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14 Environmental Health Advocates, Inc.

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

17 ENVIRONMENTAL HEALTH
18 ADVOCATES, INC.,

19 Plaintiff,

20 v.

21 STEARN'S PRODUCTS, INC., a California
22 corporation, ULTA SALON, COSMETICS &
23 FRAGRANCE, INC., a Delaware corporation,
24 and DOES 1 through 100, inclusive,

25 Defendants.

Case No. 22CV020591

**[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 Stearn’s Products, Inc. (“Defendant” or “Stearn’s”) with EHA and Stearn’s
5 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 Stearn’s 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 Stearn’s manufactures, imports, sells, and distributes for sale Derma E
16 Essentials Sun Protection Mineral Powder SPF 30 that contains airborne, unbound particles of Titanium
17 Dioxide (“TiO₂”). EHA further alleges that Stearn’s does so without providing a sufficient health
18 hazard warning as required by Proposition 65 and related Regulations. Pursuant to Proposition 65,
19 TiO₂ is listed as a chemical known to cause cancer. Stearn’s denies these allegations and asserts that
20 its products are safe and in compliance with all applicable laws, rules and regulations.

21 **1.5 Notice of Violation**

22 On or around August 1, 2022, EHA served Defendant Stearn’s, Ulta Salon, Cosmetics &
23 Fragrance, Inc., the California Attorney General, and all other required public enforcement agencies
24 with a 60-Day Notice of Violation of Proposition 65 (“Notice”). On or around October 18, 2022, EHA
25 served Defendant Stearn’s, Ulta Salon, Cosmetics & Fragrance, Inc., the California Attorney General,
26 and all other required public enforcement agencies with a 60-Day Amended Notice of Violation of
27 Proposition 65 that corrected the address for the manufacturer. The Notice alleged that Stearn’s had
28 violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards

1 associated with exposures to TiO₂ contained in Derma E Essentials Sun Protection Mineral Powder
2 SPF 30.

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 product covered by this Consent Judgment is Derma E Essentials Sun Protection Mineral
7 Powder SPF 30.

8 **1.7 State of the Pleadings**

9 On or around October 26, 2022, EHA filed a Complaint against Stearn's and Ulta Salon,
10 Cosmetics & Fragrance, Inc. for the alleged violations of Proposition 65 that are the subject of the
11 Notice ("Complaint").

12 **1.8 No Admission**

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

21 **1.9 Jurisdiction**

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

26 **1.10 Effective Date**

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

1 **2. INJUNCTIVE RELIEF**

2 **2.1 Reformulation of the Covered Products**

3 Commencing one year after the Effective Date, Defendant shall not sell any Covered Product
4 that: (1) when measured using air capture, contains greater than 250 respirable-sized unbound TiO₂
5 particles per liter (str/L) of air, or for elongate fibers of TiO₂, greater than 75 str/L; or (2) when
6 measured using bulk testing, greater 5.0 X 10³ respirable-sized TiO₂ unbound particles. This would
7 be measured using either of the following methods:

8 **A. Air Capture**

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

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

23 **B. Bulk Testing**

24 1. Preparation for qualitative presence or absence and quantification of TiO₂ particles
25 unbound in the respirable-size fraction by TEM are conducted as follows: The product is prepared for
26 analysis by weighing and suspending a portion of the suspect material in an alcohol/deionized water
27 mix. Measured aliquots of the sample suspension are then filtered through a 0.2 µm mixed cellulose
28 ester filter (MCE). It has been determined that the optimal range of material extracted from the product

1 falls between 10-50 mg suspended in a 400 mL 50/50 DI H₂O/isopropyl alcohol solution*, from which
2 1-5 mL aliquots are drawn and filtered. The final MCE filter is dried, collapsed with acetone, and
3 coated with carbon in a vacuum evaporator. The fibers and solids collected on the carbon-coated filter
4 replicate are transferred onto copper grids for TEM analysis.

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

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

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


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

26 **2.2 Clear and Reasonable Warnings**


27 For Covered Products that contain TiO₂ in a concentration exceeding the Reformulation
28 Standard set forth in section 2.1 above, and which are distributed or directly sold by Stearn’s in the

1 State of California on or after the Effective Date, Stearn's shall provide one of the following warning
2 statements.

3 **Option 1:**

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

8 **Option 2:**

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

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

20 **2.3 Sell-Through Period**

21 Notwithstanding anything else in this Consent Judgment, Covered Products that are
22 manufactured, packaged, or put into commerce on or after the date this Agreement is executed shall be
23 subject to the release of liability pursuant to this Consent Judgment, without regard to when such
24 Covered Products were, or are in the future, distributed or sold to customers. As a result, the obligations
25 of Stearn's, or any Releasees (if applicable), stated in this Section 2 do not apply to Covered Products
26 manufactured, packaged, or put into commerce between the date this Agreement is executed and the
27 Effective Date.

28 ///

1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Settlement Amount**

3 Stearn's 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 six thousand dollars (\$6,000.00) pursuant to Health and Safety Code section
6 25249.7(b) and attorneys' fees and costs in the amount of fifty-four thousand dollars (\$54,000.00)
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
16 San Diego, CA 92101

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

18 For United States Postal Service Delivery:

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

24 For Federal Express 2-Day Delivery:

25 Mike Gyurics
26 Fiscal Operations Branch Chief
27 Office of Environmental Health Hazard Assessment
28 1001 I Street
Sacramento, CA 95814

Stearn's agrees to provide EHA's counsel with a copy of the check payable to OEHHA,
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 All payments referenced in this section shall be paid within fourteen (14) days of the date the
6 Court approves EHA’s motion to approve this Consent Judgment.

7 **3.3 Attorney’s Fees and Costs**

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

12 Stearn’s shall provide its payment for civil penalty and for attorneys’ fees and costs to EHA’s
13 counsel by physical check or by electronic means, including wire transfers, at Stearn’s discretion, as
14 follows: fifty-four thousand dollars (\$54,000.00) payable to Entorno Law, LLP, payable within
15 fourteen (14) days of the date the Court approves EHA’s motion to approve this Consent Judgment.

16 The address for this payment is:

17 Noam Glick
18 Entorno Law, LLP
225 Broadway, Suite 1900
San Diego, CA 92101

19 **4. CLAIMS COVERED AND RELEASE**

20 **4.1 EHA’s Public Release of Proposition 65 Claims**

21 Plaintiff, acting on its own behalf and in the public interest, releases Stearn’s, and its parents,
22 subsidiaries, affiliated entities under common ownership or control, its directors, officers, principals,
23 agents, employees, attorneys, insurers, accountants, predecessors, successors, and assigns (“Defendant
24 Entities”), each entity to whom Defendant directly or indirectly distributes, ships, or sells the Covered
25 Products, including but not limited to downstream distributors, wholesalers, customers, retailers
26 (including but not limited to Ulta Salon, Cosmetics & Fragrance, Inc.), and marketplaces franchisees,
27 franchisors, cooperative members, suppliers, licensees, and licensors, and all of the foregoing entities’
28 owners, directors, officers, agents, principals, employees, attorneys, insurers, accountants,

1 representatives, predecessors, successors, and assigns (collectively referred to as the “Releasees”) from
2 all claims for violations of Proposition 65 up through the Effective Date based on exposure to TiO2
3 from Covered Products as set forth in the Notice(s). Compliance with the terms of this Consent
4 Judgment constitutes compliance with Proposition 65 with respect to exposures to TiO2 from Covered
5 Products as set forth in the Notice(s), except as to any third-party internet seller that is instructed by
6 Stearn’s to provide warnings as a condition of selling the Covered Products in California and fails to
7 do so. This Consent Judgment is a full, final, and binding resolution of all claims under Proposition 65
8 that were or could have been asserted against Stearn’s and/or Releasees for failure to comply with
9 Proposition 65 for alleged exposure to TiO2 from Covered Products.

10 **4.2 EHA’s Individual Release of Claims**

11 EHA, in its individual capacity, also provides a release to Stearn’s and/or Releasees, which
12 shall be a full and final accord and satisfaction of, as well as a bar to, all actions, causes of action,
13 obligations, costs, expenses, attorneys’ fees, damages, losses, claims, liabilities, and demands of every
14 nature, character, and kind, whether known or unknown, suspected or unsuspected, arising out of
15 alleged or actual exposures to TiO2 in Covered Products manufactured, imported, sold, or distributed
16 by Stearn’s before the Effective Date.

17 **4.3 Stearn’s Release of EHA**

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

23 **4.4 No Other Known Claims or Violations**

24 EHA and EHA’s counsel affirm that they are not presently aware of any actual or alleged
25 violations of Proposition 65 by Stearn’s or for which Stearn’s bears legal responsibility other than
26 those that are fully resolved by this Consent Judgment.
27
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 Stearn's 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 Stearn's 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 Stearn's:
Eric Weiss
2 Scali Rasmussen, PC
300 South Grand Ave., Suite 2750
3 Los Angeles, CA 90071
eweiss@scalilaw.com

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

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

7 **10. COUNTERPARTS; DIGITAL SIGNATURES**

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

11 **11. POST EXECUTION ACTIVITIES**

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

21 **12. MODIFICATION**

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

25 **13. AUTHORIZATION**

26 The undersigned are authorized to execute this Consent Judgment and acknowledge that they
27 have read, understand, and agree to all of the terms and conditions contained herein.
28

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

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

6 **15. ENTIRE AGREEMENT**

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

12 **AGREED TO:**

AGREED TO:

13
14 Date: 6/22/2023

Date: 6/21/23

15 By: 
16 ENVIRONMENTAL HEALTH
17 ADVOCATES, INC.

By: 
STEARN'S PRODUCTS, INC.

18 **IT IS SO ORDERED.**

19
20 Date: _____

21 JUDGE OF THE SUPERIOR COURT