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9 Public Interest Alliance LLC

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 FOR THE COUNTY OF ALAMEDA

12 UNLIMITED CIVIL JURISDICTION

13 THE PUBLIC INTEREST ALLIANCE, LLC, a
14 California limited liability company

15 Plaintiff,

16 vs.

17 ACCESS BUSINESS GROUP LLC, et al.

18 Defendants.

) Case No. RG13697992

) [PROPOSED] CONSENT JUDGMENT –
) KANEBO COSMETICS USALLC

) (Cal. Health & Safety Code section 25249.6 *et*
) *seq.*)

19 1. INTRODUCTION

20 1.1 **Parties.** This Consent Judgment is entered into by and between plaintiff PUBLIC
21 INTEREST ALLIANCE LLC (“PIA”) and KANEBO COSMETICS USA LLC (“Kanebo”), with PIA
22 and Kanebo collectively referred to as the “Parties.”

23 1.2 **Public Interest Alliance LLC.** Public Interest Alliance LLC is a California limited
24 liability company dedicated to improving human health, preserving the natural environment, and
25 promoting compliance with environmental and consumer disclosure laws.

26 1.3 **Kanebo.** For purposes of this [Proposed] Consent Judgment only, Kanebo is deemed to
27 be a “person in the course of doing business” for purposes of the Safe Drinking Water and Toxic
28 Enforcement Act of 1986, California Health & Safety Code § 25249.6, *et seq.* (“Proposition 65”).

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Case No.: RG13697992

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[PROP] CONSENT JUDGMENT – KANEBO

1 1.4 **General Allegations**

2 1.4.1 PIA alleges that Kanebo manufactured, imported, sold and/or distributed for sale
3 in California, cosmetic and personal care powders that contain Titanium Dioxide (“TiO2”). PIA further
4 alleges that during use, some TiO2 is released into the air, exposing consumers to unbound TiO2
5 particles of respirable size without the health hazard warnings that Proposition 65 requires. A list of
6 such products is identified on Exhibit A attached hereto (the “Covered Products”). TiO2 is a chemical
7 widely used as a whitening agent in a wide range of consumer products, including, without limitation,
8 paper, paints, printers’ inks, toothpaste, cosmetics, and personal care products. In 2010, the
9 International Agency for Research on Cancer (“IARC”) issued Monograph 93, which concluded that
10 TiO2 is “possibly carcinogenic” to humans when inhaled.

11 1.4.2 Pursuant to Proposition 65, on September 2, 2011, California identified and
12 listed Titanium Dioxide (airborne, unbound chemicals of respirable size) as a chemical known to cause
13 cancer. Titanium Dioxide (airborne, unbound chemicals of respirable size) became subject to the “clear
14 and reasonable warning” requirements of the Act one year later on September 2, 2012. Cal. Code
15 Regs., Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8, 25249.10(b).

16 1.4.3 Titanium Dioxide (airborne, unbound chemicals of respirable size) is hereinafter
17 referred to as the “Listed Chemical.” PIA alleges that the Listed Chemical is released into the air when
18 the Covered Products are applied to the skin by brush, pad or sponge, leading to human exposures.

19 1.5 **Notice of Violation.** On or about June 21, 2013, PIA served Kanebo and certain
20 requisite public enforcement agencies with Proposition 65 60-Day Notices of Violation and
21 Proposition 65 Supplemental Notices of Violation (the “NOV”) that provided the recipients with notice
22 of alleged violations of Proposition 65 based on Kanebo’s alleged failure to warn customers and
23 consumers, workers and other individuals that the Covered Products exposed users in California to the
24 Listed Chemical. To the best of the Parties’ knowledge, no public enforcer has commenced or is
25 diligently prosecuting the allegations set forth in the NOV.

26 1.6 **Complaint.** On October 3, 2013, PIA filed a Complaint in the Superior Court in and for
27 the County of Alameda styled, *PIA v. Access Business Group, LLC, et al.*, Case No. RG13697992,

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1 alleging violations of Proposition 65 arising from unwarned exposures to the Listed Chemical when
2 the Covered Products are used (the "Complaint")

3 1.7 **No Admission.** Kanebo denies the material factual and legal allegations contained in
4 the NOV and Complaint and maintains that all products it has manufactured, imported, distributed,
5 and/or sold in California, including the Covered Products, have been and are in compliance with all
6 laws. Nothing in this proposed Consent Judgment shall be construed as an admission by Kanebo of any
7 fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this proposed
8 Consent Judgment constitute or be construed as an admission by Kanebo of any fact, finding,
9 conclusion, issue of law, or violation of law. This section shall not, however, diminish or otherwise
10 affect Kanebo's obligations, responsibilities, and duties under this proposed Consent Judgment.

11 1.8 **Consent to Jurisdiction.** For purposes of this proposed Consent Judgment only, the
12 Parties stipulate that this Court has jurisdiction over Kanebo as to the allegations contained in the
13 Complaint, that venue is proper in the County of Alameda, and that this Court has jurisdiction to enter
14 and enforce the provisions of this Consent Judgment pursuant to Proposition 65 and California Code of
15 Civil Procedure § 664.6.

16 2. **DEFINITIONS**

17 2.1 **California Customers.** "California Customer" shall mean any customer that Kanebo
18 reasonably understands is located in California, has a California warehouse or distribution center,
19 maintains a retail outlet in California, or has made any internet sales into California between
20 September 2, 2012, and the Effective Date, inclusive.

21 2.2 **Effective Date.** "Effective Date" shall mean the date that this Court enters an order
22 approving the terms of this proposed Consent Judgment.

23 2.3 **Reformulated Products.** "Reformulated Products" shall mean Covered Products that
24 contain no Titanium Dioxide that was added intentionally as a product ingredient.

25 2.4 **Retailer.** "Retailer" means a Kanebo authorized entity or person that offers a Covered
26 Product for retail sale to consumers in the State of California.

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1 **3. COVENANTS IN LIEU OF INJUNCTION**

2 3.1 **Reformulation Covenant.** Commencing on the Effective Date, Kanebo shall not
3 distribute or sell to California Customers, manufacture or import for distribution or sale to California
4 Customers or cause to be manufactured or imported for distribution or sale to California Customers,
5 any Covered Products that are not Reformulated Products or unless and until Kanebo complies with
6 the provisions of Paragraph 3.5, below (Product Warnings) (the "Reformulation Covenant").

7 3.2 **Vendor Notification/Certification.** Kanebo hereby certifies that is has provided
8 written notice to all of its vendors of each of the Covered Products, instructing each such vendor to no
9 longer provide Covered Products that contain Titanium Dioxide.

10 3.3 **Covered Products No Longer in Kanebo's Control.** Kanebo hereby certifies that it
11 has sent a letter, electronic or otherwise ("Notification Letter") to all California stores or
12 establishments that Kanebo reasonably understands or believes had any inventory of Covered Products
13 available for sale in California as of the date that Kanebo was served with the NOV. The Notification
14 Letter advised the recipients to return, at Kanebo's sole expense, all units of the Covered Products held
15 for sale in California or to California Customers to Kanebo.

16 3.4 **Current Inventory.** PIA and its counsel acknowledge that Kanebo has provided PIA
17 and its counsel with evidence supporting the conclusion that Kanebo has ceased selling and
18 distributing any Covered Products in California or to a California Customer. To the best of Kanebo's
19 knowledge, as of the Effective Date, no Retailers have any Covered Products remaining in inventory
20 for sale in California or to a California Customer.

21 3.5 **Product Warnings**

22 3.5.1 **Product Labeling.** If Kanebo sells any Covered Products in the future that are
23 not Reformulated Products, Kanebo shall provide a warning under this Consent Judgment, which shall
24 be (1) affixed to the exterior packaging of such product or (2) affixed to the product itself in immediate
25 proximity to any marketing, ownership or pricing tags or labels or, if none, to a surface of the product
26 that would be immediately visible to a purchaser or user upon inspection or use. Each warning shall be
27 of such size, color and font and shall be prominently placed with such conspicuousness as compared

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1 with other words, statements, designs, or devices as to render it likely to be read and understood by an
2 ordinary individual under customary conditions before purchase. Each warning shall be provided in a
3 manner such that the consumer or user understands to which specific product the warning applies, so
4 as to minimize the risk of consumer confusion. A warning provided under to this proposed Consent
5 Judgment shall state:

6 **WARNING:** This product contains a chemical known to the State of
7 California to cause cancer.

8 3.5.2 **Internet Website Warning.** A warning shall be given in conjunction with any
9 sale by Kanebo or a Retailer of the Covered Products that are not Reformulated Products to California
10 Consumers via the internet, which warning shall appear on each product display page and on a link
11 prominently displayed on a checkout page, which link must be accessed by the purchaser prior to
12 completion of checkout process. The following warning statement shall be used and shall appear in the
13 same type size or larger than the Covered Product description text:

14 **WARNING:** This product contains a chemical known to the State of
15 California to cause cancer.

15 4. **MONETARY PAYMENTS**

16 4.1 **Civil Penalties Pursuant to Health & Safety Code § 25249.7(b).** In settlement of all
17 the claims referred to in this proposed Consent Judgment, Kanebo shall pay a civil penalty in the
18 amount of One Thousand Dollars (\$ 1,000) in accordance with this Section. The penalty payment will
19 be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with
20 seventy-five percent (75%) of the funds remitted to the California Office of Environmental Health
21 Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to “Judd Law Group
22 LLP in Trust for Public Interest Alliance LLC.” All penalty payments shall be made within five (5)
23 business days after the Effective Date and delivered to the addresses listed in Section 4.3 below. Any
24 failure by Kanebo to deliver the required civil penalty payments to either OEHHA or Judd Law Group
25 LLP within two days of the required date shall result in imposition of a 10% simple interest assessment
26 on the undelivered payment(s) until delivery.

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1 4.3.3 **Tax Documentation.** Kanebo shall issue a separate 1099 form for each payment
2 required by this Section to: (a) PIA (EIN 46-3826361), to the address set forth in Section 4.3.1(a)
3 above; (b) OEHHA, who shall be identified as “California Office of Environmental Health Hazard
4 Assessment” (EIN 68-0284486) in the 1099 form, to be delivered directly to OEHHA, P.O. Box 4010,
5 Sacramento, CA 95814, and (c) “Judd Law Group LLP” (EIN: 90-0789749) to the address set forth in
6 Section 4.3.1(a) above.

7 **5. CLAIMS COVERED AND RELEASED**

8 5.1 **PIA’s Release of Proposition 65 Claims.** This Consent Judgment is a full, final and
9 binding resolution and release between PIA, acting on his own behalf and in the public interest, and
10 PIA hereby releases Kanebo, its parents, subsidiaries, affiliates, directors, officers, attorneys, and each
11 entity to whom Kanebo directly or indirectly distributed or sold Covered Products, including, but not
12 limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative
13 members, and licensees (collectively, “Releasees”), from all claims for violations of Proposition 65
14 through the Effective Date based on unwarned exposures to the Listed Chemicals in the Covered
15 Products, as set forth in the NOV and Complaint. Compliance with the terms of this proposed Consent
16 Judgment constitutes compliance with Proposition 65 with respect to exposures to the Listed
17 Chemicals from the Covered Products, as set forth in the NOVs. The Parties further understand and
18 agree that this Section 5.1 release shall not extend upstream to any entities, other than the parents,
19 subsidiaries, affiliates, directors, officers, and attorneys of Kanebo.

20 5.2 **Kanebo’s Release of PIA.** Kanebo, on behalf of itself, its past and current agents,
21 representatives, attorneys, successors, and assignees, hereby waives any and all claims against PIA and
22 its attorneys and other representatives, for any and all actions taken or statements made (or those that
23 could have been taken or made) by PIA and its attorneys and other representatives, whether in the
24 course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter
25 with respect to the Covered Products.

26 **6. PRESERVATION OF COMPETITIVENESS.** The intent of this Section 6 is to protect the
27 competitive interests of Kanebo arising from PIA’s claims and to ensure that by settling the allegations

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1 in the NOV and the Complaint, Kanebo is not disadvantaged with respect to its competitors.
2 Specifically, the parties agree that should any agreement or consent judgment be entered into by PIA,
3 the California Office of Environmental Health Hazard Assessment, or the California Attorney
4 General's Office concerning personal care products similar to the Covered Products that contains
5 provisions that would materially impact the terms of this Agreement, such benefits shall accrue to
6 Kanebo and this Agreement shall be amended by a stipulation and proposed order, a copy of which
7 shall be provided to the Attorney General's office at least five (5) business days prior to submission to
8 the Court, to provide Kanebo the benefit thereof. Further, should there be a court decision involving
9 any other person or entity that received a Proposition 65 60-Day Notice of Violation alleging Titanium
10 Dioxide in personal care products similar to the Covered Products and such decision is in whole or in
11 part favorable to the defendant(s) in such action, then that decision shall be incorporated into this
12 Agreement by a stipulation and proposed order, a copy of which shall be provided to the Attorney
13 General's office at least five (5) business days prior to submission to the Court. Further, should any
14 consent judgment establish a "No Significant Risk Level" for Titanium Dioxide (airborne, unbound
15 particles of respirable size) and provide for other parties to opt-in, any payments Kanebo has made
16 pursuant to this Agreement shall be offset against any opt-in payment requirements of such consent
17 judgment. Should PIA in the future become aware of facts or circumstances that have not been
18 publicly disclosed that, in PIA's opinion affect Kanebo's competitiveness, it shall so notify Kanebo's
19 counsel by email within forty-five (45) days after PIA becomes aware of such non-public facts or
20 circumstances. PIA shall prepare all such stipulations and proposed orders, at PIA's sole expense, and
21 shall make reasonable efforts to obtain the parties' signatures thereto.

22 7. **COURT APPROVAL.** This proposed Consent Judgment is not effective until it is approved
23 and entered by the Court and shall be null and void if, for any reason, it is not approved and entered by
24 the Court within one year after it has been fully executed by all Parties. If the Court does not approve
25 the proposed Consent Judgment, the Parties shall meet and confer as to whether to modify the
26 language or appeal the ruling. If the Parties do not jointly agree on a course of action to take, then the
27 case shall proceed in its normal course on the Court's trial calendar. If the Court's approval is

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1 ultimately overturned by an appellate court, the Parties shall meet and confer as to whether to modify
2 the terms of this proposed Consent Judgment. If the Parties do not jointly agree on a course of action to
3 take, then the case shall proceed in its normal course on the Court's trial calendar.

4 8. **SEVERABILITY**. If, subsequent to the Court's approval and entry of this proposed Consent
5 Judgment, any of the provisions of this Consent Judgment are held by a court to be unenforceable, the
6 validity of the enforceable provisions remaining shall not be adversely affected.

7 9. **GOVERNING LAW**. The terms of this Consent Judgment shall be governed by the laws of
8 the State of California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
9 inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are
10 rendered inapplicable or are no longer required as a result of any such repeal or preemption, or
11 rendered inapplicable by reason of law generally as to the Covered Products, then Kanebo may make a
12 formally noticed motion to this Court for relief from this Agreement or provisions of this Agreement,
13 with the requisite written notice to PIA, and shall only have no further obligations pursuant to this
14 Consent Judgment to the extent of any Court order so excusing or eliminating such obligation. Nothing
15 in this proposed Consent Judgment shall be interpreted to relieve Kanebo from any obligation to
16 comply with any pertinent state or federal law or regulation.

17 10. **NOTICES**. Unless specified herein, all correspondence and notices required to be provided
18 pursuant to this Consent Judgment shall be in writing and sent by: (i) personal delivery, (ii) first-class
19 registered or certified mail, return receipt requested; or (iii) overnight courier to any party by the other
20 party at the following addresses:

21 To Kanebo:

22 Kanebo Cosmetics USA LLC
23 c/o Dennis R. Ward, Secretary
24 2535 Spring Grove Ave.
Cincinnati, OH 45214

To PIA:

Public Interest Alliance, LLC
c/o Jeffrey M. Judd
2 Embarcadero Center, Suite 610
San Francisco, CA 94111

25 With a copy to:

26 Anthony J. Cortez, Esq.
27 GREENBERG TRAUERIG, LLP
1201 K Street, Suite 1100
Sacramento, CA 95814

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1 Any Party, from time to time, may specify in writing to the other Party a change of address to
2 which all notices and other communications shall be sent.

3 11. **COUNTERPARTS, FACSIMILE AND PDF SIGNATURES.** This Consent Judgment may
4 be executed in counterparts and by facsimile or pdf signature, each of which shall be deemed an
5 original, and all of which, when taken together, shall constitute one and the same document. A
6 facsimile or pdf signature shall be as valid as the original.

7 12. **COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(f).** PIA and its
8 attorneys agree to comply with the reporting form requirements referenced in California Health &
9 Safety Code section 25249.7(f).

10 13. **POST EXECUTION.** PIA and Kanebo each agrees to mutually employ its best efforts to
11 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent
12 Judgment by the Court in a timely manner. The parties acknowledge that, pursuant to California Health
13 & Safety Code section 25249.7, a noticed motion is required to obtain judicial approval of this Consent
14 Judgment, which PIA shall draft and file, and Kanebo shall join. If any third party objection to the
15 noticed motion is filed, PIA and Kanebo shall work together to file a joint reply and appear at any
16 hearing before the Court. The Court shall maintain jurisdiction under Code of Civil Procedure § 664.6
17 and, if after entry of a Consent Judgment, either party determines that the other is in breach of this
18 Consent Judgment, such party shall provide to the other written notice of such alleged breach pursuant
19 to Section 10, above, and the noticed party shall thereafter have thirty (30) days within which to
20 attempt to cure or otherwise resolve the alleged breach (the "Cure Period"). If the alleged breach is not
21 resolved or cured to the reasonable satisfaction of the noticing party during the Cure Period, the
22 noticing party may thereafter bring a noticed motion to have the Court resolve the dispute by order,
23 including, as applicable, an order awarding the prevailing party reasonable attorney fees and costs
24 incurred in connection with the motion. This provision is a material component of the Consent
25 Judgment and shall be treated as such in the event of a breach.

26 14. **MODIFICATION.** This Consent Judgment may be modified only: (1) by written agreement
27 of the Parties and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a

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1 successful motion of any party and entry of a modified Consent Judgment by the Court.

2 15. **AUTHORIZATION.** The undersigned are authorized to execute this Consent Judgment on
3 behalf of their respective parties and have read, understood, and agree to all of the terms and
4 conditions of this Consent Judgment.

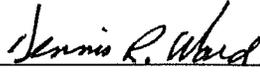
5 Dated: October 24, 2014

PUBLIC INTEREST ALLIANCE LLC

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7 By: 
Managing Member

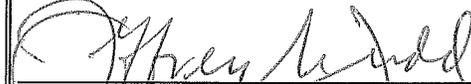
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9 Dated: October 7, 2014

KANEBO COSMETICS USA LLC

10 By: 
11
12 Dennis R. Ward, Secretary
2535 Spring Grove Ave.
13 Cincinnati, OH 45214

14 Approved as to form:

15 JUDD LAW GROUP LLP

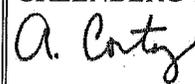
16 
17 By Jeffrey M. Judd
Attorneys for Plaintiff

Dated: October 24, 2014

18 PUBLIC INTEREST ALLIANCE LLC

19 Approved as to form:

20
21 GREENBERG TRAUERIG, LLC

22 
23 By Anthony J. Cortez
Attorneys for Defendant
24 KANEBO COSMETICS USA LLC

Dated: October 7, 2014

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EXHIBIT A

COVERED PRODUCTS

- Sensai Cellular Performance Powder Foundation TF11 Creamy Beige
- Sensai Cellular Performance Powder Foundation TF12 Summer Breeze
- Sensai Cellular Performance Powder Foundation TF13 Warm Beige
- Sensai Cellular Performance Powder Foundation TF14 Bamby Beige
- Sensai Cellular Performance Powder Foundation TF22 Natural Beige
- Sensai Cellular Performance Powder Foundation TF23 Almond Beige
- Sensai Cellular Performance Powder Foundation TF24 Amber Beige
- Sensai Cellular Performance Powder Foundation TF25 Topaz Beige
- Sensai Designing Duo Bronzing Powder BP01
- Sensai Designing Duo Bronzing Powder BP02
- Sensai Platinum Pearl Highlighting Powder
- Sensai Eye Loose Powder
- Sensai Bronzing Powder BP01
- Sensai Bronzing Powder BP02
- Sensai Loose Powder Translucent
- Sensai Silky Highlighting Powder
- Sensai Cellular Performance Pressed Powder
- Sensai Cellular Performance Pressed Powder refill
- Sensai Cheek Blush CH01
- Sensai Cheek Blush CH02
- Sensai Cheek Blush CH03
- Sensai Cheek Blush CH04
- Sensai Cheek Blush CH05
- Sensai Eye Shadow Palette ES01
- Sensai Eye Shadow Palette ES02
- Sensai Eye Shadow Palette ES03
- Sensai Eye Shadow Palette ES11
- Sensai Eye Shadow Palette ES12
- Sensai Eye Shadow Palette ES13
- Sensai Eye Shadow Palette ES14
- Sensai Triple Touch Compact TC01
- Sensai Triple Touch Compact TC02
- Sensai Triple Touch Compact TC03
- Sensai Gold Shimmering Powder

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