdiction over this matter for purposes of enabling
16 California or DermaQuest to apply to the Court at any time for further directions or orders as may
17 be necessary or appropriate for the construction or carrying out of this Judgment, for modification
18 of any of the injunctive provisions of this Judgment, for enforcement of or compliance with this
19 Judgment, and/or for the punishment of any violation of this Judgment.

20 12. This Judgment shall be binding and effective immediately upon entry by the Clerk
21 of this Court, and the Clerk is ordered to enter this judgment forthwith.

22
23 Dated: February 1, 2010

John A. Bick
Superior Court Judge

24
25 LA2009603309
Document in ProLaw