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8 Attorneys for Plaintiff  
MICHAEL DIPIRRO

9  
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 IN AND FOR THE COUNTY OF ALAMEDA, HAYWARD BRANCH  
12 UNLIMITED CIVIL JURISDICTION

13 MICHAEL DIPIRRO, ) No. 01-032306  
14 )  
14 Plaintiff, )  
15 )  
15 v. ) SETTLEMENT AGREEMENT  
16 )  
16 MARKWINS INTERNATIONAL; and DOES )  
17 1 through 1000, )  
18 )  
18 Defendants. )  
\_\_\_\_\_ )

19  
20 This Settlement Agreement ("Agreement" or "Settlement Agreement") is entered into  
21 by and between Michael DiPirro and Markwins International, a California corporation  
22  
23

24 SETTLEMENT AGREEMENT

1 ("Markwins") as of December 10, 2001 (the "Effective Date"). The parties agree to the  
2 following terms and conditions:

3 **WHEREAS:**

4 A. Michael DiPirro is an individual residing in San Francisco, California,  
5 who seeks to promote awareness of exposures to toxic chemicals and improve human health  
6 by reducing or eliminating hazardous substances contained in consumer and industrial  
7 products;

8 B. Markwins is a company that currently manufactures and distributes  
9 certain eyeshadows, blushes, lipsticks, lip liners and cosmetic kits (which contain two or more  
10 cosmetic items) that are alleged to contain lead (or lead compounds), a substance known to  
11 the State of California to cause birth defects (or other reproductive harm) (the "Listed  
12 Chemical");

13 C. On October 11, 2000, Michael DiPirro first served Markwins and  
14 other public enforcement agencies with a document entitled "60-Day Notice of Violation"  
15 which provided Markwins and such public enforcers with notice that Markwins was in  
16 violation of Health & Safety Code §25249.6 for allegedly failing to warn purchasers that  
17 certain products it sells in California expose users the Listed Chemical; and

18 D. On November 28, 2001, Michael DiPirro filed a complaint entitled  
19 Michael DiPirro v. Markwins International, et al. in the Alameda County Superior Court,  
20 naming Markwins as a defendant and alleging violations of Business & Professions Code  
21 §17200 and Health & Safety Code §25249.6 in the interest of the general public in California  
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1 who allegedly have been exposed to the Listed Chemical contained in certain products that  
2 Markwins sells.

3 E. Nothing in this Agreement shall be construed as an admission by  
4 Markwins of any fact, finding, issue of law, assertion, allegation or violation of law, nor shall  
5 compliance with this Agreement constitute or be construed as an admission by Markwins of  
6 any fact, finding, conclusion, issue of law, or violation of law. However, this paragraph shall  
7 not diminish or otherwise affect the obligations, responsibilities, and duties of Markwins  
8 under this Agreement.

9 NOW THEREFORE, MICHAEL DIPIRRO AND MARKWINS AGREE AS  
10 FOLLOWS:

11 1. **Reformulation Commitment.** Markwins shall reformulate the Products so as to  
12 *eliminate the presence of lead* as follows:

13 1.1. **Reformulation Timetable.** Beginning immediately, Markwins shall  
14 initiate or otherwise arrange for diligent efforts to be undertaken to revise the Product's  
15 formulations so as to *eliminate the presence of lead*, as that phrase is defined in paragraph  
16 1.4, below. As of July 31, 2002, Markwins agrees not to manufacture or sell (or cause to be  
17 manufactured or sold on its behalf) any of the Products unless each such Product has been  
18 manufactured so as to *eliminate the presence of lead*, as that phrase is defined in paragraph  
19 1.4, below.

20 1.2. **Warning Commitment.** Although Markwins intends to reformulate the  
21 Products, as discussed in paragraph 1.1 above, in the event that Products are manufactured  
22 or sold by Markwins in California that still contain lead, as that phrase is defined in paragraph  
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1 1.4, below, after July 31, 2002, Markwins agrees that such Products shall comply with  
2 section 1.3, below.

3 **1.3. Health Hazard Statement.**

4 ¶1.3.A. For all Products containing lead (or lead compounds), such  
5 Products shall bear the following warning statement:

6 **“WARNING: This product contains lead, a chemical known to the  
7 State of California to cause birth defects (or other  
reproductive harm).”**

8 The warning statement shall be prominently placed on the Products  
9 label with such conspicuousness, as compared with other words, statements, designs or  
10 devices, by way of adhesive sticker or otherwise printed on the label, as to render it likely to  
11 be read and understood by an ordinary individual under customary conditions of purchase or  
12 use.

13 **1.3.B. Product Characterization.** Markwins acknowledges that plaintiff  
14 asserts that each of the Products listed in Exhibit A contains lead (or lead compounds) and  
15 Plaintiff alleges that the customary use or application of the Products is likely to expose users  
16 to lead (or lead compounds), a substance known to the State of California to birth defects (or  
17 other reproductive harm). In the event that Markwins obtains analytical, risk assessment or  
18 other data (“Exposure Data”) that shows an exposure to any or all Products will have “no  
19 observable effect,” as such standard is applicable and as is defined under Health & Safety  
20 Code §25249.10(c) and Markwins seeks to eliminate the warnings, as set forth herein, then  
21 Markwins shall provide DiPirro with ninety (90) days prior written notice of its intent to limit  
22 or eliminate the warning provisions under this Agreement based on the Exposure Data and

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1 shall provide DiPirro with all such supporting Exposure Data. Within ninety (90) days of  
2 receipt of Markwins Exposure Data, DiPirro shall provide Markwins with written notice of  
3 his intent to challenge the Exposure Data (in the event that he chooses to make such a  
4 challenge). If DiPirro fails to provide Markwins written notice of his intent to challenge the  
5 Exposure Data within ninety (90) days of receipt of Markwins' notice and the Exposure  
6 Data, DiPirro shall waive all rights to challenge the Exposure Data, and Markwins shall be  
7 entitled to limit or eliminate the warning provisions required under this Agreement with  
8 respect to those Product(s) to which the Exposure Data applies. If DiPirro timely notifies  
9 Markwins of his intent to challenge the Exposure Data, DiPirro and Markwins (a) may stop  
10 its efforts to eliminate the warnings upon notice to DiPirro with no further liability or  
11 obligations or (b) shall negotiate in good faith for a period not to exceed thirty (30) days  
12 following receipt of Markwins' notice to attempt to reach a settlement of this issue. If a  
13 settlement is not reached, DiPirro and Markwins agree to submit such challenge to the  
14 Superior Court for determination, pursuant to the court's continuing jurisdiction of this  
15 matter under C.C.P. §664.6 and this Agreement. The prevailing party shall be entitled to  
16 reasonable attorneys' fees and costs associated with bringing a motion brought under this  
17 paragraph to the court for determination.

18 **1.4. Lead Content.** Through reformulation, Markwins intends to  
19 completely *eliminate the presence of lead* in the Products. Markwins asserts, however, that  
20 it may be impossible to remove all detectable amounts of lead from the Products. Therefore,  
21 for purposes of this Settlement Agreement, the *presence of lead* shall be deemed to be  
22 *eliminated* in the Products according to the following schedule: 1) no lipstick shall contain

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24 SETTLEMENT AGREEMENT

1 greater than .35 parts per million (ppm) of lead; and 2) no other cosmetic item, including eye  
2 shadows and blushes, shall contain greater than .5 parts per million (ppm) of lead. Markwins  
3 shall use EPA testing methodology 6020 or 6010 to determine whether the respective levels  
4 have been exceeded in their cosmetic products. The parties agree that Markwins may modify  
5 the test method so long as: 1) the method is appropriate under 22 CCR §12901; and 2)  
6 DiPirro is provided 30 day written notice of the requested modification. Consent by DiPirro  
7 to such modification shall not be unreasonably withheld.

8 **2. Payment Pursuant To Health & Safety Code §25249.7(b).**

9 Pursuant to Health & Safety Code §25249.7(b), Markwins shall pay a civil penalty of  
10 \$115,000 (one hundred fifteen thousand dollars) in two installments. The first payment of  
11 \$25,000 (twenty five thousand dollars) shall be paid within fifteen (15) calendar days after the  
12 Effective Date of this Agreement and shall be held by DiPirro's counsel in his firm trust  
13 account until the Alameda County Superior Court approves and enters the Settlement  
14 Agreement.

15 The second payment of \$90,000 (ninety thousand dollars) shall be made on or  
16 before September 1, 2002. However, the second payment shall be waived if Markwins  
17 reformulates its Products to *eliminate the presence of lead* (as defined in paragraph 1.4,  
18 above) by July 31, 2002. In order to receive a waiver of the second penalty payment, a  
19 written statement from Markwins or its counsel stating that reformulation has been  
20 completed must be provided to DiPirro no later than August 15, 2002.

21 The penalty payments are to be made payable to "Chanler Law Group In  
22 Trust For Michael DiPirro". Penalty monies shall be apportioned by DiPirro in accordance

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1 with Health & Safety Code §25192, with 75% of these funds remitted to the State of  
2 California's Department of Toxic Substances Control. If the Settlement Agreement is not  
3 approved by the Court, DiPirro will return all funds, with interest thereon at a rate of six  
4 percent (6%) per annum, within ten (10) calendar days of notice of the Court's decision.

5 Markwins understands that the payment schedule as stated in this Settlement  
6 Agreement is a material factor upon which DiPirro has relied in entering into this Settlement  
7 Agreement. Markwins agrees that all payments will be made in a timely manner in  
8 accordance with the payment due dates. Markwins will be given a five (5) calendar day grace  
9 period from the date payment is due. Markwins agrees to pay Michael DiPirro a \$250 per  
10 calendar day fee for each day the payment is not received after the grace period ends. For  
11 purposes of this paragraph, each new day (requiring an additional \$250 payment) will begin  
12 at 5 p.m. (PST).

13 **3. Reimbursement Of Fees And Costs.** The parties acknowledge that  
14 DiPirro offered to resolve the dispute without reaching terms on the amount of fees and costs  
15 to be reimbursed, thereby leaving this open issue to be resolved after the material terms of the  
16 agreement had been reached, and the matter settled. Markwins then expressed a desire to  
17 resolve the fee and cost issue concurrently with other settlement terms, so the parties tried to  
18 (and did) reach an accord on the compensation due to DiPirro and his counsel under the  
19 private attorney general doctrine codified at C.C.P. §1021.5.

20 Markwins shall reimburse DiPirro and his counsel for his fees and costs,  
21 incurred as a result of investigating, bringing this matter to Markwins' attention, litigating  
22 and negotiating a settlement in the public interest. Markwins shall pay \$125,000 (one

23 SETTLEMENT AGREEMENT  
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1 hundred twenty five thousand dollars), except as provided for in paragraph 3.1 below, for all  
2 attorneys' fees, expert and investigation fees, and litigation costs. Markwins agrees to pay  
3 the total sum of \$125,000, except as provided for in paragraph 3.1 below, within fifteen (15)  
4 calendar days of the Effective Date. Such sum shall be held by DiPirro's counsel in his firm  
5 trust account until the Alameda County Superior Court approves and enters the Settlement  
6 Agreement. If the Settlement Agreement is not approved by the Court, DiPirro will return all  
7 funds, with interest thereon at a rate of six percent (6%) per annum, within ten (10) calendar  
8 days of notice of the Court's decision. Payment should be made payable to the "Chanler Law  
9 Group".

10 Markwins understands that the payment schedule as stated in this Settlement  
11 Agreement is a material factor upon which DiPirro has relied in entering into this Settlement  
12 Agreement. Markwins agrees that all payments will be made in a timely manner in  
13 accordance with the payment due dates. Markwins will be given a five (5) calendar day grace  
14 period from the date payment is due. Markwins agrees to pay Michael DiPirro a \$250 per  
15 calendar day fee for each day the payment is not received after the grace period ends. For  
16 purposes of this paragraph, each new day (requiring an additional \$250 payment) will begin  
17 at 5 p.m. (PST).

18 **3.1 Additional Contingent Fees and Costs.** In the event that the  
19 California Attorney General's Office, pursuant to 11 CCR Section 3000, *et seq.*, serves  
20 objections to this Settlement Agreement on either of the parties, such that it requires plaintiff  
21 to incur additional legal fees or costs relating to this Settlement Agreement, Markwins shall  
22 reimburse DiPirro for any fees and costs incurred by DiPirro and his counsel in excess of

23 SETTLEMENT AGREEMENT  
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1 \$1,500, but in any case no higher than \$7,000 above the initial \$1,500, from the date of  
2 receipt of the Attorney General's objections. Such additional legal fees or costs relating to  
3 this Settlement Agreement include, but are not limited to: further editing and finalizing of the  
4 Settlement Agreement; corresponding with opposing counsel; retention of experts; presenting  
5 of the Settlement Agreement (or any modifications thereof) to the Attorney General for  
6 further comment; and any briefing and/or appearance before the Court related to this  
7 Settlement Agreement.

8 Plaintiff agrees to document all fees and costs incurred from the date  
9 of receipt of the Attorney General's objections through the date of court approval of the  
10 Settlement Agreement. Prior to receiving such documentation, Markwins agrees to enter  
11 into a letter agreement in which the parties agree that, by transmitting such information, no  
12 privilege will be waived by DiPirro or his counsel.

13 Such additional reimbursement of legal fees and costs shall be due  
14 within ten (10) calendar days after receipt of both notice of Court approval of the Settlement  
15 Agreement and final billing statement from plaintiff. Markwins has the right to object to such  
16 reimbursement and may submit the resolution of this issue to the American Arbitration  
17 Association (AAA) in Northern California to determine the reasonableness of the additional  
18 fees and costs sought, provided that such notice of objection or decision to arbitrate is  
19 received by plaintiff by the end of the ten (10) calendar days. If an arbitration notice is not  
20 filed with AAA in a timely manner, DiPirro may file a motion with the Court for fees and  
21 costs pursuant to CCP §1021.5 and this Settlement Agreement associated with any additional  
22 fees and costs incurred as set forth in this paragraph.

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1                   **4. Michael DiPirro's Release Of Markwins.** Michael DiPirro, by this  
2 Agreement, on behalf of himself, his agents, representatives, attorneys, assigns and in the  
3 interest of the general public, waives all rights to institute or participate in, directly or  
4 indirectly, any form of legal action, and releases all claims, liabilities, obligations, losses,  
5 costs, expenses, fines and damages, against Markwins and its distributors, retailers (including,  
6 but not limited to, Wal-Mart Co. Inc.; J.C. Penny Company, Inc.; Walgreen Co., Inc.;  
7 Macy's; Nordstrom Inc.; Sears; and Mervyn's), customers, directors, officers, employees,  
8 successors and assigns, whether under Proposition 65 or the Business & Profession Code  
9 §17200 et seq. based on Markwins' alleged failure to warn for cancer or reproductive  
10 toxicity caused by exposure to the Listed Chemical contained in any of the Products. With  
11 respect to *DiPirro v. Wal-Mart* (Alameda County Superior Court No. H217587-0), plaintiff  
12 will dismiss the case without prejudice within five (5) business days of receiving the approval  
13 of this Settlement Agreement from the Court.

14                   **5. Markwins' Release Of Michael DiPirro.** Markwins, by this  
15 Agreement, waives all rights to institute any form of legal action against Michael DiPirro and  
16 his attorneys or representatives, for all actions or statements made by Michael DiPirro, and  
17 his attorneys or representatives, in the course of seeking enforcement of Proposition 65 or  
18 Business & Profession Code §17200 against Markwins.

19                   **6. Court Approval.** If, for any reason, this Settlement Agreement is not  
20 approved by the Court, this Agreement shall be deemed null and void.

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1                   7.     **Severability.** In the event that any of the provisions of this  
2 Agreement are held by a court to be unenforceable, the validity of the enforceable provisions  
3 shall not be adversely affected.

4                   8.     **Attorney's Fees.** In the event that a dispute arises with respect to any  
5 provision(s) of this Agreement (including, but not limited to, disputes arising from the  
6 payments provisions in paragraphs 2 and 3), the prevailing party shall be entitled to recover  
7 costs and reasonable attorneys' fees.

8                   9.     **Governing Law.** The terms of this Agreement shall be governed by  
9 the laws of the State of California.

10                  10.    **Notices.** All correspondence to Michael DiPirro shall be mailed to:

11                             Jennifer Henry or David Bush  
12                             Bush & Henry  
13                             4400 Keller Ave., Suite 200  
                              Oakland, CA 94605  
                              (510) 577-0747

14                             All correspondence to Markwins shall be mailed to:

15                             Thomas H. Clarke, Jr., Esq.  
16                             Ropers, Majeski, Kohn & Bentley  
17                             333 Market Street, Suite 3150  
                              San Francisco, CA 94105  
                              (415) 543-4800

18  
19                  11.    **Compliance With Reporting Requirements (Health & Safety**  
20 **Code §25249.7(f)).** The parties acknowledge that the reporting provisions of Health &  
21 Safety Code § 25249.7(f) apply to this Settlement Agreement. Counsel for DiPirro shall  
22 comply with that section by submitting the required reporting form to, and serving a copy of

23 SETTLEMENT AGREEMENT  
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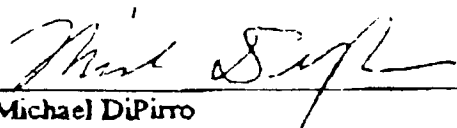
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this Settlement Agreement on the California Attorney General's Office within two business days after the parties execute this Settlement Agreement. Following the expiration of the Attorney General's thirty-day review period, counsel for DiPirro shall submit the Settlement Agreement to the Court in accordance with the requirements of Health & Safety Code § 25249.7(f) and its implementing regulations, thereby allowing the Attorney General to serve any comments to this Settlement Agreement prior to the end of the thirty (30) day period.

14. **Counterparts and Facsimile.** This Agreement may be executed in counterparts and facsimile, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

15. **Authorization.** The undersigned are authorized to execute this Agreement on behalf of their respective parties and have read, understood and agree to all of the terms and conditions of this Agreement.

**AGREED TO:**  
**DATE:** \_\_\_\_\_

  
\_\_\_\_\_  
Michael DiPirro  
PLAINTIFF

**AGREED TO:**  
**DATE:** \_\_\_\_\_

\_\_\_\_\_  
Markwins International  
DEFENDANT

1 this Settlement Agreement on, the California Attorney General's Office within two business  
 2 days after the parties execute this Settlement Agreement. Following the expiration of the  
 3 Attorney General's thirty-day review period, counsel for DiPirro shall submit the Settlement  
 4 Agreement to the Court in accordance with the requirements of Health & Safety Code  
 5 § 25249.7(f) and its implementing regulations, thereby allowing the Attorney General to  
 6 serve any comments to this Settlement Agreement prior to the end of the thirty (30) day  
 7 period.

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 9 counterparts and facsimile, each of which shall be deemed an original, and all of which, when  
 10 taken together, shall constitute one and the same document.

11 13. Authorization. The undersigned are authorized to execute this  
 12 Agreement on behalf of their respective parties and have read, understood and agree to all of  
 13 the terms and conditions of this Agreement.

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 16 AGREED TO:  
 17 DATE: \_\_\_\_\_

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 20 AGREED TO:  
 21 DATE: 12/19/01

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 24 \_\_\_\_\_  
 25 Michael DiPirro  
 PLAINTIFF

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 28 \_\_\_\_\_ - Chief Adm. Officer  
 Markwins International  
 DEFENDANT

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**EXHIBIT A**

A. Cosmetics packaged by Markwins International and sold at various retail locations throughout California:

- Eye shadows
- Blushes
- Lipsticks
- Lip liners

SETTLEMENT AGREEMENT

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Attorneys for Plaintiff  
MICHAEL DIPIRRO

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA, HAYWARD BRANCH  
UNLIMITED CIVIL JURISDICTION

MICHAEL DIPIRRO, ) No. 01-032306  
)  
Plaintiff ) PROOF OF SERVICE  
)  
v. )  
)  
MARKWINS INTERNATIONAL; and )  
DOES 1 through 1000, )  
)  
)  
Defendants. )  
\_\_\_\_\_ )

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action; my business address is 4400 Keller Avenue, Suite 200, Oakland, CA 94605.

On December 21, 2001 I served the following documents:

CONSENT JUDGMENT;

REPORT OF SETTLEMENT; and

REPORT OF SETTLEMENT ATTACHMENT

the following party or parties by placing a true and correct copy thereof in a sealed envelope, via Fed-Ex overnight mail, addressed to the party or parties listed below, and delivering it to an authorized Fed-Ex drop-off location:

Office of the California Attorney General  
Proposition 65 Enforcement Reporting  
Attention: Prop 65 Coordinator  
1515 Clay Street, 20<sup>th</sup> Floor  
P.O. Box 70550  
Oakland, CA 94612-0550

Executed on December 21, 2001 at Oakland, California.

  
Casey Langfelder