

## **SETTLEMENT AGREEMENT AND RELEASE**

### **1. INTRODUCTION**

#### **1.1 Parties**

This Settlement Agreement and Release (“Settlement Agreement”) is entered into by and between Environmental Health Advocates, Inc. (“EHA”), on the one hand, and Jouer Cosmetics, LLC (“Jouer”), on the other hand, with EHA and Jouer each individually referred to as a “Party” and collectively as the “Parties.” EHA is a corporation in the State of California serving in the interest of the general public by seeking to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products. EHA alleges that Jouer is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code § 25249.6 et seq. (“Proposition 65”).

#### **1.2 General Allegations**

EHA alleges that Jouer manufactures, sells, and distributes for sale in California, makeup palettes that contain Titanium Dioxide (“TiO<sub>2</sub>”) and that it does so without first providing the health hazard warning required by Proposition 65. TiO<sub>2</sub> is listed pursuant to Proposition 65 as a chemical known to cause cancer.

#### **1.3 Product Description**

The products covered by this Settlement Agreement are defined as, and expressly limited to, all powdered face makeup products containing TiO<sub>2</sub> including, but not limited to, Jouer Cosmetics Rose Gold Blush Bouquet Dual Blush Palette Mini (“Covered Products”), that are manufactured, sold or distributed for sale in the State of California by Jouer.

#### **1.4 Notice of Violation**

On or around October 25, 2022, EHA served Jouer, Sephora USA, Inc., the California Attorney General, and certain other public enforcement agencies (EHA believes required) with a 60-Day Notice of Violation of Proposition 65 (“Notice”). The Notice alleged that Jouer had violated

Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated with exposures to TiO<sub>2</sub> contained in Covered Products.

To the best of the Parties' knowledge, no public enforcer has commenced or is otherwise prosecuting an action to enforce the violations alleged in the Notice.

### **1.5 No Admission**

Jouer denies the material, factual, and legal allegations in the Notice and maintains that all of the products it sold and/or distributed for sale in California, including Covered Products, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Jouer of any fact, finding, conclusion, issue of law or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Jouer of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Jouer. This Section shall not, however, diminish or otherwise affect Jouer's obligations, responsibilities, and duties under this Settlement Agreement.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean the date this Agreement is fully executed by the Parties.

### **1.7 Compliance Date**

For purposes of this Settlement Agreement, the term "Compliance Date" shall mean one year after the Effective Date.

## **2. INJUNCTIVE RELIEF**

### **2.1 Reformulation Standard**

Commencing on or before the Compliance Date, Jouer shall not sell any Covered Product in the State of California that: (1) when measured using air capture, contains greater than 250 respirable-sized unbound TiO<sub>2</sub> particles per liter (str/L) of air, or for elongate fibers of TiO<sub>2</sub>, greater than 75 str/L; or (2) when measured using bulk testing, contains greater than 5.0 X 10<sup>3</sup> respirable-sized TiO<sub>2</sub> unbound particles; or (3) when measured using a cascade impactor, contains greater than 0.00837 mg

respirable-sized TiO<sub>2</sub> unbound particles per mg of bulk makeup powder. This would be measured using one 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<sup>-4</sup> to 10<sup>-5</sup> 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 TiO<sub>2</sub> 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 H<sub>2</sub>O/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.

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

3. Products prepared and analyzed by this bulk screening protocol that are found to contain  $>5.0 \times 10^3$  RPTi /mg of product shall be deemed as “Fails TiO<sub>2</sub> screening test”, as would any product found to contain respirable titanium dioxide fibers (mineralogically, acicular to fibrous rutile) observed on the filter analyzed to the specified analytical sensitivity ( $5.0 \times 10^3$  RPTi /mg). Product samples thusly failing this standard would then be recommended for further testing to confirm releasability such as product use simulation in a controlled environment with appropriate air testing, etcetera. Alternatively, such products may be reformulated by the manufacturer or removed as noncompliant.

### **C. Cascade Impactor**



Use a cascade impactor (Andersen, NGI or Marple-Miller, All USP<601> approved impactors) to perform separation of the particle below 10µm from the bulk makeup powder. 1-10 grams of bulk makeup powder will be aerosolized using an eductor with high pressure to aerosolize the makeup powder. This powder will be fed into a cascade impactor operating at 30 lpm. All powder will be collected and weighed to show mass fraction and weights above and below 10µm in size. Particles collected below 10µm will be analyzed for TiO<sub>2</sub> content via ICP-AES, which will be used to determine the mass of TiO<sub>2</sub> in the <10µm powder and to quantify all TiO<sub>2</sub> mass content below 10µm. This value will be used to calculate the value for mass fraction and does of TiO<sub>2</sub> below 10µm in size present in the bulk powdered makeup samples.

Should EHA reach a court-approved settlement with another cosmetics manufacturer alleging a violation of Proposition 65 with respect to TiO<sub>2</sub>, Defendant may comply with the reformulation standard in that settlement and will be deemed in compliance with Proposition 65.

Covered Products' compliance with either the air capture or bulk testing standard set forth in this section constitutes compliance with Proposition 65 as to TiO<sub>2</sub>.

## 2.2 General Warning Requirements

Jouer agrees that any Covered Product that contains TiO<sub>2</sub> in a concentration level exceeding the standard set forth in Section 2.1 above, and which is distributed or directly sold by Jouer in the State of California after the Compliance Date, shall include one of the following warning statements:

- 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](http://www.P65Warnings.ca.gov).
  
- 2)  **WARNING:** Cancer— [www.P65Warnings.ca.gov](http://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 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 Jouer where Covered Products are sold into California.

### (i) Changes in Warning Regulations or Statutes

In the event that the Office of Environmental Health Hazard Assessment promulgates one or more regulations requiring or permitting Proposition 65 warning text and/or methods of transmission

applicable to the Covered Products and the chemical at issue, which are different than those set forth above, Jouer shall be entitled to use, at its discretion, such other warning text and/or method of transmission without being deemed in breach of this Agreement. If regulations or legislation are enacted providing that Proposition 65 warnings as to TiO<sub>2</sub> in this product are no longer required, a lack of warning by Jouer will not thereafter be a breach of this Agreement. Jouer shall instruct any third-party website to which it sells its Covered Products to include the same warning as a condition of selling the Covered Products.

### **2.3 Grace Period for Existing Inventory of Covered Products**

Notwithstanding anything else stated in this Settlement Agreement, the requirements of Sections 2.1 and 2.2 above shall not apply to Covered Products that are already in the stream of commerce as of the Compliance Date, which Covered Products are expressly subject to the releases provided in Section 5.1. For the avoidance of doubt, Covered Products in the stream of commerce specifically includes, but is not limited to, Covered Products in the process of manufacture.

### **2.4 Jouer Relieved of Obligations**

In the event that Proposition 65 is repealed, or is otherwise rendered inapplicable for any reason including, but not limited to, changes in the law, then Jouer may provide written notice to EHA of any asserted change, and shall have no further injunctive obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Covered Products are so affected.

Further, in the event the California Office of Health Hazard Assessment adopts a regulation or safe use determination, or issues an interpretive guideline that exempts Covered Products from meeting the requirements of Proposition 65; or if TiO<sub>2</sub> cases are permanently enjoined by a court of competent jurisdiction; or if Proposition 65 is determined to be preempted by federal law or a burden on First Amendment rights with respect to TiO<sub>2</sub> in the Covered Products or in products substantially similar to the Covered Products, then Jouer shall be relieved of its obligation to comply with Section 2 herein.

## **3. MONETARY SETTLEMENT TERMS**

### **3.1 Civil Penalty Payment**

Pursuant to Health and Safety Code § 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, Jouer agrees to pay three thousand dollars (\$3,000.00) in civil penalties. The penalty payment will be allocated in accordance with California Health and Safety Code §§ 25249.12(c)(1) & (d), with 75% of the penalty amount paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount retained by EHA. Within fourteen (14) days of the Effective Date, Jouer shall issue two separate checks for the initial civil penalty payment to (a) “OEHHA” in the amount of two thousand two hundred fifty dollars (\$2,250.00) and (b) Environmental Health Advocates, Inc., in the amount of seven hundred fifty dollars (\$750.00).

All payments owed to OEHHA (EIN: 68-0284486), pursuant to this Section 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 Non-United States Postal Service Delivery:

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

All penalty payments owed to EHA shall be sent to:

Isaac Fayman  
Environmental Health Advocates  
225 Broadway, Suite 1900  
San Diego, CA 92101

### **3.2 Attorney Fees and Costs**

The Parties reached an accord on the compensation due to EHA and its counsel under the private attorney general doctrine and principles of contract law. Under these legal principles, within fourteen (14) days of the Effective Date, Jouer agrees to pay thirty-two thousand dollars (\$32,000.00) to EHA and its counsel for all fees and costs incurred in investigating, bringing this matter to the attention of Jouer, and negotiating a settlement. This payment shall be delivered to:

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

### **3.3 Tax Documentation**

Jouer agrees to provide a completed IRS 1099 for its payments to, and EHA agrees to provide IRS W-9 forms for, each of the payees under this Settlement Agreement. The Parties acknowledge that Jouer cannot issue any settlement payments pursuant to Section 3.1 and 3.2 above until after Jouer receives the requisite W-9 forms from EHA's counsel.

## **4. CLAIMS COVERED AND RELEASED**

### **4.1 EHA's Release of Jouer**

This Settlement Agreement is a full, final, and binding resolution of all claims between EHA, on its own behalf and not on behalf of the public, and Jouer for all claims that can or could have been asserted by EHA, on its own behalf, on behalf of its past and current agents, representatives, attorneys, successors and assignees, against Jouer and each of its respective parents, subsidiaries, affiliated entities under common ownership, directors, officers, members, employees, attorneys, and each entity to whom Jouer directly or indirectly distributes or sells the Covered Products, including, but not limited to, its downstream distributors, wholesalers, customers, retailers (including, but not limited to Sephora USA, Inc.), franchisees, cooperative members and licensees ("Releasees"), based on the alleged exposure to TiO<sub>2</sub> in the Covered Products manufactured, sold or distributed for sale in the State of California by Jouer before the Compliance Date, as alleged in the Notice and in the Complaint, or for any other reason.



In further consideration of the promises and agreements herein contained, EHA on its own behalf and not on behalf of the public, on behalf of its past and current agents, representatives, attorneys, successors and assignees hereby waives any and all rights it may have to institute or participate in, directly or indirectly, any form of legal action and releases all claims against Jouer and Releasees including, without limitation, all actions and causes of action, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses including, but not exclusively, investigation fees, expert fees and attorney fees arising under Proposition 65 with respect to the alleged exposure to TiO<sub>2</sub> in the Covered Products manufactured, distributed, sold or offered for sale in the State of California by Jouer, before the Compliance Date.

#### **4.2 Jouer's Release of EHA**

Jouer, on its own behalf and on behalf of its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against EHA and its attorneys and other representatives, for any and all actions taken or statements made by EHA and its attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Covered Products.

#### **4.3 No Other Known Claims of Violations**

EHA and its counsel affirm they are not presently aware of any actual or alleged violation of Proposition 65 by Jouer for which Jouer bears legal responsibility other than those that are fully resolved by this Settlement Agreement.

#### **4.4 California Civil Code Section 1542**

It is possible that other claims not known to the Parties arising out of the facts alleged in the Notice and relating to the Covered Products will develop or be discovered. EHA, on behalf of itself only, on one hand, and Jouer on behalf of itself only, on the other hand, acknowledge that this Settlement Agreement is expressly intended to cover and include all such claims up through the Effective Date. The Parties acknowledge that the claims released in Sections 5.1 and 5.2 may include unknown claims, and nevertheless waive California Civil Code section 1542 as to any such unknown claims. California Civil Code section 1542 reads as follows:

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

**5. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any provision of this Settlement Agreement is held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

**6. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California.

**7. ENFORCEMENT**

In any action to enforce the terms of this Settlement Agreement, the prevailing party shall be entitled to its reasonable attorneys' fees and costs.

**8. NOTICE**

Unless specified herein, all correspondence and notice required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (a) personal delivery; (b) first-class, registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any Party by the other at the following addresses:

For Jouer:

Daniel S. Silverman  
Venable LLP  
2049 Century Park East, Suite 2300  
Los Angeles, CA 90067

For EHA:

Noam Glick  
Entorno Law, LLP

225 Broadway, Suite 1900  
San Diego, CA 92101

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

**9. COUNTERPARTS; FACSIMILE SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or portable document format (PDF) signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

**10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

EHA and its attorneys agree to comply with the reporting form requirements referenced in California Health and Safety Code § 25249.7(f).

**11. MODIFICATION**

This Settlement Agreement may be modified only by written agreement of the Parties.

**12. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood, and agree to all of the terms and conditions of this Settlement Agreement.

**13. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**


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

**14. ENTIRE AGREEMENT**

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

**AGREED TO:**

Date: 05/09/2023

By:   
ENVIRONMENTAL HEALTH  
ADVOCATES, INC.

**AGREED TO:**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
JOUER COSMETICS, LLC


AGREED TO:

Date: 05/09/2023

By:   
ENVIRONMENTAL HEALTH  
ADVOCATES, INC.

AGREED TO:

Date: 5.17.2023

By:   
JOUR COSMETICS, LLC