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FILED
Superior Court of California
County of Los Angeles

NOV 01 2022

Sherri R. Carter, Executive Officer/Clerk of Court
By: A. Ortiz, Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF LOS ANGELES

11 (Unlimited Jurisdiction)

12 ECOLOGICAL ALLIANCE, LLC, a California
13 limited liability company,

14 Plaintiff,

15 v.

16 LA TORTILLA FACTORY, INC., a Delaware
17 corporation; and DOES 1 through 10, inclusive,

18 Defendant.

Case No.: 22STCV07139


[PROPOSED] STIPULATED
CONSENT JUDGMENT

1
2 Plaintiff Ecological Alliance, LLC ("Plaintiff"), and Defendant LA Tortilla Factory, Inc.
3 ("Defendant") hereby enter into this Stipulated Consent Judgment ("Consent Judgment") as
4 follows:

5 WHEREAS: On or about March 25, 2021, Plaintiff, through Plaintiff's counsel, served a
6 60 Day Notice to Defendant, Winco Foods, LLC, the California Attorney General, the District
7 Attorneys of every County in the State of California, and the City Attorneys for every City in the
8 State of California with a population greater than 750,000 (collectively, "Public Prosecutor(s)")
9 alleging that Defendant violated California's Safe Drinking Water and Toxic Enforcement Act of
10 1986, California Health and Safety Code § 25249.6, et seq., and its implementing regulations
11 (collectively, "Proposition 65") alleging that and that Plaintiff intended to file an enforcement
12 action in the public interest; and

13 WHEREAS: On or about June 3, 2021, Plaintiff, through Plaintiff's counsel, served a 60
14 Day Notice to Defendant, Gelson's Markets, the California Attorney General and Public
15 Prosecutor(s) alleging that Defendant violated Proposition 65 and that Plaintiff intended to file an
16 enforcement action in the public interest; and

17 WHEREAS: Plaintiff alleges that Defendant manufactured and/or distributed La Tortilla
18 Factory Power Green tortilla wraps and gluten free tortillas containing Lead. (collectively the
19 "Covered Products") that were sold or distributed for sale in California and further alleges that
20 those Covered Products expose consumers in the State of California to chemicals including Lead,
21 which are listed by the State of California pursuant to California Health and Safety Code §
22 25249.8; and

23 WHEREAS: Plaintiff further alleges that persons in the State of California were exposed
24 to Lead in Covered Products without being provided the Proposition 65 warning set out at
25 California Health and Safety Code § 25249.6 and its implementing regulations ("Proposition 65
26 Warning");

27 WHEREAS: Defendant denies the allegations of the 60 Day Notice, and denies that it has
28 violated Proposition 65 and expressly denies that it has engaged in any wrongdoing whatsoever,

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2 WHEREAS: Plaintiff seeks to provide the public with Proposition 65 warnings and
3 believes that this objective is achieved by the actions described in this Consent Judgment; and

4 WHEREAS: Plaintiff and Defendant wish to resolve their differences without the delay
5 and expense of litigation.
6

7 NOW THEREFORE BE IT RESOLVED AND AGREED UPON AS BETWEEN
8 PLAINTIFF ACTING IN THE PUBLIC INTEREST AND DEFENDANT AS FOLLOWS:
9

10 **INTRODUCTION**

11 1.1. On March 25, 2021 Plaintiff served a 60-Day Notice upon Defendant, Winco
12 Foods, LLC, and on Public Prosecutors. On June 3, 2021, Plaintiff served a 60-Day
13 Notice upon Defendant, Gelson's Markets, and on Public Prosecutors. No Public
14 Prosecutors commenced an enforcement action. No Public Prosecutor having
15 commenced an enforcement action, Plaintiff proceeded to file its Complaint and
16 Amended Complaint (collectively "Complaint") against Defendant in the present action.

17 1.2. For purposes of this Consent Judgment, the Parties agree that Defendant is a
18 business entity that has employed ten or more persons at all times relevant to this action,
19 and qualifies as a "person in the course of doing business" within the meaning of
20 Proposition 65.

21 1.3. For purposes of this Consent Judgment only, Plaintiff and Defendant (the
22 "Parties") stipulate that: 1) this Court has jurisdiction over the allegations of violation
23 contained in the Complaint, and personal jurisdiction over Defendant as to the acts
24 alleged in the Complaint; 2) venue is proper in the County of Los Angeles; and 3) this
25 Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all
26 claims which were or could have been raised in the Complaint based on the facts alleged
27 therein with respect to the Covered Products, and of all claims which were or could have
28 been raised by any person or entity based in whole or in part, directly or indirectly, on the
facts alleged in the 60-Day Notice, in the present action, or arising therefrom or related

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2 thereto, with respect to Covered Products, including any Proposition 65 claim arising out
3 of an exposure to Covered Products (collectively, "Proposition 65 Claims").

- 4 1.4. The Parties enter into this Consent Judgment as a full and final settlement of the
5 Proposition 65 Claims, for the purpose of avoiding prolonged and costly litigation and of
6 resolving the issues raised therein both as to past and future conduct. By execution of
7 this Consent Judgment and agreeing to comply with its terms, the Parties do not admit
8 any fact, conclusion of law, or violation of law, nor shall Defendant's compliance with
9 the Consent Judgment constitute or be construed as an admission by Defendant of any
10 fact, conclusion of law, or violation of law. Defendant denies the material, factual, and
11 legal allegations in the 60-Day Notices and the Complaint and expressly denies any
12 wrongdoing whatsoever.

13 **2. DEFINITIONS**

- 14 2.1. "Effective Date" shall mean, with respect to this Consent Judgment, the date the
15 Consent Judgment has been approved and entered by the Court.
16 2.2. "Covered Products" shall mean, with respect to this Consent Judgment, La Tortilla
17 Factory Power Greens wraps, and all gluten free tortillas that are manufactured,
18 distributed, sold and/or offered for sale by Defendant in California, including but not
19 limited to La Tortilla Factory Premium Cassava Tortillas, La Tortilla Factory Gluten Free
20 Wraps and Cauliflower Tortillas with Cassava Flour.

21 **3. INJUNCTIVE RELIEF**

- 22 3.1. For each Covered Product, Defendant agrees to undertake, or cause to be
23 undertaken on its behalf, either: (a) reformulation of the Covered Product to bring it
24 within the Proposition exemption identified in Section 3.2 below or (b) to provide a
25 warning as prescribed in Sections 3.3.-3.4 below. Compliance with this Section 3.1 will
26 constitute compliance by Defendant with all requirements of Proposition 65 relating to
27 Lead exposure in the Covered Products.
28

11/03/2022

11/03/2022

3.2. Proposition 65 Exemption for the Covered Products

Covered Products shall be deemed to comply with Proposition 65, and be exempt from any Proposition 65 warning requirements with respect to Lead, if the Covered Product contains no more than 0.5 micrograms of lead per serving, with serving size measured by the serving size specified on the label for the Covered Product.

3.2.1 For purposes of measuring and determining compliance with the Lead level, the average lead level of five (5) randomly selected samples of a Covered Product shall be used, so long as no single sample exceeds 0.75 micrograms of lead.

3.3. Warning Option

Covered Products that do not meet the warning exemption set forth in Section 3.2, shall be accompanied by a warning as described in Section 3.4 below. This warning requirement shall only be required as to gluten free tortillas that are manufactured, distributed, marketed, sold or shipped for sale to consumers by Defendant in the State of California, after September 1, 2022, and as to Power Green wraps that are manufactured, distributed, marketed, sold or ship for sale to Consumers by Defendant in the State of California after December 31, 2022. No Proposition 65 warning shall be required as to any gluten free tortillas that are distributed prior to September 1, 2022, and any Power Green wraps prior to December 31, 2022, and all such Covered Products already in distribution and the stream of commerce before those respective dates are hereby deemed to be exempt from a Proposition 65 warning with respect to Lead and/or expressly released under this Consent Judgment.

3.4. Warning Language

Where required to meet the criteria set forth in Section 3.3, Defendant shall provide one of the following warning statements ("Warning"), displayed in a reasonably conspicuous manner:

Option (1)

WARNING: Consuming this product can expose you to chemicals including Lead, which [is] are 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

Option (2)

WARNING: [Cancer and] Reproductive Harm--
www.P65Warnings.ca.gov/food

The Warning shall be provided through a warning on the label that is securely affixed to or printed upon the label and complies with the warning content provided in Option 1 or Option 2 above. In addition, for any Covered Product sold over the internet by Defendant, the Warning shall appear prior to checkout on the primary product page, or as a pop-up when a California address is input into the shipping instructions, or on the checkout page when a California delivery address is indicated for any purchase of any Covered Product. The Warning may be provided with a conspicuous hyperlink stating "WARNING" in all capital and bold letters so long as the hyperlink goes directly to a page prominently displaying the Warning without content that detracts from the Warning. Given Defendant's lack of control over third-party websites, the online warning requirements expressed in this Section apply only to Covered Products sold through Defendant's website. However, Defendant will instruct any third-party website sellers to which it supplies the Cover Product to provide the Warnings as a condition of selling the Covered Product. If subsequently enacted changes to Proposition 65 or its implementing regulations require the use of additional or different information on any warning specifically applicable to the Covered Products (the "New Safe Harbor Warning"), the Parties agree that the New Safe Harbor warning may be utilized in place of or in addition to, as applicable, the warnings set forth in this Section.

4. MONETARY RELIEF

- 4.1. Within ten (10) business days of the receiving notice that this Consent Judgment has been approved of and entered by the Court, and after receiving taxpayer information

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2 from Plaintiff, Defendant shall pay the total sum of \$42,000 which includes \$10,000 in
3 civil penalties and \$32,000 in payment of Plaintiff's costs and reasonable attorney's fees.
4 The \$10,000 civil penalty shall be apportioned pursuant to Health and Safety Code
5 section 25249.12 (d), with 75%, or \$8,000, paid to the State of California's Office of
6 Environmental Health Hazard Assessment and 25%, or \$2,000, payable to Plaintiff.

7 4.2. The payments specified in Section 4.1. shall be made by wire transfer to Plaintiff's
8 counsel Custodio & Dubey LLP as set forth below. Plaintiffs' counsel will remit the
9 portions due to the State of California Office of Environmental Health Hazard
10 Assessment and to Plaintiff.

11 Bank: Bank of America, N.A.

12 Routing Transit No.: 026009593

13 Account No.: 325149324377

14 Beneficiary: Custodio & Dubey LLP

15 **5. CLAIMS COVERED AND RELEASE**

16 5.1. This Consent Judgment is a full, final and binding resolution between Ecological
17 Alliance on behalf of itself and in the public interest, and Defendant La Tortilla Factory
18 and its respective officers, directors, members, shareholders, employees, attorneys,
19 agents, parent companies, subsidiaries, divisions, affiliates, suppliers, franchisees,
20 licensees, and retailers (including Winco Food, LLC, and Gelson's Markets), their parent
21 and all subsidiaries and affiliates thereof, their respective employees, agents and assigns,
22 as well as all other upstream and downstream entities in the distribution chain for any of
23 the Covered Products, and the predecessors, successors, and assigns of any of them
24 (collectively, the "Released Parties").

25 5.2. Plaintiff acting on its own behalf and in the public interest releases the Released Parties
26 from all claims, actions, causes of actions, suits, demand, liability, damages, penalties,
27 fees, costs, and expenses asserted or which could have been asserted from the handling or
28 consumption of the Covered Products, as to any alleged violations of Proposition 65 or its

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2 implementing regulations up through the Effective Date based on exposure to Lead from
3 the Covered Products as set forth in the Notices of Violation, the Complaint and herein.
4 Compliance with the terms of this Consent Judgment constitutes compliance with
5 Proposition 65 with respect to exposures to Lead from the Covered Products. This
6 release does not apply to third-party websites that do not provide the required Warnings.

7 5.3. It is possible that other claims not known to the Parties arising out of the facts
8 contained in the 60-Day Notice, or alleged in the Complaint, relating to the Covered
9 Products, will hereafter be discovered or developed. Plaintiff, on behalf of itself only, on
10 the one hand, and Defendant, on the other hand, acknowledge that this Consent Judgment
11 is expressly intended to cover and include all such claims through and including the
12 Effective Date, including all rights of action thereon. Plaintiff and Defendant
13 acknowledge that the claims released in Sections 5.1 and 5.2 may include unknown
14 claims, and nevertheless intend to release such claims, and in doing so waive California
15 Civil Code § 1542 which reads as follows:

16 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH
17 THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS
18 OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE,
19 WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY
20 AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

21 5.4. Plaintiff understands and acknowledges that the significance and consequence of
22 this waiver of California Civil Code § 1542 is that even if Plaintiff suffers future damages
23 arising out of or resulting from, or related directly or indirectly to, in whole or in part, the
24 Covered Products, including but not limited to any exposure to, or failure to warn with
25 respect to exposure to, the Covered Products, Plaintiff will not be able to make any claim
26 for those damages against any of the Released Parties.
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2 5.5. Compliance by Defendant with the terms of this Consent Judgment shall constitute
3 compliance with Proposition 65 with respect to exposure to Lead in the Covered Products
4 as set forth in the 60 Day Notices and/or the Complaint.

5 **6. COMPLIANCE WITH HEALTH AND SAFETY CODE SECTION 25249.7(F)**

6 6.1. Plaintiff and its attorneys agree to comply with the reporting form requirements
7 referenced in California Health and Safety Code § 25249.7(f).

8 **7. PROVISION OF NOTICE**

9 7.1. When any Party is entitled to receive any notice or writing under this Consent
10 Judgment, the notice or writing shall be sent by first class certified mail with return
11 receipt requested, or by electronic mail, as follows:

12 To Defendant:

13 Lauren M. Michals, Esq.
14 Nixon Peabody LLP
15 One Embarcadero Center, 32nd Floor
16 San Francisco, CA 94111
17 lmichals@nixonpeabody.com

18 To Plaintiff:

19 Vineet Dubey, Esq.
20 Custodio & Dubey LLP
21 445 S. Figueroa St., Ste 2520
22 Los Angeles, CA 90071
23 dubey@cd-lawyers.com

24 7.2. Any party may modify the person and address to whom the notice is to be sent by
25 sending the other Party notice that is transmitted in the manner set forth in section 7.1.

26 **8. COURT APPROVAL**

27 8.1. Upon execution of this Consent Judgment by all Parties, Plaintiff shall prepare and
28 file, at its sole cost and expense, a Motion for Approval of this Consent Judgment that
Defendant shall support. This Consent Judgment shall not become effective until
approved and entered by the Court. If this Consent Judgment is not entered by the Court,
it shall be of no force or effect, and shall not be introduced into evidence or otherwise
used in any proceeding for any purpose.

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2 8.2. This Consent Judgment may apply to and benefit the Parties and their respective officers,
3 directors, shareholders, employees, agents, parent companies, subsidiaries, divisions,
4 franchisees, licensees, customers, distributors, wholesalers, retailers, predecessors,
5 successors, and assigns. This Consent Judgment shall have no application to any
6 Covered Products that are distributed or sold exclusively outside the State of California
7 and that is not intended for use by California consumers.

8 **9. GOVERNING LAW AND CONSTRUCTION**

9 9.1. The terms of this Consent Judgment shall be governed by the laws of the State of
10 California.

11 **10. ENTIRE AGREEMENT**

12 10.1. This Consent Judgment contains the sole and entire agreement and understanding
13 of the Parties with respect to the entire subject matter hereof, and any and all prior
14 discussions, negotiations, commitments, or understandings related thereto, if any, are
15 hereby merged herein and therein.

16 10.2. There are no warranties, representations, or other agreements between the Parties
17 except as expressly set forth herein. No representations, oral or otherwise, express or
18 implied, other than those specifically referred to in this Consent Judgment have been
19 made by any Party hereto.

20 10.3. No other agreements not specifically contained or referenced herein, oral or
21 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
22 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or
23 to bind any of the Parties hereto only to the extent that they are expressly incorporated
24 herein.

25 10.4. No supplementation, modification, waiver, or termination of this Consent
26 Judgment shall be binding unless executed in writing by the Party to be bound thereby,
27 and approved and ordered by the Court.

28 10.5. No waiver of any of the provisions of this Consent Judgment shall be deemed or

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2 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor
3 shall such waiver constitute a continuing waiver.

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5 **11. RETENTION OF JURISDICTION & ENFORCEMENT**

6 11.1. This Court shall retain jurisdiction of this matter to implement, enforcer or modify
7 the Consent Judgment. Any alleged breach of the terms of this Consent Judgment must
8 be brought in this Court.

9 11.2. If Plaintiff alleges that any Covered Products fail to comply with this Consent
10 Judgment, then Plaintiff shall inform Defendant in a reasonably prompt manner of its test
11 results and related packaging information, including information sufficient to permit
12 Defendant to identify the Covered Products at issue. The Parties shall first attempt to
13 resolve the matter prior to Plaintiff taking any further legal action.

14 11.3. In the event that Proposition 65 is repealed or preempted as to food products, or
15 if lead is deemed to be naturally occurring in the Covered Products and not requiring a
16 warning through a law or regulation, then Plaintiff shall have no further obligation
17 pursuant to this Consent Judgment with respect to, and to the extent that the Covered
18 Products are so affected.

19 **12. NO EFFECT ON OTHER SETTLEMENTS**

20 12.1. Nothing in this Consent Judgment shall preclude Plaintiff from resolving any
21 claim against another entity on terms that are different from those contained in this
22 Consent Judgment.

23 **13. EXECUTION IN COUNTERPARTS**

24 13.1. This Consent Judgment may be executed in counterparts, each of which shall be
25 deemed to be an original, and all of which, taken together, shall constitute the same
26 document. Execution of the Consent Judgment by e-mail, facsimile, or other electronic
27 means, shall constitute legal and binding execution and delivery. Any photocopy of the
28 executed Consent Judgment shall have the same force and effect as the original.

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3 **14. AUTHORIZATION**

4 14.1. The undersigned are authorized to stipulate to, enter into, and execute this Consent
5 Judgment on behalf of their respective parties, and have read, understood, and agree to all
6 of the terms and conditions of this Consent Judgment.

7 **15. SEVERABILITY**

8 15.1. If subsequent to Court approval of this Consent Judgment, any part or provision is
9 declared by a Court to be invalid, void, or unenforceable, the remaining portions or
10 provisions shall continue in full force and effect.

11 **AGREED TO:**

12 **Ecological Alliance LLC**

13
14 Date: September 8, 2022

15 By: Harmony Welsh

16 Harmony Welsh, Managing Member

17 **AGREED TO:**

18 **LA Tortilla Factory, Inc.**

19 Date: ~~September~~ ^{October} 7, 2022

20 By: David Lydon

21
22 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Health &
23 Safety Code § 25249.7(f)(4) and Code of Civil Procedure § 664.6, judgment is hereby entered.

24
25 Dated: 11/1/2022

26 [Signature]
27 JUDGE OF THE SUPERIOR COURT
28