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15 Attorneys for Plaintiff  
16 Environmental Health Advocates, Inc.

**FILED**  
ALAMEDA COUNTY

FEB 17 2021

CLERK OF THE SUPERIOR COURT

By *[Signature]* Deputy

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **IN AND FOR THE COUNTY OF ALAMEDA**

13 ENVIRONMENTAL HEALTH  
14 ADVOCATES, INC.,

15 Plaintiff,

16 v.

17 FERRARA CANDY COMPANY,

18 Defendant.

Case No.:RG20079914

~~PROPOSED~~ AMENDED CONSENT  
JUDGMENT AS TO FERRARA CANDY  
COMPANY

1     **1.     INTRODUCTION**

2           1.1       The “Complaint” means the Complaint in the above-captioned matter.

3           1.2       The Compliance Date means eighteen months from the Effective Date.

4           1.3       The “Products” means Girl Scout S’Mores (“S’Mores”) and Keebler Chips Deluxe  
5 Rainbow cookies (“Chocolate Chip Cookies”) manufactured, distributed, or sold by Defendant.

6           1.4       “Effective Date” means the date on which notice of entry of this Consent Judgment  
7 by the Court is served upon Defendant.

8           1.5       “Defendant” refers to Ferrara Candy Company and its parent companies,  
9 subsidiaries, and affiliated companies under common ownership.

10          **1.6     Allegations**

11           Plaintiff alleges that Defendant manufactures, sells, and distributes Products for sale in  
12 California that contain acrylamide. Plaintiff further alleges that Defendant has not provided warnings  
13 under Proposition 65 for alleged exposures to acrylamide in the Products. Defendant denies that  
14 warnings are required under Proposition 65 for any exposures to acrylamide in the Products, and  
15 Defendant maintains that it has complied with all applicable federal and state laws, including but not  
16 limited to Proposition 65.

17          **1.7     The Parties**

18           Defendant has ten or more employees and has manufactured, distributed, or sold the Products  
19 in the year preceding the filing of the Complaint. In July 2019, Kellogg Company completed its sale  
20 of various products to Ferrero International S.A. Defendant, a company related to Ferrero  
21 International S.A., manufactures, markets, advertises, and sells the Products on behalf of Ferequity  
22 Inc., a subsidiary of Ferrero International S.A.. The term “Kellogg” refers to Kellogg Company and  
23 Kellogg Sales Company.

24          **1.8     Notices of Violation**

25           On April 22, 2020 Plaintiff issued 60-Day Notices of Violation of California Health and Safety  
26 Code section 25249.6 *et seq.* claiming violations of Proposition 65 for alleged exposures to acrylamide  
27 in the Products (“Notices”) by Defendant and other companies. The Notices were served on  
28 Defendant, the California Attorney General, and all other required California public prosecutors.

1           **1.9     No Admission**

2           By stipulating to the entry of this Consent Judgment and agreeing to provide the relief and  
3 remedies specified herein, Defendant does not admit that it has violated, or threatened to violate,  
4 Proposition 65 or any other law or legal duty, and Defendant does not admit that the chemical  
5 acrylamide in food poses any risk to human health.

6           Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,  
7 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment  
8 be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law.  
9 This Section shall not, however, diminish or otherwise affect Defendant's obligations, responsibilities,  
10 and duties under this Consent Judgment.

11           **1.10    Jurisdiction**

12           For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this  
13 Court has jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in  
14 the County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this  
15 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

16    **2.     INJUNCTIVE RELIEF**

17           **2.1**     Any Products that are manufactured or purchased by Defendant on and after the  
18 Compliance Date that it thereafter sells in California or distributes for sale in California shall either  
19 (1) not exceed 280 parts per billion ("ppb") acrylamide, as set forth in Section 2.2 ("Acrylamide  
20 Limit") or (2) comply with the warning requirements of Section 2.4.

21           **2.1.1.** As used in this Section 2.1, distribution for sale in California refers to directly  
22 shipping a Product into California or to sell a Product to a distributor that Defendant knows will sell  
23 the Product in California.

24           **2.2     Testing**

25           (a)     Compliance with the 280 ppb acrylamide limit shall be determined using LC-MS/MS  
26 (Liquid Chromatograph-Mass Spectrometry), GC/MS/MS (Gas Chromatography/Mass  
27 Spectrometry), or any other testing method agreed upon by the Parties. Any testing for purposes of  
28

1 Section 2.1 shall be performed by any laboratory accredited by the State of California, a federal  
2 agency, or a nationally recognized accrediting organization.

3 (b) The Acrylamide Limit is determined by randomly selecting and testing, over no less  
4 than a ten-day period, one sample from up to four lots of Products produced at locations that supply  
5 such Products to California ("Sampling Data"). The mean and standard deviation shall be calculated  
6 using the Sampling Data. Any data points that are more than three standard deviations outside the  
7 mean shall be discarded once, and the mean and standard deviation recalculated using the remaining  
8 data points. The arithmetic mean determined in accordance with this procedure shall be used to  
9 measure compliance with the Acrylamide Limit.

10 (c) Prior to Defendant's first distribution or sale in California of Products manufactured or  
11 purchased on and after the Compliance Date, and at least once a year thereafter for an additional two  
12 consecutive years, Defendant shall arrange for acrylamide testing meeting the requirements of Section  
13 2.2. Defendant shall send the testing reports obtained pursuant to Section 2.2 to Plaintiff within 30  
14 days of Defendant's receipt of those testing reports. The testing requirements of Section 2.2 do not  
15 apply to any Products for which Defendant has complied with the warning requirements of Section  
16 2.4.

17 **2.3 Sell-Through Period**

18 Notwithstanding anything else in this Consent Judgement, the Products that are manufactured  
19 on or prior to the Compliance Date shall be subject to release of liability pursuant to this Consent  
20 Judgement, without regard to when such products were, or are in the future, distributed or sold to  
21 customers. As a result, the obligations in Section 2 do not apply to these Products manufactured on or  
22 prior to the Compliance Date.

23 **2.4 Warnings**

24 If Defendant provides warnings under Section 2.1, Products may be sold in California with one  
25 of the following warning statements:

26 **Option 1:**

27 **WARNING:** Consuming this product can expose you to chemicals including acrylamide,  
28 which is known to the State of California to cause cancer [and birth defects or other  
reproductive harm]. For more information go to [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food).

1           **Option 2:**

2           **WARNING: Cancer [and Reproductive Harm] – [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food)**

3           The warning in Option 2 may be used only if the warning appears on the product container or  
4 labeling. Terms in bracketing are optional. The word “**WARNING**” shall be displayed in all capital  
5 letters and bold print. This warning statement shall be prominently displayed on the Product, on the  
6 packaging of the Product, or on a placard, shelf tag, or sign, provided that the statement is displayed  
7 with such conspicuousness, as compared with other words, statements, or designs as to render it likely  
8 to be read and understood by an ordinary individual prior to sale. If the warning statement is displayed  
9 on the Product’s label, it must be set off from other surrounding information and enclosed in a text  
10 box. If the warning statement is displayed on a placard, shelf tag, or sign where the Product is offered  
11 for sale, the warning placard or sign must enable an ordinary individual to easily determine which  
12 Products the warning applies to, and to differentiate between the Products and other products to which  
13 the warning statement does not apply. For sales by Defendant on the internet or by catalog where the  
14 consumer is not physically present, the warning statement shall be displayed in such a manner that it  
15 is likely to be read and understood by an ordinary individual prior to the authorization of or actual  
16 payment

17   **3.    MONETARY SETTLEMENT TERMS**

18           **3.1    Settlement Amount**

19           Defendant shall pay one hundred thirty-five thousand dollars (\$135,000) in settlement and total  
20 satisfaction of all the claims referred to in the Notices, the Complaint, and this Consent Judgment.  
21 This includes civil penalties in the amount of fifteen thousand dollars (\$15,000) pursuant to Health  
22 and Safety Code section 25249.7(b) and attorney’s fees and costs in the amount of one hundred twenty  
23 thousand dollars (\$120,000) pursuant to Code of Civil Procedure section 1021.5 and Health and Safety  
24 Code section 25249 et seq.

25           **3.2    Civil Penalty**

26           The portion of the settlement attributable to civil penalties shall be allocated according to  
27 Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty  
28

1 paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”), and the  
2 remaining twenty-five percent (25%) of the penalty paid to Plaintiff.

3 All payments owed to Plaintiff shall be delivered to the following payment address:

4 Noam Glick  
5 Glick Law Group  
6 225 Broadway, Suite 2100  
7 San Diego, CA 92101

8 All payments owed to OEHHA (EIN: 68-0284486) shall be delivered directly to OEHHA (Memo  
9 line “Prop 65 Penalties”) at the following addresses:

10 For United States Postal Delivery:

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

16 For Non-United States Postal Service Delivery:

17 Mike Gyurics  
18 Fiscal Operations Branch Chief  
19 Office of Environmental Health Hazard Assessment  
20 1001 I Street  
Sacramento, CA 95814

21 Defendant agrees to provide Plaintiff’s counsel with a copy of the check payable to OEHHA  
22 simultaneous with its penalty payment to Plaintiff.

23 The Parties, including Plaintiff, will exchange completed IRS 1099, W-9, or other forms as  
24 required. Relevant information for Glick Law Group, Nicholas & Tomasevic, and Plaintiff are set out  
25 below:

- 26 • “Environmental Health Advocates, Inc.” whose address and tax identification number  
27 shall be provided within five (5) days after this Consent Judgment is fully executed  
28 by the Parties:

- “Glick Law Group” (EIN: 47-1838518) at address provided in Section 3.2;
- “Nicholas & Tomasevic” (EIN: 46-3474065) at address provided in Section 3.3; and
- “Office of Environmental Health Hazard Assessment” at 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 Plaintiff’s counsel, who are entitled to attorney’s fees and costs incurred by it in this action, including but not limited to investigating potential violations, bringing this matter to Defendant’s attention, as well as litigating and negotiating a settlement in the public interest.

Defendant shall provide its payment to Plaintiff’s counsel in two checks, divided equally, payable to Glick Law Group, PC (\$60,000) and Nicholas & Tomasevic, LLP (\$60,000) respectively.

The addresses for these two entities are:

Noam Glick  
Glick Law Group  
225 Broadway, Suite 2100  
San Diego, CA 92101

Craig Nicholas  
Nicholas & Tomasevic, LLP  
225 Broadway, 19<sup>th</sup> Floor  
San Diego, CA 92101

### 3.4 Timing

The above mentioned checks will be issued within fourteen (14) days of the Effective Date.

## 4. CLAIMS COVERED AND RELEASED

### 4.1 Plaintiff’s Public Release of Proposition 65 Claims

This Consent Judgment is a full, final, and binding resolution between, on the one hand, Plaintiff, on behalf of itself and its attorneys, investigators, agents, heirs, and assigns (collectively referred to as “Plaintiff Releasers”) and on behalf of the public in the public interest, and, on the other hand, Defendant and its parents, subsidiaries, affiliated entities under common ownership, its directors, officers, principals, agents, employees, attorneys, insurers, accountants, predecessors, successors, and assigns (“Defendant Entities”), other companies variously named in the Notices (Little Brownie

1 Bakers and CVS Pharmacy, Inc.), and each entity to whom Defendant directly or indirectly distributes.  
2 ships, or sells the Products including but not limited to downstream distributors, wholesalers,  
3 customers, retailers, franchisees, cooperative members, licensors, licensees, and their owners,  
4 directors, officers, agents, principals, employees, attorneys, insurers, accountants, representatives,  
5 predecessors, successors, and assigns (collectively referred to as the "Releasees"), of all claims,  
6 actions, causes of action (in law or in equity), suits, liabilities, demands, obligations, damages, costs,  
7 fines, penalties, losses, expenses, and fees (including, but not limited to, investigation fees, expert fees,  
8 and attorney's fees), and expenses (collectively, "Claims") that have been or could have been asserted  
9 under Proposition 65 for any exposures to acrylamide from the Products manufactured, purchased,  
10 distributed, or sold by Defendant or Kellogg before the Compliance Date. Compliance with the terms  
11 of this Consent Judgment constitutes compliance with Proposition 65 with respect to any exposures to  
12 acrylamide from Products manufactured, purchased, sold, or distributed by Defendant on and after the  
13 Compliance Date.

#### 14 **4.2 Plaintiff's Individual Release of Claims**

15 Plaintiff, in its individual capacity, on behalf of itself and the Plaintiff Releasers, also waives  
16 all rights to institute or participate in, directly or indirectly, any form of legal action, and discharges  
17 and releases all Claims as to all Releasees under Proposition 65 or any statutory or common law from  
18 the alleged failure to provide warnings for any exposures to acrylamide, or for causing any exposures  
19 to acrylamide, in the Products and in wafer and chocolate chip cookie products manufactured,  
20 purchased, distributed, or sold by Defendant or Kellogg. The release in this Section 4.2 is effective as  
21 a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,  
22 expenses, attorney's fees, damages, losses, claims, liabilities, and demands by Plaintiff of any nature,  
23 character or kind, whether known or unknown, or suspected or unsuspected. Plaintiff acknowledges  
24 that it is familiar with Section 1542 of the California Civil Code, which provides as follows:

25 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS  
26 THAT THE CREDITOR OR RELEASING PARTY DOES NOT  
27 KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT  
28 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.



1 Plaintiff understands and acknowledges the significance and consequence of this waiver of California  
2 Civil Code section 1542.

3 **4.3 Defendant's Release of Plaintiff**

4 Defendant, on its own behalf, and on behalf of Releasees as well as its past and current agents,  
5 representatives, attorneys, successors, and assignees, hereby waives any and all claims against Plaintiff  
6 and its attorneys and other representatives, for any and all actions taken or statements made by Plaintiff  
7 and its attorneys and other representatives, whether in the course of investigating claims, otherwise  
8 seeking to enforce Proposition 65 against it, in this matter or with respect to the Products.

9 **5. COURT APPROVAL**

10 This Consent Judgment is not effective until it is approved and entered by the Court and shall  
11 be null and void if it is not approved and entered by the Court within six months after it has been fully  
12 submitted to the Court by the Parties, or by such additional time as the Parties may agree to in writing.

13 **6. SEVERABILITY**

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

17 **7. GOVERNING LAW**

18 The terms of this Consent Judgment shall be governed by the laws of the state of California  
19 and apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise  
20 rendered inapplicable for reasons, including but not limited to changes in the law, then Defendant may  
21 provide written notice to Plaintiff of any asserted change, and shall have no further injunctive  
22 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are  
23 so affected.

24 **8. NOTICE**

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

1 For Defendant:

2 Sarah Esmaili  
3 Arnold & Porter  
4 Three Embarcadero Center, 10th Fl  
San Francisco, CA 94111

For Plaintiff:

Noam Glick  
Glick Law Group, PC  
225 Broadway, 21st Floor  
San Diego, CA 92101

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

7 9. COUNTERPARTS; FACSIMILE 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 10. POST EXECUTION ACTIVITIES

12 Plaintiff agrees to comply with the reporting form requirements referenced in Health and  
13 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety  
14 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement,  
15 which motion Plaintiff shall draft and file. In furtherance of obtaining such approval, the Parties agree  
16 to mutually employ their 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  
19 approval, responding to any objection that any third-party may make, and appearing at the hearing  
20 before the Court if so requested.

21 11. ENFORCEMENT

22 Prior to bringing any motion or order to show cause to enforce the terms of this Consent  
23 Judgment, a Party seeking to enforce the Consent Judgment shall provide the other Party written  
24 notice of the alleged violation. The Parties shall meet and confer in an effort to try to reach  
25 agreement on an appropriate cure for the alleged violation. Plaintiff shall not bring an enforcement  
26 action or institute a judicial proceeding if Defendant demonstrates it has complied with the  
27 requirements of Section 2. Defendant is entitled to designate such information as confidential.  
28

1           In the event that meet and confer efforts are unsuccessful, the Party alleging a violation may  
2 initiate a judicial proceeding to enforce this Consent Judgment no earlier than 60 days after issuing  
3 the written notice specified in Section 11. In the event that Plaintiff proves a violation of Section 2 in  
4 a judicial proceeding to enforce the Consent Judgment, the Court may order appropriate injunctive  
5 relief, including but not limited to ordering that Defendant cease selling any affected Products in  
6 California without a clear and reasonable warning pursuant to Proposition 65. In any enforcement  
7 proceeding regarding this Consent Judgment, Defendant may assert any and all defenses that are  
8 available.

9       **12.    MODIFICATION**

10           **12.1   Modification.** This Consent Judgment may be modified only by: (i) a written  
11 agreement of the Parties and entry of a modified consent judgment thereon by the Court; or (ii) a  
12 successful motion or application of any Party, and the entry of a modified consent judgment thereon  
13 by the Court.

14           **12.2   Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment shall  
15 attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the  
16 Consent Judgment.

17           **12.3   Change in Proposition 65.** If Proposition 65 or its implementing regulations  
18 (including but not limited to the published "no significant risk level" for acrylamide set forth at Cal.  
19 Code Regs., tit. 27, section 25705, subdivision (c)(2) or any "alternative risk level" adopted by  
20 regulation or court decision) are changed from their terms as they exist on the date of entry of this  
21 Consent Judgment, or if OEHHA takes some other final regulatory action that determines that  
22 warnings for acrylamide are not required or modifies the standard for warnings for acrylamide, then  
23 Defendant may seek to modify this Consent Judgment. Any such modification shall have no effect on  
24 Defendant's financial obligations as provided herein.

25           **12.4   Other Court Decisions.** If a final decision of a court determines that warnings for  
26 acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide exposures are  
27 preempted or otherwise unlawful or unconstitutional, then Defendant may move to modify this Consent  
28

1 Judgment to conform to such ruling in order to avoid unfair, inconsistent, or anti-competitive results.  
2 Any such modification shall have no effect on Defendant's financial obligations as provided herein.

3 **12.5. Federal Agency Action and Preemption.** If a court of competent jurisdiction or an  
4 agency of the federal government, including, but not limited to, the U.S. Food and Drug  
5 Administration, states through any guidance, regulation or legally binding act that federal law has  
6 preemptive effect on any of the requirements of this Consent Judgment, then Defendant may seek to  
7 modify this Consent Judgment in accordance with the procedure for noticed motions set forth in Section  
8 12.1 to bring it into compliance with or avoid conflict with federal law. Any such modification shall  
9 have no effect on Defendant's financial obligations as provided herein.

10 **12.6 Scientific Studies.** If an agency of the federal government, including, but not limited  
11 to the U.S. Food and Drug Administration, states through any guidance, regulation, or other legally  
12 binding act, following a review of scientific studies and following public notice and comment, a cancer  
13 potency estimate for acrylamide that equates to a no significant risk level higher than 0.2 micrograms  
14 per day, then Defendant shall be entitled to seek a modification of this Consent Judgment. Any such  
15 modification shall have no effect on Defendant's financial obligations as provided herein.

16 **12.8** Before filing any motion to modify the Consent Judgment, Defendant shall provide  
17 written notice to Plaintiff to initiate the meet and confer procedure in Section 12.2. If the Parties do  
18 not agree on the proposed modification during informal meet and confer efforts, Defendant may file a  
19 motion to modify the Consent Judgment within sixty (60) days of the date of the written notice that  
20 Defendant provides to Plaintiff under this Section 12.

21 **13. RETENTION OF JURISDICTION**

22 This Court shall retain jurisdiction of this matter to implement or modify the Consent  
23 Judgment. Notwithstanding the provisions of Section 12, nothing in this Consent Judgment limits or  
24 affects the Court's authority to modify this Consent Judgment as provided by law.

25 **12. 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 **13. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

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

6 **14. 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  
11 or otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.

12 **AGREED TO:**

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

14 By: \_\_\_\_\_

15 \_\_\_\_\_ [print name]

16 ENVIRONMENTAL HEALTH  
17 ADVOCATES, INC.

12 **AGREED TO:**

13 2/5/2021

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

14 By: \_\_\_\_\_

15 DocuSigned by:  
16 *Natalie Hagstrom*  
17 AB08FEAA3FET43D...  
18 Natalie Hagstrom

19 \_\_\_\_\_ [print name]

20 FERRARA CANDY COMPANY

18 **AGREED TO:**

19 2/5/2021

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

21 By: \_\_\_\_\_

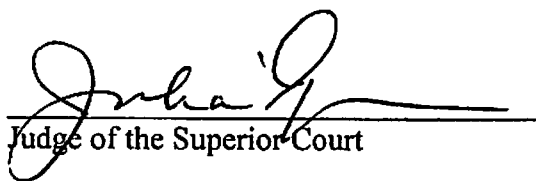
22 DocuSigned by:  
23 *Joyce McCarthy*  
24 8FCE502BEEFE40A  
25 Joyce McCarthy

26 \_\_\_\_\_ [print name]

27 FERRARA CANDY COMPANY

24 **IT IS SO ORDERED, ADJUDGED, AND DECREED:**

25 Dated: 2/17/21

26   
27 Judge of the Superior Court