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14 Attorneys for Plaintiff Environmental Health Advocates, Inc.

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

16 **IN AND FOR THE COUNTY OF ALAMEDA**

17 ENVIRONMENTAL HEALTH
18 ADVOCATES, INC., an organization

19 Plaintiff,

20 v.

21 LILY'S SWEETS, LLC, a Delaware
22 corporation and DOES 1 through 100,
23 inclusive

24 Defendants.

Case No. _____

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Environmental Health Advocates
4 ("EHA") and Lily's Sweets, LLC ("Lily's") with EHA and Lily's each individually referred to as a
5 "Party" and collectively referred to as the "Parties."

6 **1.2 Plaintiff**

7 EHA is an organization in California and acting in the interest of the general public. It seeks to
8 promote awareness of exposures to toxic chemicals and to improve human health by reducing or
9 eliminating hazardous substances contained in consumer products.

10 **1.3 Defendant**

11 Lily's employs ten or more individuals and is a "person in the course of doing business" for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code
13 section 25249.6 *et seq.* ("Proposition 65").

14 **1.4 General Allegations**

15 EHA claims that Lily's manufactures, imports, sells, and distributes for sale Lily's Dark
16 Chocolate Covered Almonds containing acrylamide. EHA further alleges that Lily's does so without
17 providing a sufficient health hazard warning as required by Proposition 65 and related Regulations.
18 Pursuant to Proposition 65, acrylamide is listed as a chemical known to cause cancer and reproductive
19 harm.

20 **1.5 Notice of Violation**

21 On August 16, 2019, EHA served Lily's, Sprouts Farmers Market, the California Attorney
22 General, and all other required public enforcement agencies with a 60-Day Notice of Violation of
23 California Health and Safety Code section 25249.6 *et seq.* ("Notice"). The Notice alleges that Lily's
24 violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards
25 associated with exposures to acrylamide contained in its "Lily's Dark Chocolate Covered Almonds."

26 No public enforcer has commenced or is otherwise prosecuting an action to enforce the
27 violations alleged in the Notice.
28

1 **1.6 Product Description**

2 For purposes of this Consent Judgment “Product” or “Products” are defined as Lily’s Dark
3 Chocolate Covered Almonds that allegedly contain acrylamide and are manufactured, imported, sold,
4 or distributed for sale in California by Lily’s and Releasees, defined *infra*.

5 **1.7 Other Releasees**

6 This Consent Judgment expressly encompasses all of the subject Products, whether sold under
7 Lily’s own brand name, or some other private label, at all grocery, retail, and other locations and sales
8 channels.

9 **1.8 Complaint**

10 On _____, EHA filed a Complaint against Lily’s for the alleged violations of Health and
11 Safety Code section 25249.6 that are the subject of the Notice (“Complaint”).

12 **1.9 No Admission**

13 Lily’s denies the material, factual, and legal allegations in the Notice and Complaint, and
14 maintains that all of the products it has manufactured, imported, sold, and/or distributed for sale in
15 California, including the Products, have been, and are, in compliance with all laws. Nothing in this
16 Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of
17 law, or violation of law, and compliance with this Consent Judgment shall not be construed as an
18 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
19 not, however, diminish or otherwise affect Lily’s obligations, responsibilities, and duties under this
20 Consent Judgment.

21 **1.10 Jurisdiction**

22 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
23 Court has jurisdiction over Lily’s as to the allegations in the Complaint, that venue is proper in the
24 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
25 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

26 **1.11 Effective Date**

27 For purposes of this Consent Judgment, the term “Effective Date” means the date on which the
28 Court grants the motion for approval of this Consent Judgment, as discussed in Section 5.

1 **2. INJUNCTIVE RELIEF**

2 **2.1 Reformulation of the Product**

3 Commencing on the Effective Date, and continuing thereafter, Lily's shall not manufacture any
4 Product that will be sold or offered for sale in California that exceeds the following acrylamide
5 concentration limits, such concentration to be determined by use of a test performed by a laboratory
6 accredited by the State of California, a federal agency, or a nationally recognized accrediting
7 organization, using LC-MS/MS (Liquid Chromatograph-Mass Spectrometry): the average acrylamide
8 concentration shall not exceed 225 ppb by weight (the "Average Level") for the Products. The Average
9 Level is determined by randomly selecting and testing at least one sample each from five different lots
10 of the Products (or the maximum number of lots available for testing if less than five) during a testing
11 period of at least 60 days.

12 **2.2 Sell-Through Period**

13 Notwithstanding anything else in this Consent Judgment, the Products that were manufactured
14 prior to the Effective Date and six (6) months thereafter shall be subject to the release of liability
15 pursuant to this Consent Judgment, without regard to when such Products were, or are in the future,
16 distributed or sold to customers. As a result, the obligations of Lily's, or any Releases, do not apply to
17 these Products manufactured prior to the Effective Date and six (6) months thereafter.

18 **3. MONETARY SETTLEMENT TERMS**

19 **3.1 Settlement Amount**

20 Lily's shall pay forty-seven thousand five hundred dollars (\$47,500) in settlement and total
21 satisfaction of all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This
22 includes civil penalties in the amount of five thousand dollars (\$5,000) pursuant to Health and Safety
23 Code section 25249.7(b) and attorney's fees and costs in the amount of forty-two thousand five hundred
24 dollars (\$42,500) pursuant to Code of Civil Procedure section 1021.5.

25 **3.2 Civil Penalty**

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

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

3 All payments owed to EHA shall be made payable to the Glick Law Group Client Trust
4 Account, and shall be delivered to the following address:

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

9 All payments owed to OEHHA (EIN: 68-0284486) shall be delivered directly to OEHHA
10 (Memo Line "Prop 65 Penalties") at the following addresses:

11 For United States Postal Service Delivery:

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

17 For Non-United States Postal Service Delivery:

18 Mike Gyurics
19 Fiscal Operations Branch Chief
20 Office of Environmental Health Hazard Assessment
21 1001 I Street
22 Sacramento, CA 95814

23 Lily's agrees to provide EHA's counsel with a copy of the check payable to OEHHA,
24 simultaneous with its penalty payments to EHA.

25 The Parties will exchange completed IRS 1099, W-9, or other forms as required. Relevant
26 information for Glick Law Group and N&T are set out below:

- 27 • "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.2(a)(i);
- 28 • "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section 3.2(a)(i);
- and
- "Office of Environmental Health Hazard Assessment" at 1001 I Street, Sacramento, CA 95814.

1 **3.3 Attorney's Fees and Costs**

2 The portion of the settlement attributable to attorney's fees and costs shall be paid to EHA's
3 counsel, who are entitled to attorney's fees and costs incurred by it in this action, including but not
4 limited to investigating potential violations, bringing this matter to Lily's attention, as well as litigating
5 and negotiating a settlement in the public interest.

6 Lily's shall provide its payment to EHA's counsel in two checks, divided equally, payable to
7 Glick Law Group, PC (\$21,250) and Nicholas & Tomasevic, LLP (\$21,250) respectively. The
8 addresses for these two entities are:

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

11 Craig Nicholas
12 Nicholas & Tomasevic, LLP
 225 Broadway, 19th Floor
 San Diego, CA 92101

13 **3.4 Timing**

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

15 **4. CLAIMS COVERED AND RELEASED**

16 **4.1 EHA's Public Release of Proposition 65 Claims**

17 For any claim or violation arising under Proposition 65 alleging a failure to warn about
18 exposures to acrylamide from Products manufactured, imported, sold, or distributed by Lily's prior
19 to the Effective Date, EHA, acting on its own behalf and in the public interest, releases Lily's of any
20 and all liability. This includes Lily's parents, subsidiaries, affiliated entities under common ownership,
21 its directors, officers, principals, agents, employees, attorneys, insurers, accountants, predecessors,
22 successors, and assigns, and each entity to whom Lily's directly or indirectly distributes, ships, or
23 sells the Products, including but not limited to, downstream distributors, wholesalers, customers,
24 retailers, franchisees, cooperative members, and licensees, and their owners, directors, officers,
25 agents, principals, employees, attorneys, insurers, accountants, representatives, predecessors,
26 successors, and assigns (collectively, the "Releasees"). Releasees include Sprouts Farmers Market,
27 Lily's parent, and all subsidiaries and affiliates thereof and their respective employees, agents, and
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1 assigns that sell Lily's Products. Compliance with the terms of this Consent Judgment constitutes
2 compliance with Proposition 65 with respect to the alleged or actual failure to warn about exposures
3 to acrylamide from Products manufactured, imported, sold, or distributed by Lily's after the Effective
4 Date. This Consent Judgment is a full, final and binding resolution of all claims that were or could
5 have been asserted against Lily's and/or Releasees for failure to provide warnings for alleged
6 exposures to acrylamide contained in Products.

7 **4.2 EHA's Individual Release of Claims**

8 EHA, in its individual capacity, also provides a release to Lily's and/or Releasees, which shall
9 be a full and final accord and satisfaction of as well as a bar to all actions, causes of action, obligations,
10 costs, expenses, attorney's fees, damages, losses, claims, liabilities, and demands by EHA of any
11 nature, character, or kind, whether known or unknown, suspected or unsuspected, arising out of alleged
12 or actual exposures to acrylamide in Products manufactured, imported, sold, or distributed by Lily's
13 before the Effective Date.

14 **4.3 Lily's Release of EHA**

15 Lily's, on its own behalf, and on behalf of Releasees as well as its past and current agents,
16 representatives, attorneys, successors, and assignees, hereby waives any and all claims against EHA
17 and its attorneys and other representatives, for any and all actions taken or statements made by EHA
18 and its attorneys and other representatives, whether in the course of investigating claims, otherwise
19 seeking to enforce Proposition 65 against it, in this matter or with respect to the Products.

20 **4.4 Mutual Release of Known and Unknown Claims**

21 EHA, on behalf of itself and its agents, attorneys, representatives, successors, and assigns, in
22 its respective individual capacity only and not in its representative capacity, and Lily's, each provide
23 a general release of the other including the Releasees herein which shall be effective as a full and
24 final accord and satisfaction, as a bar to all claims of any nature, character or kind, known or
25 unknown, suspected or unsuspected, arising out of alleged violations of Proposition 65 with respect
26 to the Products. EHA and Lily's each acknowledge that they are each familiar with Section 1542 of
27 the California Civil Code, which provides as follows:
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1 A general release does not extend to claims that the creditor or
2 releasing party does not know or suspect to exist in his or her favor at
3 the time of executing the release, and that if known by him or her must
4 have materially affected his or her settlement with the debtor or
5 released party.

6 **5. COURT APPROVAL**

7 This Consent Judgment is not effective until it is approved and entered by the Court and shall
8 be null and void if it is not approved and entered by the Court within one year after it has been fully
9 executed by the Parties, or by such additional time as the Parties may agree to in writing.

10 **6. SEVERABILITY**

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

13 **7. GOVERNING LAW**

14 The terms of this Consent Judgment shall be governed by the laws of the state of California and
15 apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise
16 rendered inapplicable for reasons, including but not limited to changes in the law, or if the state of
17 California's No Significant Risk Level (NSRL) for acrylamide is increased by OEHHA or through
18 other legal process to a level greater than or equal to 1.0 mcg/day, then Lily's may provide written
19 notice to EHA of any asserted change, and shall have no further injunctive obligations pursuant to this
20 Consent Judgment with respect to, and to the extent that, the Products are so affected.

21 **8. NOTICE**

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

25 For Lily's:

26 Caitlin C. Blanche
27 K&L Gates LLP
28 1 Park Plaza Twelfth Floor
Irvine, CA 92614

For EHA:

Noam Glick
Glick Law Group, PC
225 Broadway, 21st Floor
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.

1 **9. COUNTERPARTS: FACSIMILE SIGNATURES**

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

5 **10. POST EXECUTION ACTIVITIES**

6 EHA agrees to comply with the reporting form requirements referenced in Health and Safety
7 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
8 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which
9 motion EHA shall draft and file. In furtherance of obtaining such approval, the Parties agree to
10 mutually employ their best efforts, including those of their counsel, to support the entry of this
11 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
12 purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for approval,
13 responding to any objection that any third-party may make, and appearing at the hearing before the
14 Court if so requested. Defendant agrees to cooperate with efforts of Plaintiff's counsel to seek court
15 approval of this Consent Judgment, provide materials requested by the Court in a timely fashion, and
16 refrain from opposing or delaying court approval in any manner.

17 **11. MODIFICATION**

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

21 **12. AUTHORIZATION**

22 The undersigned are authorized to execute this Consent Judgment and acknowledge that they
23 have read, understand, and agree to all of the terms and conditions contained herein.
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1 **AGREED TO:**

2 Date: 12/27/2019

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4 By: Noam Glick
5 Noam Glick
6 Environmental Health Advocates, Inc.
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AGREED TO:

Date: December 24, 2019

By: Jane S Miller [print name]
Lily's Sweets, LLC