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12 Environmental Health Advocates, Inc.

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **IN AND FOR THE COUNTY OF ALAMEDA**

15 ENVIRONMENTAL HEALTH
16 ADVOCATES, INC.,

17 Plaintiff,

18 v.

19 MARKWINS BEAUTY BRANDS, INC., a
20 California corporation, 99 CENTS ONLY
21 STORES, LLC, a California limited liability
22 company, and DOES 1 through 100, inclusive,

23 Defendants.

Case No. 22CV008716

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Environmental Health Advocates, Inc.,
4 (“EHA” or “Plaintiff”) and Markwins Beauty Brands, Inc. (“Defendant” or “Marwkins”) with EHA
5 and Markwins each individually referred to as a “Party” and collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

7 EHA is a corporation organized in the state of California, acting in the interest of the general
8 public. It seeks to promote awareness of exposures to toxic chemicals and to improve human health by
9 reducing or eliminating hazardous substances contained in consumer products.

10 **1.3 Defendant**

11 Markwins employs ten or more individuals and for purposes of this Consent Judgment only, is
12 a “person in the course of doing business” for purposes of the Safe Drinking Water and Toxic
13 Enforcement Act of 1986, Health and Safety Code section 25249.6 et seq. (“Proposition 65”).

14 **1.4 General Allegations**

15 EHA alleges that Markwins manufactures, imports, sells, and distributes for sale Beauty
16 Benefits Highlighting duo that contains asbestos. EHA further alleges that Markwins does so without
17 providing a sufficient health hazard warning as required by Proposition 65 and related Regulations.
18 Pursuant to Proposition 65, asbestos is listed as a chemical known to cause cancer. Markwins denies
19 these allegations and asserts that its products are safe and in compliance with all applicable laws, rules
20 and regulations.

21 **1.5 Notices of Violation**

22 On or around May 27, 2021, EHA served Defendant Markwins, 99 Cents Only Stores, LLC,
23 the California Attorney General, and all other required public enforcement agencies with a 60-Day
24 Notice of Violation of Proposition 65 (“Notice”). The Notice alleged that Markwins had violated
25 Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated
26 with exposures to asbestos contained in Beauty Benefits Highlighting Duo.

27 On or around December 23, 2021, EHA issued to Defendant Markwins, 99 Cents Only Stores,
28 LLC, the California Attorney General, and all other required public enforcement agencies a 60-Day

1 Notice of Violation of Proposition 65 (“First Amended Notice”). The First Amended Notice included
2 supplemental supporting documents for the named products.

3 No public enforcer has commenced or is otherwise prosecuting an action to enforce the
4 violations alleged in the Notice.

5 **1.6 Product Description**

6 The products covered by this Consent Judgment are Beauty Benefits Highlighting Products,
7 including but not limited Beauty Benefits Highlighting Duo (“Covered Products”).

8 **1.7 State of the Pleadings**

9 On or around March 22, 2023 EHA filed a Complaint against Markwins for the alleged
10 violations of Proposition 65 that are the subject of the Notice (“Complaint”).

11 **1.8 No Admission**

12 The Parties enter into the Consent Judgment to settled disputed claims between them as set
13 forth herein and in the Notice, First Amended Notice and Complaint concerning Markwins compliance
14 with Proposition 65. Markwins denies the material factual and legal allegations of the Notice, First
15 Amended Notice, and Complaint and maintains that all of the products it has manufactured, imported,
16 sold, and/or distributed for sale in California, including Covered Products, have been, and are, in
17 compliance with all applicable laws, rules and regulations. Nothing in this Consent Judgment shall be
18 construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law, nor
19 shall compliance with this Consent Judgment be construed as an admission of any fact, finding,
20 conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or
21 otherwise affect Markwins’s obligations, responsibilities, and duties under this Consent Judgment.
22 Notwithstanding the allegations in the Notice, First Amended Notice, and Complaint, Markwins
23 maintains that it has not knowingly manufactured, or caused to be manufactured, the Covered Products
24 for sale in California in violation of Proposition 65.

25 **1.9 Jurisdiction**

26 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
27 Court has jurisdiction over Markwins as to the allegations in the Complaint, that venue is proper in the
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1 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
2 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” means the date on which this
5 Consent Judgment is approved and entered as a judgment of the Court, as discussed in Section 5.

6 **2. INJUNCTIVE RELIEF**

7 **2.1 Stop Sale**

8 After the Effective Date, Markwins shall not manufacture or cause to manufacture Covered
9 Products for ultimate sale into the State of California.

10 **2.2 Sell-Through Period**

11 Notwithstanding anything else in this Consent Judgment, Covered Products that are
12 manufactured prior to the Effective Date shall be subject to the release of liability pursuant to this
13 Consent Judgment, without regard to when such Covered Products were, or are in the future, distributed
14 or sold to customers. As a result, the obligations of Markwins, or any Releasees (if applicable), stated
15 in this Section 2 do not apply to Covered Products manufactured prior to the Effective Date.

16 **3. MONETARY SETTLEMENT TERMS**

17 **3.1 Settlement Amount**

18 Markwins shall pay seventy thousand dollars (\$70,000.00) in settlement and total satisfaction
19 of all the claims referred to in the Notice, First Amended Notice, the Complaint, and this Consent
20 Judgment. This includes civil penalties in the amount of six thousand dollars (\$6,000.00) pursuant to
21 Health and Safety Code section 25249.7(b) and attorneys’ fees and costs in the amount of sixty-four
22 thousand dollars (\$64,000.00) pursuant to Code of Civil Procedure section 1021.5.

23 **3.2 Civil Penalty**

24 The portion of the settlement attributable to civil penalties shall be allocated according to Health
25 and Safety Code section 25249.12(c)(1) and (d), with 75 percent (\$4,500.00) of the penalty paid to the
26 California Office of Environmental Health Hazard Assessment (“OEHHA”), and the remaining 25
27 percent (\$1,500) of the penalty paid to EHA individually.

28 All payments owed to EHA shall be delivered to the following address:

1 Environmental Health Advocates
2 225 Broadway, Suite 2100
3 San Diego, CA 92101

4 All payments owed to OEHHA (EIN: 68-0284486) shall be delivered directly to OEHHA
(Memo Line "Prop 65 Penalties") at the following addresses:

5 For United States Postal Service Delivery:

6 Mike Gyurics
7 Fiscal Operations Branch Chief
8 Office of Environmental Health Hazard Assessment
9 P.O. Box 4010
10 Sacramento, CA 95812-4010

11 For Federal Express 2-Day Delivery:

12 Mike Gyurics
13 Fiscal Operations Branch Chief
14 Office of Environmental Health Hazard Assessment
15 1001 I Street
16 Sacramento, CA 95814

17 Markwins agrees to provide EHA's counsel with a copy of the check payable to OEHHA,
18 simultaneous with its penalty payment to EHA.

19 Plaintiff and its counsel will provide completed IRS 1099, W-9, or other tax forms as required.
20 Relevant information is set out below:

- 21 • "Environmental Health Advocates, Inc." (EIN: 84-2322975) at the address provided above.
- 22 • "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA 95814.

23 **3.3 Attorney's Fees and Costs**

24 The portion of the settlement attributable to attorneys' fees and costs shall be paid to EHA's
25 counsel, who are entitled to attorneys' fees and costs incurred by it in this action, including but not
26 limited to investigating potential violations, bringing this matter to Markwins's attention, as well as
27 litigating and negotiating a settlement in the public interest.

28 Markwins shall provide its payment for attorneys' fees and costs by physical check or by
electronic means, including wire transfers, at Markwins's discretion. The attorney fee payment shall
be made payable to Entorno Law, LLP. The address for this entity is:

Noam Glick
Entorno Law, LLP
225 Broadway, Suite 1900

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2 **3.4 Timing of Payments**

3 All payments described in sections 3.1-3.3 herein shall be paid within 14 days of the Effective
4 Date.

5 **4. CLAIMS COVERED AND RELEASE**

6 **4.1 EHA's Public Release of Proposition 65 Claims**

7 Plaintiff, acting on its own behalf and in the public interest, releases Markwins, and its parents,
8 subsidiaries, affiliated entities under common ownership or control, its directors, officers, principals,
9 agents, employees, attorneys, insurers, accountants, predecessors, successors, and assigns ("Defendant
10 Entities"), each entity to whom Defendant directly or indirectly distributes, ships, or sells the Covered
11 Products, including but not limited to downstream distributors, wholesalers, customers, retailers
12 (including 99 Cents Only Stores, LLC), and marketplaces franchisees, franchisors, cooperative
13 members, suppliers, manufacturers, vendors, customers, purchasers, users, licensees, and licensors, and
14 all of the foregoing entities' owners, directors, officers, agents, principals, employees, attorneys,
15 insurers, accountants, representatives, predecessors, successors, and assigns (collectively referred to as
16 the "Releasees") from all claims for violations of Proposition 65 for Covered Products manufactured
17 up through the Effective Date based on exposure to asbestos as set forth in the Notice(s).

18 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition
19 65 with respect to exposures to asbestos from Covered Products as set forth in the Notice(s). This
20 Consent Judgment is a full, final, and binding resolution of all claims under Proposition 65 that were
21 or could have been asserted against Markwins and/or Releasees for failure to comply with Proposition
22 65 for alleged exposure to asbestos from Covered Products.

23 **4.2 EHA's Individual Release of Claims**

24 EHA, in its individual capacity, also provides a release to Markwins and/or Releasees, which
25 shall be a full and final accord and satisfaction of, as well as a bar to, all actions, causes of action,
26 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities, and demands of every
27 nature, character, and kind, whether known or unknown, fixed or contingent, suspected or unsuspected,
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1 arising out of alleged or actual exposures to asbestos in Covered Products manufactured, imported,
2 sold, or distributed by Markwins before the Effective Date.

3 EHA acknowledges that it is familiar with California Civil Code section 1542, which provides
4 as follows:

5 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT
6 THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR
7 SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
8 EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR
9 HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER
10 SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

11 EHA, in its individual capacity only, and on behalf of itself, its past and current agents,
12 representatives, attorneys, successors, and/or assignees expressly waives and relinquishes any and all
13 rights and benefits which it may have under, or which may be conferred on it by the provisions of
14 California Civil Code section 1542 as well as under any other state or federal statute or common law
15 principle of similar effect, to the fullest extent that it may lawfully waive such rights or benefits
16 pertaining to the released matters.

17 **4.3 EHA's Representation and Warranty**

18 EHA represents and warrants that it is not aware of any facts that would support any other
19 asbestos Proposition 65 claims against Markwins or any of its affiliated entities.

20 **4.4 Markwins's Release of EHA**

21 Markwins on its own behalf, and on behalf of Releasees as well as its past and current agents,
22 representatives, attorneys, successors, and assignees, hereby waives any and all claims against EHA
23 and its attorneys and other representatives, for any and all actions taken or statements made by EHA
24 and its attorneys and other representatives, whether in the course of investigating claims, otherwise
25 seeking to enforce Proposition 65 against them, in this matter or with respect to the Covered Products.

26 **4.5 No Other Known Claims or Violations**

1 EHA and EHA's counsel affirm that they are not presently aware of any actual or alleged
2 violations of Proposition 65 by Markwins or for which Markwins bears legal responsibility other than
3 those that are fully resolved by this Consent Judgment.

4 **5. COURT APPROVAL**

5 This Consent Judgment is not effective until it is approved by the Court and shall be null and
6 void if it is not approved by the Court within one year after it has been fully executed by the Parties, or
7 by such additional time as the Parties may agree to in writing.

8 **6. SEVERABILITY**

9 Subsequent to the Court's approval and entry of this Consent Judgment, if any provision is held
10 by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

11 **7. GOVERNING LAW**

12 The terms of this Consent Judgment shall be governed by the laws of the state of California as
13 applied within the state of California. In the event that Proposition 65 is repealed, or is otherwise
14 rendered inapplicable for reasons, including but not limited to changes in the law, then Markwins may
15 provide written notice to EHA of any asserted change, and shall have no further injunctive obligations
16 pursuant to this Consent Judgment with respect to, and to the extent that, the Covered Products are so
17 affected.

18 In the event the California Office of Health Hazard Assessment adopts a regulation or safe use
19 determination, or issues an interpretive guideline that exempts Covered Products from meeting the
20 requirements of Proposition 65; or if asbestos cases are permanently enjoined by a court of competent
21 jurisdiction; or if Proposition 65 is determined to be preempted by federal law or a burden on First
22 Amendment rights with respect to asbestos in Covered Products or Covered Products substantially
23 similar to Covered Products, then Markwins shall be relieved of its obligation to comply with Section
24 2 herein.

25 **8. ENFORCEMENT**

26 Only a Party to this Consent Judgment may enforce this Consent Judgment. Should a Party
27 wish to enforce any portion of this Consent Judgment against another Party, it must provide the other
28 Party with a written notice of the claim and meet and confer for at least thirty (30) days prior to

1 proceeding with an enforcement motion. In any action to enforce the terms of this Consent Judgment,
2 the prevailing party shall be entitled to its reasonable attorneys' fees and costs.

3 **9. NOTICE**

4 Unless otherwise specified herein, all correspondence and notice required by this Consent
5 Judgment shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified
6 mail, return receipt requested; or (iii) a recognized overnight courier; and (iv) with a copy by email; to
7 the following addresses:

8 If to Markwins:

9 Will Wagner
10 Arnold & Porter
11 Three Embarcadero Center 10th Floor
San Francisco, CA 94111
Will.Wagner@arnoldporter.com

If to EHA:

Noam Glick
Entorno Law, LLP
225 Broadway, Suite 2100
San Diego, CA 92101
noam@enteronolaw.com

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

15 **10. COUNTERPARTS; DIGITAL SIGNATURES**

16 This Consent Judgment may be executed in counterparts and by facsimile signature, each of
17 which shall be deemed an original, and all of which, when taken together, shall constitute one and the
18 same document.

19 **11. POST EXECUTION ACTIVITIES**

20 EHA agrees to comply with the reporting form requirements referenced in Health and Safety
21 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
22 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which
23 motion EHA shall draft and file. In furtherance of obtaining such approval, the Parties agree to mutually
24 employ their reasonable best efforts, including those of their counsel, to support the entry of this
25 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
26 purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for approval,
27 responding to any objection that any third-party may make, and appearing at the hearing before the
28 Court if so requested.

1 **12. MODIFICATION**

2 This Consent Judgment may be modified by: (i) a written agreement of the Parties and entry of
3 a modified consent judgment thereon by the Court; or (ii) a successful motion or application of any
4 Party, and the entry of a modified consent judgment thereon by the Court.

5 **13. AUTHORIZATION**

6 The undersigned are authorized to execute this Consent Judgment and acknowledge that they
7 have read, understand, and agree to all of the terms and conditions contained herein.

8 **14. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

9 If a dispute arises with respect to either Party’s compliance with the terms of this Consent
10 Judgment entered by the Court, the Parties shall meet and confer in person, or by telephone, and/or in
11 writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be filed
12 in the absence of such a good faith attempt to resolve the dispute beforehand.

13 **15. ENTIRE AGREEMENT**

14 This Consent Judgment contains the sole and entire agreement and understanding of the Parties
15 with respect to the entire subject matter herein, and any and all prior discussions, negotiations,
16 commitments, and understandings related hereto. No representations, oral or otherwise, express or
17 implied, other than those contained herein have been made by any Party. No other agreements, oral or
18 otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.

19 **AGREED TO:**

AGREED TO:

20
21 Date: 3/02/2023

Date: 3/02/2023

22 By:  _____
23 ENVIRONMENTAL HEALTH
24 ADVOCATES, INC.

By:  _____
MARK WINS BEAUTY BRANDS, INC

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26 **IT IS SO ORDERED.**

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28 Date: _____

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