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11 Attorneys for Plaintiff
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 SEED BEAUTY, LLC, a California limited
20 liability company, ULTA BEAUTY, INC., a
21 Delaware corporation, ULTA BEAUTY
22 CREDIT SERVICES CORPORATION, a
23 Delaware corporation, ULTA SALON
24 COSMETICS & FRAGRANCE, INC., a
25 Delaware corporation, and DOES 1 through
26 100, inclusive,

27 Defendants.
28

Case No. 22CV010833

[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 Seed Beauty, LLC (“Defendant” or “Seed”) with EHA and Seed each
5 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
9 by reducing or eliminating hazardous substances contained in consumer products.

10 **1.3 Defendant**

11 For purposes of this Consent Judgment only, Seed employs ten or more individuals and for
12 purposes of this Consent Judgment only, is a “person in the course of doing business” for purposes of
13 the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section
14 25249.6 et seq. (“Proposition 65”).

15 **1.4 General Allegations**

16 EHA alleges that Seed manufactures, imports, sells, and distributes for sale ColourPop Exes
17 and Oh’s Pressed Powder Eyeshadow Palette that contains asbestos. EHA further alleges that Seed
18 does so without providing a sufficient warning as required by Proposition 65 and related Regulations.
19 Pursuant to Proposition 65, asbestos is listed as a chemical known to cause cancer. Seed denies these
20 allegations, denies there is asbestos in ColourPop Exes and Oh’s Pressed Powder Eyeshadow Palette,
21 and asserts that its products are safe and in compliance with all applicable laws, rules and regulations.

22 **1.5 Notices of Violation**

23 On or around May 27, 2021, EHA served Defendant Seed, Ulta Beauty, Inc., Ulta Beauty
24 Credit Services Corporation, the California Attorney General, and all other required public
25 enforcement agencies with a 60-Day Notice of Violation of Proposition 65 (“Notice”). The Notice
26 alleged that Seed had violated Proposition 65 by failing to sufficiently warn consumers in California
27 of the health hazards associated with exposures to asbestos contained in ColourPop Exes and Oh’s
28 Pressed Powder Eyeshadow Palette.

1 On or around December 9, 2021, EHA served Defendant Seed, Ulta Beauty, Inc., Ulta Beauty
2 Credit Services Corporation, Ulta Salon Cosmetics & Fragrance, Inc., the California Attorney
3 General, and all other required public enforcement agencies with a 60-Day Notice of Violation of
4 Proposition 65 (“First Amended Notice”). The First Amended Notice included Ulta Salon Cosmetics
5 & Fragrance as a retailer.

6 On or around February 3, 2022, EHA served Defendant Seed, Ulta Beauty, Inc., Ulta Beauty
7 Credit Services Corporation, Ulta Salon Cosmetics & Fragrance, Inc., the California Attorney
8 General, and all other required public enforcement agencies with a 60-Day Notice of Violation of
9 Proposition 65 (“Second Amended Notice”). The Second Amended Notice included supplemental
10 supporting documents for the named products.

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

13 **1.6 Product Description**

14 The products covered by this Consent Judgment are powdered cosmetic products
15 manufactured, distributed, or sold by Seed, including but not limited to ColourPop Exes and Oh’s
16 Pressed Powder Eyeshadow Palette (the “Covered Products”).

17 **1.7 State of the Pleadings**

18 On or around May 04, 2022, EHA filed a Complaint against Seed for the alleged violations of
19 Proposition 65 that are the subject of the Notice, the First Amended Notice, and Second Amended
20 Notice (“Complaint”).

21 **1.8 No Admission**

22 Seed denies the material factual and legal allegations in the Notice, First Amended Notice,
23 Second Amended Notice, and the Complaint and maintains that all of the products it has
24 manufactured, imported, sold, and/or distributed for sale in California, including the Covered
25 Products, have been, and are, in compliance with all applicable laws, rules and regulations. Nothing
26 in this Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law,
27 issue of law, or violation of law, nor shall compliance with this Consent Judgment be construed as an
28 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall

1 not, however, diminish or otherwise affect Seed’s obligations, responsibilities, and duties under this
2 Consent Judgment.

3 **1.9 Jurisdiction**

4 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
5 Court has jurisdiction over Seed as to the allegations in the Complaint, that venue is proper in the
6 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
7 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

8 **1.10 Effective Date**

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

11 **2. INJUNCTIVE RELIEF**

12 **2.1 Reformulation and Testing of the Covered Products**

13 Commencing on July 1, 2024, Seed shall not manufacture, import, or distribute for sale in
14 California any Covered Products unless each lot of any Covered Product, or each lot of the talc
15 ingredient used in any Covered Product sold into California, is tested by transmission electron
16 microscopy (“TEM”) for the presence of asbestos in the manner set forth in this Consent Judgment,
17 and the results confirm there is no detectable asbestos in the Covered Product or lot of talc tested. To
18 meet this testing requirement, Seed must use the TEM Testing Protocol set forth in Section 2.2.

19 For purposes of complying with this Section 2, Seed may rely on a confirmation provided by
20 the supplier of the talc ingredient for a Covered Product or the supplier or manufacturer of a Covered
21 Product, provided said confirmation confirms no detectable amount of asbestos fibers using the TEM
22 Testing Protocol. If a lot of the talc ingredient from the supplier tests non-detect for asbestos, any
23 product using the talc from that tested lot will be deemed in compliance with Proposition 65.

24 If Seed does not receive a confirmation that the TEM Testing Protocol has been completed by
25 either the supplier of the talc ingredient for the Covered Product or supplier or manufacturer of the
26 Covered Product, Seed will have a sample from each category of Covered Products (e.g., blush
27 product, eye shadow, etc.) sold into California tested at least twice per year (i.e., every six months)
28 using the TEM Testing Protocol at a laboratory accredited to perform such testing for the presence of

1 asbestos.

2 If asbestos contamination is discovered and/or reported, Seed will not utilize any talc from the
3 contaminated lot. If Seed discovers asbestos contamination using its own testing, it shall immediately
4 cease any distribution or sales of the contaminated units.

5 Covered Products' compliance with the standard set for in this section constitutes compliance
6 with Proposition 65 as to asbestos.

7 **2.2 TEM Testing Protocol**

8 Products to be evaluated by this screening protocol for potentially releasable asbestos content
9 shall be prepared and analyzed by TEM and quantified on an asbestos structures per milligram basis
10 (asbestos str/mg), using the definitions and counting criteria for asbestos structures of the Asbestos
11 Hazard Emergency Response Act.

12 **Preparation of Bulk Powder Products for Bulk Asbestos Structure Quantification by TEM**

13 Preparation for quantification of asbestos structures by TEM shall be conducted as follows:
14 The product is prepared for analysis by weighing and suspending a portion of the suspect material in
15 an alcohol/deionized water mix. Measured aliquots of the sample suspension are then filtered through
16 a 0.2 µm mixed cellulose ester filter (MCE). Between 10-50 mg of the material shall be suspended in
17 a 400 mL 50/50 DI H₂O/isopropyl alcohol solution, from which 1-5 mL aliquots shall be drawn and
18 filtered. The final MCE filter is dried, collapsed with acetone, and coated with carbon in a vacuum
19 evaporator. The fibers and solids collected on the carbon-coated filter replicate are transferred onto
20 copper grids for TEM analysis.

21 **TEM Bulk Analysis for Asbestos Fiber Structures**

22 The resulting preparation is then scanned to assure a particle loading of the filter between 5-
23 15%, and then quantified by analysis, measuring lengths and widths and chemistries of particulate to
24 determine overall asbestos concentration on the final filter. Only particle structures that contain
25 asbestos as countable by the AHERA protocol, to include morphology, chemistry (by EDS) and
26 diffraction structure (by SAED) will be considered for quantification. Sufficient area of the filter shall
27 be analyzed to reach an analytical sensitivity of at least 500 str/mg of product. Typical preparations of
28 mineral powders by the preparations procedures outlined here with aliquots adjusted to obtain the

1 target particle loading (5-15%) on 200 mesh Cu TEM grids with an approximate average grid
2 opening area of 0.01 mm² provide this level of analytical sensitivity by scanning approximately 200
3 grid openings (two full grids) area of the filter or its equivalent. Scanning is typically done at 1,500-
4 5,000x, and individual asbestos fibers measured at 20,000-25,000x.

5 **Pass/Fail Criterion**

6 Products prepared and analyzed by this bulk screening protocol that are found to contain >500
7 str/mg of product shall be deemed as “*Fails bulk asbestos screening test*”. Products prepared and
8 analyzed by this bulk screening protocol that are found to contain ≤500 str/mg of product shall be
9 deemed as “*Passes bulk asbestos screening test*”, and no further testing recommended or required.

10 **2.3 Sell-Through Period**

11 Notwithstanding anything else in this Consent Judgment, Covered Products that are
12 manufactured, packaged, or put into commerce prior to use of the testing protocol of section 2.2 shall
13 be subject to the release of liability pursuant to this Consent Judgment, without regard to when such
14 Covered Products were, or are in the future, distributed or sold to customers.

15 **3. MONETARY SETTLEMENT TERMS**

16 **3.1 Settlement Amount**

17 Seed shall pay one hundred and twenty-five thousand dollars (\$125,000.00) in settlement and
18 total satisfaction of all the claims referred to in the Notice, First Amended Notice, Second Amended
19 Notice, the Complaint, and this Consent Judgment. This includes civil penalties in the amount of
20 twelve thousand five hundred dollars (\$12,500.00) pursuant to Health and Safety Code section
21 25249.7(b) and attorneys’ fees and costs in the amount of one hundred and twelve thousand five
22 hundred dollars (\$112,500.00) pursuant to Code of Civil Procedure section 1021.5. Payment shall be
23 made in three installments, on or before thirty (30), sixty (60) and ninety (90) days after the Effective
24 Date, in the amounts of \$41,666.67 (first installment), \$41,666.67 (second installment), and
25 \$41,666.66 (final installment). The civil penalty payment shall be part of the first installment.

26 **3.2 Civil Penalty**

27 The portion of the settlement attributable to civil penalties shall be allocated according to
28 Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the

1 penalty paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”), and
2 the remaining twenty-five percent (25%) of the penalty paid to EHA individually.

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

4 Environmental Health Advocates
5 225 Broadway, Suite 2100
6 San Diego, CA 92101

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

8 For United States Postal Service Delivery:

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

14 For Federal Express 2-Day Delivery:

15 Mike Gyurics
16 Fiscal Operations Branch Chief
17 Office of Environmental Health Hazard Assessment
18 1001 I Street
19 Sacramento, CA 95814

20 Seed agrees to provide EHA’s counsel with a copy of the check payable to OEHHA,
21 simultaneous with its penalty payment to EHA.

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

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

26 **3.3 Attorney’s Fees and Costs**

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

1 Seed shall provide its payment for civil penalty and for attorneys' fees and costs to EHA's
2 counsel as follows. Payment may be by physical check or by electronic means, including wire
3 transfers, at Seed's discretion:

- 4 1. First installment of \$41,666.67. Nine thousand three hundred seventy five dollars
5 (\$9,375.00) payable to OEHHA as a civil penalty; three thousand one hundred twenty
6 five dollars (\$3,125.00) payable to EHA pursuant to Health and Safety Code section
7 25249.12(d), and twenty nine thousand one hundred sixty-six dollars and sixty-seven
8 cents (\$29,166.67) payable to Entorno Law, LLP.
- 9 2. Second installment of \$41,666.67. Payable in full to Entorno Law, LLP.
- 10 3. Third installment of \$41,666.66. Payable in full to Entorno Law, LLP.

11 The attorney fee payments shall be made payable to Entorno Law, LLP. The address for this
12 entity is:

13 Noam Glick
14 Entorno Law, LLP
225 Broadway, Suite 1900
San Diego, CA 92101

15 **4. CLAIMS COVERED AND RELEASE**

16 **4.1 EHA's Public Release of Proposition 65 Claims**

17 Plaintiff, acting on its own behalf and in the public interest, releases Seed, and its parents,
18 subsidiaries, affiliated entities under common ownership or control, and each of their directors,
19 officers, principals, agents, employees, attorneys, insurers, accountants, predecessors, successors, and
20 assigns ("Defendant Entities"), each entity to whom Defendant Entities directly or indirectly
21 distribute, ship, or sell the Covered Products, including but not limited to downstream distributors,
22 wholesalers, customers, retailers, marketplaces, franchisees, franchisors, cooperative members,
23 suppliers, licensees, and licensors, and all of the foregoing entities' owners, directors, officers, agents,
24 principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors, and
25 assigns (collectively referred to as the "Releasees") from all claims for violations of Proposition 65
26 up through the Effective Date based on exposure to asbestos from Covered Products as set forth in the
27 Notice, First Amended Notice, and Second Amended Notice. Compliance with the terms of this
28 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to asbestos

1 from Covered Products as set forth in the Notice, First Amended Notice, and Second Amended
2 Notice. This Consent Judgment is a full, final, and binding resolution of all claims under Proposition
3 65 that were or could have been asserted against Seed, Defendant Entities and/or Releasees for failure
4 to comply with Proposition 65 for alleged exposure to asbestos from Covered Products.

5 **4.2 EHA's Individual Release of Claims**

6 EHA, in its individual capacity, also provides a release to Seed, Defendant Entities and/or
7 Releasees, which shall be a full and final accord and satisfaction of, as well as a bar to, all actions,
8 causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities, and
9 demands of every nature, character, and kind, whether known or unknown, suspected or unsuspected,
10 arising out of alleged or actual exposures to asbestos in Covered Products manufactured, imported,
11 sold, or distributed by Defendant Entities before the Effective Date.

12 **4.3 Seed's Release of EHA**

13 Seed on its own behalf, and on behalf of Releasees as well as its past and current agents,
14 representatives, attorneys, successors, and assignees, hereby waives any and all claims against EHA
15 and its attorneys and other representatives, for any and all actions taken or statements made by EHA
16 and its attorneys and other representatives, whether in the course of investigating the claims covered
17 by this Consent Judgment, otherwise seeking to enforce Proposition 65 against them, in this matter or
18 with respect to the Covered Products.

19 **4.4 No Other Known Claims or Violations**

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

23 **5. COURT APPROVAL**

24 This Consent Judgment is not effective until it is approved by the Court and shall be null and
25 void if it is not approved by the Court within one year after it has been fully executed by the Parties,
26 or by such additional time as the Parties may agree to in writing.
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1 **6. DISMISSAL OF RETAIL DEFENDANTS**

2 Within 7 days of the Court’s approval of this Consent Judgment, EHA shall file a dismissal
3 with prejudice of this action as to defendant Ulta Salon Cosmetics & Fragrance, Inc.

4 **7. SEVERABILITY**

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

8 **8. GOVERNING LAW**

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

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

22 In the event the U.S. Food and Drug Administration issues regulations related to methods for
23 detecting and identifying asbestos in talc-containing cosmetic products, Seed may satisfy the
24 requirements of this Consent Judgment through testing that conforms to any such FDA requirement.

25 **9. ENFORCEMENT**

26 In any action to enforce the terms of this Consent Judgment, the prevailing party shall be
27 entitled to its reasonable attorneys’ fees and costs.
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1 **10. NOTICE**

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

6 If to Seed:

7 Matthew Kaplan
8 Tucker Ellis LLP
9 515 South Flower Street, 42nd Floor
Los Angeles, CA 90071
matthew.kaplan@tuckerellis.com

If to EHA:

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

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

12 **10. COUNTERPARTS; DIGITAL SIGNATURES**

13 This Consent Judgment may be executed in counterparts and electronically or by facsimile
14 signature, each of which shall be deemed an original, and all of which, when taken together, shall
15 constitute one and the same document. Photographic and facsimile copies of such signed
16 counterparts may be used in lieu of the originals for any purpose. The exchange of this Agreement
17 and/or of signature pages by facsimile transmission or electronic mail attachment shall be deemed to
18 have the same legal effect as delivery of an original signed copy of this Agreement. Signatures by
19 scanned and e-mailed image or facsimile transmission shall have the same force and effect as original
20 signatures and as an electronic record executed and adopted by a Party with the intent to sign the
21 electronic record pursuant to Civil Code §§ 1633.1-1633.17.

22 **11. POST EXECUTION ACTIVITIES**

23 EHA agrees to comply with the reporting form requirements referenced in Health and Safety
24 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
25 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which
26 motion EHA shall draft and file. In furtherance of obtaining such approval, the Parties agree to
27 mutually employ their reasonable best efforts, including those of their counsel, to support the entry of
28 this agreement as judgment, and to obtain judicial approval of their settlement in a timely manner.

1 For purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion for
2 approval, responding to any objection that any third-party may make, and appearing at the hearing
3 before the Court if so requested.

4 **12. MODIFICATION**

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

8 **13. AUTHORIZATION**

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

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

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

16 **15. ENTIRE AGREEMENT**

17 This Consent Judgment contains the sole and entire agreement and understanding of the
18 Parties with respect to the entire subject matter herein, and any and all prior discussions, negotiations,
19 commitments, and understandings related hereto. No representations, oral or otherwise, express or

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1 implied, other than those contained herein have been made by any Party. No other agreements, oral or
2 otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.

3 **AGREED TO:**

AGREED TO:

4
5 Date: 02/09/2023

Date: February 8, 2023

6
7 By: 

By: 

8 ENVIRONMENTAL HEALTH
9 ADVOCATES, INC.

SEED BEAUTY, LLC

10 **IT IS SO ORDERED.**

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12 Date: _____

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JUDGE OF THE SUPERIOR COURT