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Environmental Health Advocates, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CRUZ

ENVIRONMENTAL HEALTH
ADVOCATES, INC.,

Plaintiff,

v.

ISDIN CORP., a Delaware corporation, and
DOES 1 through 100, inclusive,

Defendants.

Case No. 22CV02301

[PROPOSED] AMENDED 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 ISDIN Corp. (“Defendant” or “ISDIN”) with EHA and ISDIN 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 by
9 reducing or eliminating hazardous substances contained in consumer products.

10 **1.3 Defendant**

11 ISDIN employs ten or more individuals and for purposes of this Consent Judgment only, is a
12 “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 ISDIN manufactures, imports, sells, and distributes for sale Isdincentics
16 Mineral Brush that contains airborne, unbound particles of Titanium Dioxide (“TiO2”). EHA further
17 alleges that ISDIN does so without providing a sufficient health hazard warning as required by
18 Proposition 65 and related Regulations. Pursuant to Proposition 65, TiO2 is listed as a chemical known
19 to cause cancer. ISDIN denies these allegations and asserts that its products are safe and in compliance
20 with all applicable laws, rules and regulations.

21 **1.5 Notice of Violation**

22 On or around August 1, 2022, EHA served Defendant ISDIN, the California Attorney General,
23 and all other required public enforcement agencies with a 60-Day Notice of Violation of Proposition
24 65 (“Notice”). The Notice alleged that ISDIN had violated Proposition 65 by failing to sufficiently
25 warn consumers in California of the health hazards associated with exposures to TiO2 contained in
26 Isdincentics Mineral Brush.

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

1 **1.6 Product Description**

2 The products covered by this Consent Judgment are the Isdincentics Mineral Brushes
3 containing TiO₂ manufactured, distributed or sold by ISDIN (the “Covered Products”).

4 **1.7 State of the Pleadings**

5 On or around October 18, 2022, EHA filed a Complaint against ISDIN for the alleged
6 violations of Proposition 65 that are the subject of the Notice (“Complaint”).

7 **1.8 No Admission**

8 ISDIN denies the material factual and legal allegations of the Notice and Complaint and
9 maintains that all of the products it has manufactured, imported, sold, and/or distributed for sale in
10 California, including Covered Products, have been, and are, in compliance with all applicable laws,
11 rules and regulations. Nothing in this Consent Judgment shall be construed as an admission of any fact,
12 finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent
13 Judgment be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation
14 of law. This Section shall not, however, diminish or otherwise affect ISDIN’s obligations,
15 responsibilities, and duties under this Consent Judgment.

16 **1.9 Jurisdiction**

17 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
18 Court has jurisdiction over ISDIN as to the allegations in the Complaint, that venue is proper in the
19 County of Santa Cruz, and that the Court has jurisdiction to enter and enforce the provisions of this
20 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

21 **1.10 Effective Date**

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

24 **2. INJUNCTIVE RELIEF**

25 **2.1 Reformulation of the Covered Products**

26 Except as provided in sections 2.2 and 2.3 below, commencing on April 15, 2024, or one year
27 after the Effective Date, whichever is later, Defendant shall not sell any Covered Product that: (1) when
28 measured using air capture, contains greater than 250 respirable-sized unbound TiO₂ particles per liter

(str/L) of air, or for elongate fibers of TiO₂, greater than 75 str/L; or (2) when measured using bulk testing, greater 5.0 X 10³ respirable-sized TiO₂ unbound particles. This would be measured using either of the following methods:

A. Air Capture

1. Testing should be carried out in a sealed laboratory glovebox or containment free from external air movements or contaminants. Released particulate should be collected on a 25mm air monitoring cassette with a 0.45-micron MCE filter, connected to a personal air sampling pump calibrated to a flow rate of 2.0 L / min.

2. With the air sampling pump running, use a makeup applicator or brush and apply enough pressure to transfer the product onto the tool. Tap or blow off excess product. Simulate applying the product to a gloved hand or other nonporous surface located no more than 20 cm from the air cassette, for 10 minutes. Allow the air sampling pump to run for another 5 minutes with no disturbance of the product. Prepare the resulting filters from the air cassettes for TEM by collapsing the filter, coating with carbon evaporated in high vacuum (10⁻⁴ to 10⁻⁵ Pa), placing onto TEM grids, and dissolving away residual filter material. Particulate should be analyzed via a TEM with an acceleration voltage of 100KeV equipped with EDXA and SAED at magnifications of at least 15,000x. Calculated concentration should be made relevant to effective filter area (EFA) divided by the area analyzed, relative to the liters of air sampled, i.e., on a str/L basis.

B. Bulk Testing

1. Preparation for qualitative presence or absence and quantification of TiO₂ particles unbound in the respirable-size fraction by TEM are conducted as follows: The product is prepared for analysis by weighing and suspending a portion of the suspect material in an alcohol/deionized water mix. Measured aliquots of the sample suspension are then filtered through a 0.2 µm mixed cellulose ester filter (MCE). It has been determined that the optimal range of material extracted from the product falls between 10-50 mg suspended in a 400 mL 50/50 DI H₂O/isopropyl alcohol solution*, from which 1-5 mL aliquots are drawn and filtered. The final MCE filter is dried, collapsed with acetone, and coated with carbon in a vacuum evaporator. The fibers and solids collected on the carbon-coated filter replicate are transferred onto copper grids for TEM analysis.

1 2. The resulting preparation is then scanned to assure a particle loading of the filter
2 between 5-15%, and then quantified by analysis, measuring lengths and widths and chemistries of
3 particulate to determine overall percent TiO₂ and size bin categorized for comparison with target value
4 compliances. Only particles less than 10 µm relative aerodynamic diameter not touching or adhering
5 to other materials on the filter preparation that reveal only titanium (and oxygen) peaks by EDS will
6 be considered for quantification. To observe and quantify all such structures down to unbound particles
7 as small as 50 nm (minimum dimension of 0.050 µm), the analysis should be conducted at 20-25,000x
8 magnification. Sufficient area of the filter shall be analyzed to reach an analytical sensitivity of at least
9 5.0 X 10³ RPTi /mg of product.

10 3. Products prepared and analyzed by this bulk screening protocol that are found to contain
11 >5.0 X 10³ RPTi /mg of product shall be deemed as “Fails TiO₂ screening test”, as would any product
12 found to contain respirable titanium dioxide fibers (mineralogically, acicular to fibrous rutile) observed
13 on the filter analyzed to the specified analytical sensitivity (5.0 X 10³ RPTi /mg). Product samples
14 thusly failing this standard would then be recommended for further testing to confirm releasability such
15 as product use simulation in a controlled environment with appropriate air testing, etcetera.
16 Alternatively, such products may be reformulated by the manufacturer or removed as noncompliant.

17 Should EHA reach a court-approved settlement with another cosmetics manufacturer alleging
18 a violation of Proposition 65 with respect to TiO₂, Defendant may comply with the reformulation
19 standard in that settlement and will be deemed in compliance with Proposition 65.

20 Covered Products’ compliance with the standard set for in this section constitutes compliance
21 with Proposition 65 as to TiO₂.


22 **2.2 Clear and Reasonable Warnings**

23 For Covered Products manufactured by or for ISDIN after the Effective Date and that contain
24 TiO₂ for which ISDIN does not have evidence of compliance with the Reformulation Standard set
25 forth in section 2.1 above, and which are to be distributed or directly sold by ISDIN in the State of
26 California, ISDIN shall provide one of the following warning statements.


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Option 1:

 **WARNING:** This product can expose you to chemicals including Titanium Dioxide, which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.

Option 2:

 **WARNING:** Cancer- www.P65Warnings.ca.gov.

This warning statement shall be prominently displayed on the Covered Products, on the packing of the Covered Products, or on a placard, shelf tag, or sign provided that the statement is displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual prior to sale. If the Option 2 warning statement is displayed on the Covered Products' packaging, it must be in a type size no smaller than the largest type size used for other consumer information on the product. In no case shall a warning statement displayed on the Covered Products' packaging appear in a type size smaller than 6-point type. The same warning shall be posted on any websites under the exclusive control of ISDIN where Covered Products are sold into California. ISDIN shall instruct any third-party website to which it directly sells its Covered Products to include the same warning as a condition of selling the Covered Products in California.

Should EHA reach a court-approved settlement with another cosmetics manufacturer alleging a violation of Proposition 65 with respect to TiO₂, Defendant may comply with the warning provisions in that settlement and will be deemed in compliance with Proposition 65.

2.3 Sell-Through Period

Notwithstanding anything else in this Consent Judgment, Covered Products that are manufactured, packaged, or put into commerce within one year of the Effective Date shall be subject to the release of liability pursuant to this Consent Judgment, without regard to when such Covered Products were, or are in the future, distributed or sold to customers. As a result, the obligations of ISDIN, or any Releasees (if applicable), stated in this Section 2 do not apply to Covered Products manufactured, packaged, or put into commerce up to one year after the Effective Date.

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1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Settlement Amount**

3 ISDIN shall pay sixty thousand dollars (\$60,000.00) in settlement and total satisfaction of all
4 the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes civil
5 penalties in the amount of five thousand dollars (\$5,000.00) pursuant to Health and Safety Code section
6 25249.7(b) and attorneys' fees and costs in the amount of fifty-five thousand dollars (\$55,000.00)
7 pursuant to Code of Civil Procedure section 1021.5.

8 **3.2 Civil Penalty**

9 The portion of the settlement attributable to civil penalties shall be allocated according to Health
10 and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid
11 to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining
12 twenty-five percent (25%) of the penalty paid to EHA individually.

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

14 Environmental Health Advocates
15 225 Broadway, Suite 2100
 San Diego, CA 92101

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

18 For United States Postal Service Delivery:

19 Mike Gyurics
20 Fiscal Operations Branch Chief
 Office of Environmental Health Hazard Assessment
 P.O. Box 4010
21 Sacramento, CA 95812-4010

22 For Federal Express 2-Day Delivery:

23 Mike Gyurics
24 Fiscal Operations Branch Chief
 Office of Environmental Health Hazard Assessment
 1001 I Street
25 Sacramento, CA 95814

26 ISDIN agrees to provide EHA's counsel with a copy of the check payable to OEHHA,
27 simultaneous with its penalty payment to EHA.

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

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

5 **3.3 Attorney’s Fees and Costs**

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

10 ISDIN shall provide its payment for civil penalty and for attorneys’ fees and costs to EHA’s
11 counsel as follows. Payment may be by physical check or by electronic means, including wire transfers,
12 at ISDIN’s discretion: three thousand seven hundred and fifty dollars (\$3,750.00) payable to OEHHHA
13 as a civil penalty; one thousand two hundred and fifty dollars (\$1,250) payable to EHA pursuant to
14 Health and Safety Code section 25249.12(d), and fifty-five thousand dollars (\$55,000.00) payable to
15 Entorno Law, LLP, within fourteen (14) days of the Effective Date.

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

18 Noam Glick
19 Entorno Law, LLP
20 225 Broadway, Suite 1900
21 San Diego, CA 92101

22 **4. CLAIMS COVERED AND RELEASE**

23 **4.1 EHA’s Public Release of Proposition 65 Claims**

24 Plaintiff, acting on its own behalf and in the public interest, releases ISDIN, and its parents,
25 subsidiaries, affiliated entities under common ownership or control, its directors, officers, principals,
26 agents, employees, attorneys, insurers, accountants, predecessors, successors, and assigns
27 (“Defendant Entities”), each entity to whom Defendant directly or indirectly distributes, ships, or
28 sells the Covered Products, including but not limited to downstream distributors, wholesalers,

1 customers, retailers, and marketplaces franchisees, franchisors, cooperative members, suppliers,
2 licensees, and licensors, and all of the foregoing entities' owners, directors, officers, agents,
3 principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors, and
4 assigns (collectively referred to as the "Releasees") from all claims for violations of Proposition 65
5 based on exposure to TiO₂ from Covered Products as set forth in the Notice(s) through the end of the
6 sell through period identified in Section 2.3 above. Compliance with the terms of this Consent
7 Judgment constitutes compliance with Proposition 65 with respect to exposures to TiO₂ from
8 Covered Products as set forth in the Notice(s), except that this provision shall not apply to any third-
9 party internet site that fails to provide the warning after being instructed by ISDIN pursuant to
10 section 2.2 above. This Consent Judgment is a full, final, and binding resolution of all claims under
11 Proposition 65 that were or could have been asserted against ISDIN and/or Releasees for failure
12 to comply with Proposition 65 for alleged exposure to TiO₂ from Covered Products.

13 **4.2 EHA's Individual Release of Claims**

14 EHA, in its individual capacity, also provides a release to ISDIN and/or Releasees, which shall
15 be a full and final accord and satisfaction of, as well as a bar to, all actions, causes of action, obligations,
16 costs, expenses, attorneys' fees, damages, losses, claims, liabilities, and demands of every nature,
17 character, and kind, whether known or unknown, suspected or unsuspected, arising out of alleged or
18 actual exposures to TiO₂ in Covered Products manufactured, imported, sold, or distributed by ISDIN
19 before the end of the sell through period identified in Section 2.3 above.

20 **4.3 ISDIN's Release of EHA**

21 ISDIN 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.

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1 **4.4 No Other Known Claims or Violations**

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

5 **5. COURT APPROVAL**

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

9 **6. SEVERABILITY**

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

12 **7. GOVERNING LAW**

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

19 In the event the California Office of Health Hazard Assessment adopts a regulation or safe use
20 determination, or issues an interpretive guideline that exempts Covered Products from meeting the
21 requirements of Proposition 65; or if TiO₂ cases are permanently enjoined by a court of competent
22 jurisdiction; or if Proposition 65 is determined to be preempted by federal law or a burden on First
23 Amendment rights with respect to TiO₂ in Covered Products or Covered Products substantially similar
24 to Covered Products, then ISDIN shall be relieved of its obligation to comply with Section 2 herein.

25 **8. ENFORCEMENT**

26 In any action to enforce the terms of this Consent Judgment, the prevailing party shall be entitled
27 to its reasonable attorneys' fees and costs.
28

1 **9. 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; to
5 the following addresses:

6 **If to ISDIN:**

7 Gary M. Roberts
8 Dentons US LLP
9 601 S. Figueroa Street, Suite 2500
10 Los Angeles, CA 90017
11 Gary.roberts@dentons.com

6 **If to EHA:**

7 Noam Glick
8 Entorno Law, LLP
9 225 Broadway, Suite 2100
10 San Diego, CA 92101
11 noam@enteronolaw.com

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

13 **10. COUNTERPARTS; DIGITAL SIGNATURES**

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

17 **11. POST EXECUTION ACTIVITIES**

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

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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.

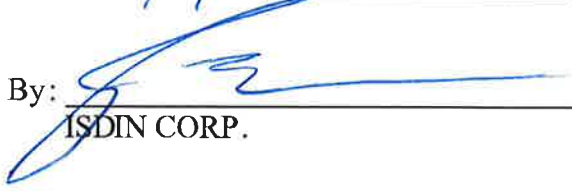
19 **AGREED TO:**

AGREED TO:

20
21 Date: 2/23/2023

Date: 3/1/2023

22
23 By: 
24 ENVIRONMENTAL HEALTH
ADVOCATES, INC.

25
26 By: 
27 ISDIN CORP.
28

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT