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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 RUDE COSMETICS, INC, a California
20 corporation; T.J. MAXX OF CA, LLC, a
21 Virginia limited liability company; and DOES
22 1 through 100, inclusive,

23 Defendants.

Case No. 23CV028331

[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 Rude Cosmetics, Inc. (“Defendant” or “Rude”) with EHA and Rude each
5 individually referred to as a “Party” and collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

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

11 **1.3 Defendant**

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

15 **1.4 General Allegations**

16 EHA alleges that Rude manufactures, imports, sells, and distributes for sale powdered face
17 makeup that contains airborne, unbound particles of Titanium Dioxide (“TiO₂”). EHA further alleges
18 that Rude does so without providing a sufficient health hazard warning as required by Proposition 65
19 and related Regulations. Pursuant to Proposition 65, TiO₂ is listed as a chemical known to cause cancer.
20 Rude denies these allegations and asserts that its products are safe and in compliance with all applicable
21 laws, rules, and regulations.

22 **1.5 Notice of Violation**

23 On or around October 5, 2022, and October 20, 2022, EHA alleges it served Rude, T.J. Maxx
24 of CA, LLC (“TJX”), the California Attorney General, and all other required public enforcement
25 agencies with 60-Day Notices of Violation of Proposition 65 (“Notices”). The Notices alleged that
26 Rude had violated Proposition 65 by failing to sufficiently warn consumers in California of the health
27 hazards associated with exposures to TiO₂ contained in powdered face makeup including—without
28 limitation—“Leopardina Rude Eyeshadow and Highlighter Palette” and “Rude Whatever forever!

1 Eyeshadow.”

2 Upon information and belief, no public enforcer has commenced or is otherwise prosecuting an
3 action to enforce the violations alleged in the Notices.

4 **1.6 Product Description**

5 The products covered by this Consent Judgment are powdered face makeup products
6 manufactured, imported, sold, and/or distributed by Rude, including but not limited to eyeshadow
7 palettes, face palettes, blushes, highlighters, contours, powders, bronzers, eyebrow products,
8 eyeshadows, loose glitters, and loose pigments, and specifically including “Leopardina Rude
9 Eyeshadow and Highlighter Palette” and “Rude Whatever forever! Eyeshadow” (“Covered Products”).

10 **1.7 State of the Pleadings**

11 On or around February 23, 2023, EHA filed a Complaint against Rude and TJX for the
12 alleged violations of Proposition 65 that are the subject of the Notices (“Complaint”).

13 **1.8 No Admission**

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

22 **1.9 Jurisdiction**

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

1 **1.10 Effective Date**

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

4 **2. INJUNCTIVE RELIEF**

5 **2.1 Reformulation of the Covered Products**

6 Except as specified in Paragraph 2.2, commencing one year after the Effective Date (the
7 “Compliance Date”), Defendant shall not sell any Covered Product that: (1) when measured using air
8 capture, contains greater than 250 respirable-sized unbound TiO₂ particles per liter (str/L) of air, or for
9 elongate fibers of TiO₂, greater than 75 str/L; or (2) when measured using bulk testing, greater 5.0 X
10 103 respirable-sized TiO₂ unbound particles. This would be measured using either of the following
11 methods:

12 **A. Air Capture**

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

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

27 **B. Bulk Testing**

28 1. Preparation for qualitative presence or absence and quantification of TiO₂ particles

1 unbound in the respirable-size fraction by TEM are conducted as follows: The product is prepared for
2 analysis by weighing and suspending a portion of the suspect material in an alcohol/deionized water
3 mix. Measured aliquots of the sample suspension are then filtered through a 0.2 µm mixed cellulose
4 ester filter (MCE). It has been determined that the optimal range of material extracted from the product
5 falls between 10-50 mg suspended in a 400 mL 50/50 DI H₂O/isopropyl alcohol solution*, from which
6 1-5 mL aliquots are drawn and filtered. The final MCE filter is dried, collapsed with acetone, and
7 coated with carbon in a vacuum evaporator. The fibers and solids collected on the carbon-coated filter
8 replicate are transferred onto copper grids for TEM analysis.

9 2. The resulting preparation is then scanned to assure a particle loading of the filter
10 between 5-15%, and then quantified by analysis, measuring lengths and widths and chemistries of
11 particulate to determine overall percent TiO₂ and size bin categorized for comparison with target value
12 compliances. Only particles less than 10 µm relative aerodynamic diameter not touching or adhering
13 to other materials on the filter preparation that reveal only titanium (and oxygen) peaks by EDS will
14 be considered for quantification. To observe and quantify all such structures down to unbound particles
15 as small as 50 nm (minimum dimension of 0.050 µm), the analysis should be conducted at 20-25,000x
16 magnification. Sufficient area of the filter shall be analyzed to reach an analytical sensitivity of at least
17 5.0 X 10³ RPTi /mg of product.

18 3. Products prepared and analyzed by this bulk screening protocol that are found to contain
19 >5.0 X 10³ RPTi /mg of product shall be deemed as “Fails TiO₂ screening test”, as would any product
20 found to contain respirable titanium dioxide fibers (mineralogically, acicular to fibrous rutile) observed
21 on the filter analyzed to the specified analytical sensitivity (5.0 X 10³ RPTi /mg). Product samples
22 thusly failing this standard would then be recommended for further testing to confirm releasability such
23 as product use simulation in a controlled environment with appropriate air testing, etcetera.
24 Alternatively, such products may be reformulated by the manufacturer or removed as noncompliant.

25 Should EHA reach a court-approved settlement with another cosmetics manufacturer alleging
26 a violation of Proposition 65 with respect to TiO₂, Defendant may comply, in its sole discretion, with
27 the reformulation/testing standard in that settlement and will be deemed in compliance with Proposition
28 65.


1 Covered Products' compliance with the standard set for in this section constitutes compliance
2 with Proposition 65 as to TiO2.

3 If, despite reasonable good-faith efforts, Rude is unable to achieve the reformulation levels or
4 employ the testing methodology set forth in Section 2.1 by the Compliance Date, Rude will have the
5 option of filing a motion to modify this Consent Judgment and pursue a reformulation level and testing
6 methodology subject to Court approval. Rude shall provide at least 21 days' notice to EHA of any
7 planned motion to modify the reformulation standard, and EHA may file an objection at its discretion.

8 **2.2 Clear and Reasonable Warnings**

9 For Covered Products that contain TiO2 in a concentration that may exceed the reformulation
10 standard set forth in section 2.1 above, and which are distributed or directly sold by Rude in the State
11 of California on or after the Compliance Date, Rude shall provide one of the following warning
12 statements.

13 **Option 1:**

14  **WARNING:** This product can expose you to chemicals including
15 Titanium dioxide (airborne, unbound particles particles of respirable
16 size), which is known to the State of California to cause cancer. For
more information go to www.P65Warnings.ca.gov.

17 **Option 2:**

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

19 This warning statement shall be prominently displayed on the Covered Products, on the
20 packaging of the Covered Products, or on a placard, shelf tag, or sign provided that the statement is
21 displayed with such conspicuousness, as compared with other words, statements, or designs as to render
22 it likely to be read and understood by an ordinary individual prior to sale. If a short form warning
23 statement (i.e., Option 2) is displayed on the Covered Products' packaging, it must be in a type size no
24 smaller than the largest type size used for other consumer information on the product. In no case shall
25 a short form warning statement displayed on the Covered Products' packaging appear in a type size
26 smaller than 6-point type. The same warning used on the Covered Product shall be posted on any
27 websites under the exclusive control of Rude where Covered Products are sold into California. Rude
28

1 shall instruct any third-party website to which it directly sells its Covered Products to include the same
2 warning as a condition of selling the Covered Products in California.

3 The warning requirements set forth herein are imposed pursuant to the terms of this Consent
4 Judgment and are recognized by the Parties as not being the exclusive manner of providing a “clear
5 and reasonable” Proposition 65 warning for the Covered Products. Warnings may also be provided in
6 any manner authorized by the Proposition 65 Regulations, as may be amended in the future, provided
7 that any such amended regulations are applicable to TIO2 in the Covered Products.

8 **2.3 Sell-Through Period**

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

15 **3. MONETARY SETTLEMENT TERMS**

16 **3.1 Settlement Amount**

17 Rude shall pay sixty thousand dollars (\$60,000.00) in settlement and total satisfaction of all the
18 claims referred to in the Notices, the Complaint, and this Consent Judgment. This includes civil
19 penalties in the amount of six thousand dollars (\$6,000.00) pursuant to Health and Safety Code section
20 25249.7(b) and attorneys’ fees and costs in the amount of fifty-four thousand dollars (\$54,000.00)
21 pursuant to Code of Civil Procedure section 1021.5.

22 **3.2 Civil Penalty**

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

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

28 Environmental Health Advocates

225 Broadway, Suite 2100
San Diego, CA 92101

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

For United States Postal Service Delivery:

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

For Federal Express 2-Day Delivery:

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

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

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

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

3.3 Attorney's Fees and Costs

The portion of the settlement attributable to attorneys' fees and costs shall be paid to EHA's counsel, who allege they 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 Rude's attention, as well as litigating and negotiating a settlement in the public interest.

Rude shall provide its payment for civil penalty and for attorneys' fees and costs to EHA's counsel as follows. Payment may be by physical check or by electronic means, including wire transfers, at Rude's discretion: four thousand five hundred dollars (\$4,500.00) payable to OEHHA as a civil penalty; one thousand five hundred dollars (\$1,500) payable to EHA pursuant to Health and Safety Code section 25249.12(d), and fifty-four thousand dollars (\$54,000.00) payable to Entorno Law, LLP, within fourteen (14) days of the Effective Date.

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

3 Noam Glick
4 Entorno Law, LLP
5 225 Broadway, Suite 1900
6 San Diego, CA 92101

7 **4. CLAIMS COVERED AND RELEASED**

8 **4.1 EHA's Public Release of Proposition 65 Claims**

9 Plaintiff, acting on its own behalf and in the public interest, releases Rude, and its parents,
10 subsidiaries, affiliated entities under common ownership or control, its directors, officers, principals,
11 agents, employees, attorneys, insurers, accountants, predecessors, successors, and assigns ("Defendant
12 Entities"), each entity to whom Defendant directly or indirectly distributes, ships, or sells the Covered
13 Products, including but not limited to downstream distributors, wholesalers, customers, retailers
14 (including TJX, its parents, subsidiaries, and related entities), and marketplaces franchisees,
15 franchisors, cooperative members, suppliers, licensees, and licensors, each entity from whom
16 Defendant directly or indirectly obtains the Covered Products, including but not limited to upstream
17 manufacturers and suppliers, and all of the foregoing entities' owners, directors, officers, agents,
18 principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors, and
19 assigns (collectively referred to as the "Releasees") from all claims for violations of Proposition 65 up
20 through the Compliance Date based on exposure to TiO₂ from Covered Products as set forth in the
21 Notices. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition
22 65 with respect to exposures to TiO₂ from Covered Products. This Consent Judgment is a full, final,
23 and binding resolution of all claims under Proposition 65 that were or could have been asserted against
24 Rude and/or Releasees for failure to comply with Proposition 65 for alleged exposure to TiO₂ from
25 Covered Products.
26
27
28

1 **4.2 EHA’s Individual Release of Claims**

2 EHA, in its individual capacity, also provides a release to Rude and/or Releasees, which shall
3 be a full and final accord and satisfaction of, as well as a bar to, all actions, causes of action, obligations,
4 costs, expenses, attorneys’ fees, damages, losses, claims, liabilities, and demands of every nature,
5 character, and kind, whether known or unknown, suspected or unsuspected, arising out of alleged or
6 actual exposures to TiO2 in Covered Products manufactured, imported, sold, or distributed by Rude
7 before the Compliance Date.

8 **4.3 Rude’s Release of EHA**

9 Rude on its own behalf, and on behalf of Defendant Entities as well as its past and current
10 agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against
11 EHA and its attorneys and other representatives, for any and all actions taken or statements made by
12 EHA and its attorneys and other representatives, whether in the course of investigating claims,
13 otherwise seeking to enforce Proposition 65 against them, in this matter or with respect to the Covered
14 Products.

15 **4.4 No Other Known Claims or Violations**

16 EHA and EHA’s counsel affirm that they are not presently aware of any actual or alleged
17 violations of Proposition 65 by Rude or for which Rude bears legal responsibility other than those
18 that are fully resolved by this Consent Judgment.

19 **4.5 Mutual Release of Unknown Claims**

20 The Parties, acting on behalf of themselves as private parties only, certify that they have read
21 the following provisions of California Civil Code Section 1542:

22 A general release does not extend to claims that the creditor or releasing
23 party does not know or suspect to exist in his or her favor at the time of
24 executing the release, and that if known by him or her, would have
25 materially affected his or her settlement with the debtor or released party.

26 The Parties expressly waive and relinquish all rights and benefits which they may have under
27 California Civil Code Section 1542 to the full extent such provisions may lawfully be waived.
28

1 **5. COURT APPROVAL**

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

5 **6. SEVERABILITY**

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

8 **7. 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 Rude may
12 provide written notice to EHA of any asserted change, and shall have no further injunctive obligations
13 pursuant to this Consent Judgment with respect to, and to the extent that, the Covered Products are so
14 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 TiO2 cases are permanently enjoined by a court of competent
18 jurisdiction; or if Proposition 65 is determined to be preempted by federal law or a burden on First
19 Amendment rights with respect to TiO2 in Covered Products or Covered Products substantially similar
20 to Covered Products, then Rude shall be relieved of its obligation to comply with Section 2 herein.

21 **8. ENFORCEMENT**

22 In any action to enforce the terms of this Consent Judgment, the prevailing party shall be entitled
23 to its reasonable attorneys’ fees and costs.

24 **9. NOTICE**

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

1 If to Rude:

2 Sherry E. Jackman
3 Sedina L. Banks
4 Greenberg Glusker LLP
5 2049 Century Park East, Suite 2600
6 Los Angeles, CA 90067
7 sjackman@greenbergglusker.com
8 sbanks@greenbergglusker.com

If to EHA:

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

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

11 **10. COUNTERPARTS; DIGITAL SIGNATURES**

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

15 **11. POST EXECUTION ACTIVITIES**

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

25 **12. MODIFICATION**

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

1 **13. AUTHORIZATION**

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

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

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

9 **15. ENTIRE AGREEMENT**

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

15 **AGREED TO:**

AGREED TO:

16
17 Date: 04/18/2023

Date: 04/18/2023

18 By: 

18 By: 

19 ENVIRONMENTAL HEALTH
20 ADVOCATES, INC.

RUDE COSMETICS, INC.

21 **IT IS SO ORDERED.**

22
23 Date: _____

24 JUDGE OF THE SUPERIOR COURT
25
26
27
28