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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 COUNTY OF ALAMEDA

9 UNLIMITED CIVIL JURISDICTION

12 MICHAEL DIPIRRO,

13 Plaintiff,

14 v.

15 GOURMET INNOVATIONS INC., dba BEST  
16 WHIP INC., et al.

17 Defendants.

Case No. RG16818835

**[PROPOSED] CONSENT JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.*)

1     **1. INTRODUCTION**

2             **1.1 Parties**

3             This Consent Judgment is entered into by and between plaintiff, Michael DiPirro (“DiPirro”),  
4 and Gourmet Innovations, Inc. (“Defendant” or “Gourmet Innovations, Inc.”), with DiPirro and  
5 Defendant individually referred to as a “Party” and collectively as the “Parties.”

6             **1.2 Plaintiff**

7             DiPirro is an individual residing in California who seeks to promote awareness of exposures  
8 to toxic chemicals and improve human health by reducing or eliminating hazardous substances  
9 contained in consumer products.

10            **1.3 Defendant**

11            DiPirro alleges that Defendant employs ten or more persons and is a person in the course of  
12 doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health  
13 and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

14            **1.4 General Allegations**

15            DiPirro alleges that Gourmet Innovations, Inc. manufactures, imports, sells, or distributes for  
16 sale, in the state of California, nitrous oxide cartridges/chargers containing Nitrous Oxide (“N2O”)  
17 without first providing the clear and reasonable exposure warning required by Proposition 65. N2O  
18 is listed pursuant to Proposition 65 as a chemical that is known to the state of California to cause birth  
19 defects or other reproductive harm (hereinafter “Listed Chemical”).

20            **1.5 Product Description**

21            The products covered by this Consent Judgment are nitrous oxide cartridges/chargers  
22 containing the Listed Chemical that are manufactured, sold, or distributed for sale in California by  
23 Gourmet Innovations, Inc. or Gourmet Innovations, West including, but not limited to *Barista*,  
24 *Barista Professional Series Cream Chargers, XXX Chargers, Profi-Serie, 8g 24-Pack, Bestwhip Plus,*  
25 *BestWhip N2O 8g Whip Cream Chargers (24 Packs) (#X0017MIUAN), Special Blue, Erotic Cream,*  
26 *Mr. Cream, Nitro Charged, 24 Barista Whipped Cream Chargers N2O Nitrous Oxide Whip Cream*  
27 *Fresh*, (“Products”).  
28

1           **1.6     Notice of Violation**

2           On or about October 1, 2015, DiPirro served Defendant and certain requisite public  
3 enforcement agencies with a “60-Day Notice of Violation” a document that informed the recipients  
4 of DiPirro’s allegation that Defendant violated Proposition 65 by failing to warn its customers and  
5 consumers in California that the Products expose users to nitrous oxide. On or about April 5, 2017,  
6 DiPirro served Defendant, Gourmet Innovations West, and certain requisite public enforcement  
7 agencies with a “Supplemental 60-Day Notice of Violation”, a document that informed the recipients  
8 of DiPirro’s allegation that Defendant violated Proposition 65 by failing to warn its customers and  
9 consumers in California that the Products expose users to nitrous oxide. (Collectively, “Notice.”) To  
10 the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting  
11 the allegations set forth in the Notice.

12           **1.7     Complaint**

13           On or about June 9, 2016, DiPirro filed the instant action against Defendant for the alleged  
14 violations of Health & Safety Code § 25249.6 that are the subject of the Notice.

15           **1.8     No Admission**

16           Gourmet Innovations, Inc. denies the material, factual, and legal allegations contained in the  
17 Notice and maintains that and any products it has manufactured, sold, or distributed for sale in  
18 California, including the Products, have been, and are, in compliance with all laws. Nothing in this  
19 Consent Judgment shall be construed as an admission by Gourmet Innovations, Inc. of any fact,  
20 finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this Consent  
21 Judgment constitute or be construed as an admission by Gourmet Innovations, Inc. of any fact,  
22 finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by  
23 Gourmet Innovations, Inc.. This section shall not, however, diminish or otherwise affect Gourmet  
24 Innovations, Inc.’ obligations, responsibilities, and duties under this Consent Judgment.

25           **1.9     Consent to Jurisdiction**

26           For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
27 jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in Alameda  
28

1 County, and that this Court has jurisdiction to enter and enforce the provisions of this Consent  
2 Judgment.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date on  
5 which both parties have executed this agreement.

6 **2. INJUNCTIVE RELIEF: WARNINGS**

7 **2.1 Proposition 65 Warnings**

8 Between the Effective Date and July 31, 2018, for all Products that contain the Listed  
9 Chemical, and are shipped to a California address for sale by Gourmet Innovations, Inc. or Gourmet  
10 Innovations West, they shall provide a clear and reasonable warning on each Product as set forth  
11 below. Each warning shall be prominently placed with such conspicuousness as compared with  
12 other words, statements, designs, or devices as to render it likely to be read and understood by an  
13 ordinary individual under customary conditions before purchase or use. Each warning shall be  
14 provided in a manner such that the consumer or user understands to which specific Product the  
15 warning applies, so as to minimize the risk of consumer confusion. The text of the warning shall be  
16 printed in black ink on a light background, in a font that is easy to read and legible, but in no case  
17 less than a size 12 font. Gourmet Innovations, Inc. or Gourmet Innovations West shall use the  
18 following warning language:

19 **WARNING: This product contains nitrous oxide, a chemical known**  
20 **to the State of California to cause birth defects or other**  
21 **reproductive harm.**

22 **2.2 Provision of Product Warning Signs to Resellers and Distributors.** Between the  
23 Effective Date and July 31, 2018, for all Products that contain the Listed Chemical, Gourmet  
24 Innovations Inc. or Gourmet Innovations West will provide one warning sign that provides the  
25 warning specified in Section 2.1 above, to each of its current customers who is either (1) a reseller  
26 of the Products to individual consumers in California, or (2) a distributor whom Gourmet  
27 Innovations Inc. or Gourmet Innovations West knows distributes the Products to a reseller who sells  
28 the Products to individual consumers in California. In the future, when Gourmet Innovations, Inc.  
or Gourmet Innovations West obtains an order for the Products from a new customer in either of

1 these two categories, Gourmet Innovations, Inc. or Gourmet Innovations West will provide that new  
2 customer with the same warning sign in conjunction with the first order to the new customer. The  
3 warning signs will be accompanied by a letter instructing the customer that if they will be selling  
4 the Products to consumers in California, they must post the enclosed sign in close proximity to the  
5 display of the products or at the point of sale for the products, and that failure to post this sign may  
6 subject the reseller to an enforcement action in which the reseller may be forced to post the sign and  
7 provide other warnings, pay civil penalties of up to \$2,500 per violation per day, and reimburse the  
8 attorney's fees of the enforcer.

9 **2.3 Internet Warnings.** For all Products that Gourmet Innovations, Inc. or  
10 Gourmet Innovations West offers for sale directly to consumers in California via its own internet  
11 store, it shall provide a warning for such Products by including the warning on one or more of the  
12 following: a) on the product display page; b) on the product packaging box, or c) by including a  
13 warning in the shipment to the California consumer. Between the Effective Date and July 31, 2018,  
14 the language of the warning shall be substantially as provided in Exhibit A.

15 **2.4 Additional Warnings.** In order to waive the second civil penalty under  
16 Section 3.2, Gourmet Innovations, Inc. or Gourmet Innovations West shall provide to each of its  
17 current customers who is either (1) a reseller of the Products to individual consumers in California,  
18 or (2) a distributor whom Gourmet Innovations Inc. or Gourmet Innovations West knows distributes  
19 the Products to a reseller who sells the Products to individual consumers in California, one sheet of  
20 multiple adhesive labels bearing the warning language set out below along with instructions that  
21 such warnings are to be affixed to the exterior packaging of each unit of Products sold or intended  
22 to be sold to individual consumers in California. In the future, when Gourmet Innovations, Inc. or  
23 Gourmet Innovations West obtains an order for the Products from a new customer in either of these  
24 two categories, Gourmet Innovations Inc. or Gourmet Innovations West will provide that new  
25 customer with one sheet of such adhesive labels and instructions in conjunction with the first order  
26 to the new customer. The instructions will note that each warning label needs to be prominently  
27 placed with such conspicuousness as compared with other words, statements, designs, or devices as  
28 to render it likely to be read and understood by an ordinary individual under customary conditions 4

1 before purchase or use and that the warning label shall not be placed so as to obscure other safety  
2 information and user instructions printed on the exterior of the package for the Products. The text  
3 of the warning shall be printed in black ink on a light background, in a font that is easy to read and  
4 legible, but in no case less than a size 12 font. Between the Effective Date and July 31, 2018,  
5 Gourmet Innovations, Inc. or Gourmet Innovations West shall use one of the following warning  
6 language options, at Gourmet Innovations, Inc.'s or Gourmet Innovations West's election:

7 OPTION 1:

8 **WARNING: This product contains nitrous oxide, a chemical known to the**  
9 **State of California to cause birth defects or other**  
10 **reproductive harm.**

11 OPTION 2:

12 **WARNING: Whipped cream cartridges contain nitrous oxide, a chemical**  
13 **known to the State of California to cause birth defects or**  
14 **other reproductive harm.**

15 **2.5 Warnings After July 31, 2018**

16 After July 31, 2018, for all warnings provided by Defendant, pursuant to the terms of this  
17 Agreement, Defendant shall use the warning language as set forth below, which shall include a  
18 symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black  
19 outline as shown below (the symbol may be black on white if the color yellow is otherwise not used  
20 on the Product's packaging).



22 **WARNING: This product can expose you to nitrous oxide, a chemical**  
23 **known to the State of California to cause birth defects or**  
24 **other reproductive harm. For more information go to**  
25 **[www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).**

26 **3. MONETARY PAYMENTS**

27 **3.1 Initial Civil Penalty.** Defendant shall pay an initial civil penalty in the amount of  
28 \$12,000.00 within seven days of Court approval of this Consent Judgment. The penalty payment will  
be allocated by DiPirro's counsel in accordance with California Health & Safety Code §

1 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of Environmental  
2 Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to DiPirro.  
3 The initial penalty payment shall be delivered to the address listed in Section 3.3 below.

4 **3.2 Payments Held in Trust.** Payments shall be delivered to the offices of Bush &  
5 Henry, Attorneys at Law, PC, 6761 Sebastopol Avenue, Suite 111, Sebastopol, CA 95472, within  
6 seven days of Court approval of this Consent Judgment, and shall be in the form of three checks for  
7 the following amounts made payable to:

- 8 (a) “Bush & Henry, Attorneys at Law” in the amount of \$9,000.00 for payment  
9 to OEHHA. Bush & Henry agree to forward such funds to OEHHA in a  
10 timely manner. Alternatively, at Defendant’s option, it can choose to deliver  
11 to the offices of Bush & Henry a certified or cashier’s check made payable to  
12 “Office of Environmental Health Hazard Assessment.”
- 13 (b) “Bush & Henry, Attorneys at Law” in the amount of \$3,000.00 as payment  
14 to Michael DiPirro. Bush & Henry agree to forward such funds in a timely  
15 manner. Alternatively, at Defendant’s option, it can choose to deliver to the  
16 offices of Bush & Henry a certified or cashier’s check made payable to  
17 “Michael DiPirro.”

18 For any payment that is returned for insufficient funds, payment must be made by a cashier’s  
19 check within ten (10) calendar days of notification of insufficient funds, plus a 10% service fee.  
20 Any payment that is not actually received by the due date will also be subject to a 10% fee.

21 **3.3 Issuance of 1099 Forms.** Defendant shall provide DiPirro’s counsel with a separate  
22 1099 form for each of its payments under this Agreement as follows:

- 23 (a) “Office of Environmental Health Hazard Assessment”, P.O. Box 4010,  
24 Sacramento, CA 95814 (EIN: 68-0284486) for civil penalties paid;
- 25 (b) “Michael DiPirro,” whose address and tax identification number shall be  
26 furnished upon request after this Agreement has been fully executed by the  
27 Parties for his portion of the civil penalties paid; and
- 28 (c) “Bush & Henry, Attorneys at Law, PC,” for fees and costs reimbursed

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pursuant to Section 4.

**4. REIMBURSEMENT OF FEES AND COSTS**

The parties acknowledge that DiPirro and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. Defendant then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The parties then attempted to (and did) reach an accord on the compensation due to OEHHA, DiPirro and his counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of this agreement. Defendant shall pay \$54,000 (fifty-four thousand) for fees and costs incurred as a result of investigating, bringing this matter to Defendant’s attention, and negotiating a settlement in the public interest. Defendant shall issue a separate 1099 for fees and costs (EIN: 81-1257634), shall make the check payable to “Bush & Henry, Attorneys at Law, PC” and shall deliver payment within seven (7) business days of Court approval of this Consent Judgment to the address listed in Section 3.3 above.

**5. CLAIMS COVERED AND RELEASED**

**5.1 DiPirro’s Public Release of Proposition 65 Claims**

DiPirro, acting on his own behalf and in the public interest, releases Defendant, suppliers of the Product to Gourmet Innovations, Inc., Gourmet Innovations West or the brand names listed in Paragraph 1.5, the officers, directors, attorneys, representatives, shareholders, subsidiaries, affiliates, divisions, or retailers of Gourmet Innovations, Inc. and Gourmet Innovations West, from all claims for violations of Proposition 65 up through the Effective Date based on exposures to nitrous oxide from the use of the Products, as set forth in the Notice and the Complaint. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to nitrous oxide from the use of the Products sold by Defendant after the Effective Date, as set forth in the Notice.



1           **5.2     DiPirro’s Individual Release of Claims**

2           DiPirro, in his individual capacity only and *not* in his representative capacity, also provides a  
3 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all  
4 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,  
5 liabilities and demands of DiPirro of any nature, character or kind, whether known or unknown,  
6 suspected or unsuspected, arising out of alleged or actual exposures to nitrous oxide from the use of  
7 the Products sold or distributed for sale by Defendant in the State of California before the Effective  
8 Date.

9           **5.3     Defendant’s Release of DiPirro**

10          Defendant, on its own behalf and on behalf of its past and current agents, representatives,  
11 attorneys, successors, and assignees, hereby waives any and all claims that it may have against  
12 DiPirro and his attorneys and other representatives, for any and all actions taken or statements made  
13 (or those that could have been taken or made) by DiPirro and his attorneys and other  
14 representatives, whether in the course of investigating claims, otherwise seeking to enforce  
15 Proposition 65 against it in this matter, or with respect to the Products.

16          **6.     COURT APPROVAL**

17          This Consent Judgment is not effective until it is approved and entered by the Court and shall  
18 be null and void if, for any reason, it is not approved and entered by the Court within one year after it  
19 has been fully executed by all Parties.

20          **7.     SEVERABILITY**

21          If, subsequent to the execution of this Consent Judgment, any provision of this Consent  
22 Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not be  
23 adversely affected.

24          **8.     GOVERNING LAW**

25          The terms of this Consent Judgment shall be governed by the laws of the state of California  
26 and apply within the state of California. In the event that Proposition 65 is repealed or is otherwise  
27 rendered inapplicable by reason of law generally, or as to the Products, then Defendant may provide  
28 written notice to DiPirro of any asserted change in the law, and have no further obligations pursuant

1 to this Consent Judgment, with respect to, and to the extent that, the Products are so affected.  
2 Nothing in this Consent Judgment shall be interpreted to relieve Defendant from any obligation to  
3 comply with any pertinent state or federal toxics control laws. This Consent Judgment shall be  
4 interpreted in accordance with the fair meaning of the terms herein, without regard to which Party  
5 may have drafted any specific provision.

6 **9. NOTICES**

7 Unless specified herein, all correspondence and notices required to be provided pursuant to  
8 this Consent Judgment shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered  
9 or certified mail, return receipt requested; or (iii) a recognized overnight courier on any party by the  
10 other party at the following addresses:

11 For Defendant Gourmet Innovations, Inc.:

12 Terry Anastassiou, Esq.  
13 Ropers Majeski Kohn & Bentley PC  
14 150 Spear Street, Suite 850  
San Francisco, CA 94105

15 For DiPirro:

16 Bush & Henry, Attorneys at Law, PC  
17 6761 Sebastopol Avenue, Suite 111  
Sebastopol, CA 95472

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

20 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

24 **11. POST EXECUTION ACTIVITIES**

25 DiPirro agrees to comply with the reporting form requirements referenced in Health & Safety  
26 Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety Code  
27 § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In furtherance  
28 of obtaining such approval, DiPirro and Defendant agree to mutually employ their best efforts, and

1 of obtaining such approval, DiPirro and Defendant agree to mutually employ their best efforts, and  
2 that of their counsel, to support the entry of this agreement as a Consent Judgment, and to obtain  
3 judicial approval of the settlement in a timely manner.

4 **12. MODIFICATION**


5 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and  
6 upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or  
7 application of any Party and the entry of a modified consent judgment by the Court.

8 **13. AUTHORIZATION**

9 The undersigned are authorized to execute this Consent Judgment on behalf of their respective  
10 Parties and have read, understood and agree to all of the terms and conditions of this Consent  
11 Judgment.

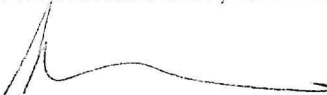
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13 **AGREED TO:**

14 Date: 3-21-18

15  
16 By:   
17 Michael DiPirro


**AGREED TO:**

14 Date: MARCH 21, 2018

15  
16 By:   
17 George Vallario, President  
Gourmet Innovations, Inc.

**AGREED TO:**

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19  
20 Date: 3 21-18

21  
22 By:   
23 Martin Nemecek, Vice President  
Gourmet Innovations, Inc.