

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties

This Settlement Agreement is entered into by and between Environmental Health Advocates, Inc. (“EHA”), on the one hand, and Nails, Inc., Limited (“Nails”), on the other hand, with EHA and Nails 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 Nails 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 Nails manufactures, sells, and distributes for sale in California, makeup palettes that contain Titanium Dioxide (“TiO₂”) and that it does so without first providing the health hazard warning required by Proposition 65. TiO₂ 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 powdered face makeup products containing Titanium Dioxide including, but not limited to, INC.redible You Glow Girl Pigment Highlighter (“Covered Products”), manufactured, sold or distributed for sale in California by Nails.

1.4 Notice of Violation

On or around November 1, 2022, EHA served Nails, 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 Nails had violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated with exposures to TiO₂ 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

Nails 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 Nails 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 Nails of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Nails. This Section shall not, however, diminish or otherwise affect Nails'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 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 the Compliance Date, Defendant shall not sell any Covered Product that: (1) when 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.

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 TiO₂ 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 5.0×10^3 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 TiO₂ 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 (5.0×10^3 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.


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 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 TiO₂.

2.2 General Warning Requirements

Nails agrees any Covered Product sold that was not reformulated pursuant to paragraph 2.1 shall contain a Proposition 65 warning. Nails agrees that each warning shall be prominently placed with such conspicuousness, as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. Each warning shall be provided in a manner such that the consumer or user understands to which *specific* Covered Products the warning applies, so as to minimize the risk of consumer confusion.

For purposes of this Settlement Agreement, a clear and reasonable warning for the Covered Products shall consist of a warning affixed to the packaging, label, tag, or directly to each Covered Products sold in California by Nails that contains the following 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.

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 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 Nails 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, Nails 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 TiO₂ in this product are no longer required, a lack of warning by Nails will not thereafter be a breach of this Agreement. Nails 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, however, Nails does not assume any duty to monitor third-party websites.

2.3 Grace Period for Existing Inventory of Covered Products

The injunctive requirements of Section 2 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 4.1. 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.

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, Nails 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, Nails 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, Nails agrees to pay twenty-five thousand dollars (\$25,000.00) to EHA and its counsel for all fees and costs incurred in investigating, bringing this matter to the attention of Nails, and negotiating a settlement. This payment be delivered to:

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

4. CLAIMS COVERED AND RELEASED

4.1 EHA's Release of Nails

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 Nails 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 Nails and each of its respective parents, subsidiaries, affiliated entities under common ownership, directors, officers, members, employees, attorneys, and each entity to whom Nails 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 failure to warn about exposures to TiO₂ required under Proposition 65 in the Covered Products manufactured, sold or distributed for sale in California by Nails before the Effective Date, as alleged in the Notice, 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 Nails 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 or actual failure to warn about exposures to TiO₂ required under Proposition 65 in the Covered Products manufactured, distributed, sold or offered for sale by Nails, before the Effective Date.

4.2 Nails's Release of EHA

Nails, 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 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 Nails 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 4.1 and 4.2 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 Nails:

Joshua Briones
Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C.
2049 Century Park East, Suite 300
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.

AGREED TO:

AGREED TO:

Date: 04/10/2023

Date: 4/11/2023

By: 

ENVIRONMENTAL HEALTH
ADVOCATES, INC

By: 

NAILS, INC LIMITED