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9 Attorneys for Plaintiff
10 Environmental Health Advocates, Inc.

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

13 ENVIRONMENTAL HEALTH
14 ADVOCATES, INC., a California corporation,

15 Plaintiff,

16 v.

17 AMERICAN DAIRY QUEEN
18 CORPORATION, a Delaware corporation,
and DOES 1 through 100, inclusive,

19 Defendants.
20

Case No.: HG19045678

[PROPOSED] CONSENT JUDGMENT

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

1. INTRODUCTION

1.1 Parties

This Consent Judgment is entered into by and between Environmental Health Advocates, Inc., (“EHA” or “Plaintiff”), on the one hand, and American Dairy Queen Corporation (“Defendant” or “Dairy Queen”) on the other hand, with EHA and Dairy Queen each individually referred to as a “Party” and collectively referred to as the “Parties.”

1.2 Plaintiff

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

1.3 Defendant

Dairy Queen employs ten or more persons, is a “person in the course of doing business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”), and has received 60-Day Notices of Violation alleging that it manufactures, imports, sells and/or distributes Covered Products (as further defined in Section 2.1 below) for sale in the State of California containing acrylamide, without the requisite health hazard warning, or has done so in the past.

1.4 General Allegations

EHA alleges that Dairy Queen violated Proposition 65 by exposing persons to acrylamide contained in ice cream cake cones without first providing a clear and reasonable warning regarding the risk of cancer and reproductive harm from acrylamide.

1.5 Notices of Violation

On August 29, 2019, EHA served Dairy Queen, the California Attorney General, and all other required public enforcement agencies with a 60-Day Notice of Violation, alleging that Dairy Queen violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated with exposures to acrylamide contained in its ice cream cake cones (“Notice”).

On February 10, 2020, EHA served Dairy Queen, the California Attorney General, and all other required public enforcement agencies with a 60-Day Notice of Violation of Proposition 65 (“Amended

1 Notice”). The Amended Notice added several franchise locations that, as alleged by EHA, violated
2 Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated
3 with exposures to acrylamide contained in Dairy Queen’s ice cream cake cones.

4 No public enforcer has commenced or is otherwise prosecuting an action to enforce the
5 violations alleged in the Notice.

6 **1.6 Complaint**

7 On August 28, 2020, EHA filed an Amended Complaint against Dairy Queen in the Superior
8 Court of California for the County of Alameda for the alleged violations of Proposition 65 that are the
9 subject of the Notice and Amended Notice (“Operative Complaint”).

10 **1.7 No Admission**

11 Nothing in this Consent Judgment is or shall be construed as an admission by Dairy Queen of
12 any fact, finding, conclusion of law, issue of law or violation of law, nor shall compliance with this
13 Consent Judgment constitute or be construed as an admission by Dairy Queen of any fact, finding,
14 conclusion of law, issue of law or violation of law. Nothing in this Consent Judgment shall prejudice,
15 waive or impair any right, remedy, argument or defense Dairy Queen may have in any other legal
16 proceeding. This paragraph shall not, however, diminish or otherwise affect the obligations,
17 responsibilities, and duties of the Parties under this Consent Judgment.

18 **1.8 Jurisdiction**

19 For purposes of this Consent Judgment and the Operative Complaint only, the Parties stipulate
20 that this Court has jurisdiction over Dairy Queen as to the allegations in the Operative Complaint, that
21 venue is proper in the County of Alameda, and that the Court has jurisdiction to enter and enforce the
22 provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section
23 664.6.

24 **1.9 Effective Date**

25 For purposes of this Consent Judgment, the term “Effective Date” means the date three (3)
26 calendar months after the date on which the Court grants the motion for approval of this Consent
27 Judgment, as discussed in Section 5.
28

1 **2. INJUNCTIVE RELIEF**

2 **2.1 Clear and Reasonable Warnings**

3 Dairy Queen shall provide warnings in the manner required by this Consent Judgement for all
4 Covered Products sold at its franchised restaurants located in the State of California. “Covered
5 Products” mean all ice cream cake cone products containing acrylamide, sold in restaurants owned and
6 operated by third parties pursuant to franchise or license agreements with Dairy Queen (“Franchise
7 Restaurants”), whether commonly called cones or dipped cones.

8 **2.2 Warning Message**

9 The warning message provided, under any of the permitted warning methods, shall be the
10 following:

11 **WARNING:**

12 Certain foods and beverages sold or served here can expose you to chemicals including
13 acrylamide in many fried or baked goods, and mercury in fish, which are known to the State of
14 California to cause cancer and birth defects or other reproductive harm. For more information go to
15 www.P65Warnings.ca.gov/restaurant.

16 In lieu of the preceding warning, Dairy Queen may use any warning language and method that
17 complies with Title 27, California Code of Regulations, section 25600 *et seq.*, as amended August 30,
18 2016 and subsequently thereafter.

19 **2.3 Warning Methods**

20 The warning shall be provided by using any of the following two methods:

21 **(a) At the entry of each restaurant.** A sign no smaller than 8 and ½ by 11-inches,
22 printed in no smaller than 28-point type placed so that it is readable and conspicuous to customers as
23 they enter each public entrance to the restaurant; or

24 **(b) At each point of sale, including drive-thru speaker boxes and windows**
25 **where applicable.** A sign no smaller than 5 by 5 inches, printed in no smaller than 20-point type
26 placed at each point of sale, including drive-thru speaker boxes and windows where applicable, so as
27 to assure that it is readable and conspicuous to consumers as they order and/or pay for menu items.

28 **2.4. Periodic Modification of Warning Message**

1 The warning message may be modified to include other foods or beverages.

2 **2.5 Implementation of Warning**

3 Within sixty (60) days of entry of this Consent Judgment, Dairy Queen shall send a letter, in
4 substantially the form and content set forth in Exhibit A, to its Franchise Restaurants within the State
5 of California, instructing them to order the signs from its supplier, Joliet, providing them the website
6 where they can go to do so, and instructing them to post the signs in the manner described above. This
7 letter shall state that the franchisee is released from liability for past violations and it is in compliance
8 with future requirements with respect to sale of the Covered Products only if the franchisee complies
9 with the warning requirements. In addition, Dairy Queen shall include inspection for compliance with
10 these requirements in its existing inspection, reporting and follow-up programs.

11 **2.6 No Warning Outside of California**

12 Nothing in this Consent Judgment requires that warnings be given for Covered Products sold
13 outside the State of California.

14 **3. MONETARY PAYMENTS**

15 **3.1 Payments**

16 Dairy Queen shall pay the following total amount of fifty-five thousand dollars (\$55,000.00),
17 within thirty days of entry of this Consent Judgment, as follows: (i) five thousand five hundred dollars
18 (\$5,500.00) in civil penalties pursuant to Health and Safety Code section 25249.7(b) and (ii) forty-nine
19 thousand five hundred dollars (\$49,500.00) as reimbursement of EHA's attorneys' fees and costs
20 pursuant to Code of Civil Procedure section 1021.5.

21 **3.2 Civil Penalty**

22 The portion of the settlement attributable to civil penalties shall be allocated according to Health
23 and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid
24 to the California Office of Environmental Health Hazard Assessment ("OEHHHA") in the amount of
25 four thousand one hundred and twenty-five dollars (\$4,125.00), and the remaining twenty-five percent
26 (25%) of the penalty paid to EHA individually in the amount of one thousand three hundred and
27 seventy-five dollars (\$1,375.00).

28 All payments owed to EHA shall be delivered to the following address:

Environmental Health Advocates
225 Broadway, Suite 2100
San Diego, CA 92101

All payments owed to OEHHHA (EIN: 68-0284486) shall be delivered directly to OEHHHA (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

Dairy Queen agrees to provide EHA's counsel with a copy of the check payable to OEHHHA, simultaneous with its penalty payments to EHA.

EHA and its counsel will provide completed IRS 1099, W-9, or other tax forms as required. Relevant information is set out below:

- "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.3;
- "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section 3.3; and
- "Office of Environmental Health Hazard Assessment:" 1001 I Street, Sacramento, CA 95814.

3.3 Attorneys' Fees and Costs

The portion of the settlement attributable to attorneys' fees and costs, forty-nine thousand five hundred dollars (\$49,500.00), shall be paid to EHA's counsel, who are entitled to attorneys' fees and costs incurred by it in this action, including but not limited to investigating potential violations, bringing this matter to Dairy Queen's attention and litigating and negotiating a settlement in the public interest.

1 Dairy Queen shall provide its payment to EHA's counsel in two checks, divided equally,
2 payable to Glick Law Group, PC for twenty-four thousand seven hundred and fifty dollars (\$24,750.00)
3 and Nicholas & Tomasevic, LLP for twenty-four thousand seven hundred and fifty dollars (\$24,750.00)
4 respectively. The addresses for these two entities are:

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

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

13 **4. CLAIMS COVERED AND RELEASED**

14 **4.1 EHA's Public Release of Claims**

15 **4.1.1** This Consent Judgment is a full, final, and binding resolution between EHA, on behalf
16 of itself and in the public interest, and Dairy Queen, its owners, parents, subsidiaries, affiliated entities
17 that are under common ownership, directors, officers, shareholders, members, agents, employees and
18 attorneys ("Releasees"), each entity to whom they directly or indirectly distribute or sell or in the past
19 have distributed or sold Covered Products, including but not limited to distributors, wholesalers,
20 retailers and Franchise Restaurants ("Downstream Releasees"), of any violation of Proposition 65, or
21 any other statutory or common law claims that have been or could have been asserted in the Operative
22 Complaint against Dairy Queen, its Releasees and Downstream Releasees, based on the failure to
23 provide clear and reasonable warnings of exposure to acrylamide contained in the Covered Products,
24 or any other claim based on the facts or conduct alleged in the Operative Complaint, that were sold
25 prior to the Effective Date. As to Covered Products, compliance with the terms of this Consent
26 Judgment resolves any issue now, in the past, and in the future concerning compliance by Dairy Queen,
27 its Releasees and Downstream Releasees with the requirements of Proposition 65.

28 **4.1.2** In further consideration of the promises and agreement herein contained, the injunctive
relief commitments set forth in Section 2, and for the payments to be made pursuant to Section 3, EHA,
on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees,

1 and in the public interest, hereby waives all rights to institute or participate in, directly or indirectly,
2 any form of legal action, and releases all claims, including, without limitation, all actions, and causes
3 of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties,
4 losses or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of
5 any nature whatsoever (collectively, "claims"), against Dairy Queen, each of its Releasees and each of
6 its Downstream Releasees. This release is limited to those claims that arise under Proposition 65 with
7 respect to acrylamide in the Covered Products distributed and/or sold by Dairy Queen, as such claims
8 relate to the alleged failure to warn under California Health & Safety Code section 25249.6 as to
9 acrylamide in the Covered Products.

10 **4.2 EHA's Individual Release of Claims**

11 EHA also, in its individual capacity only and *not* in its representative capacity, provides a
12 release herein on behalf of itself, its past and current agents, representatives, attorneys, successors
13 and/or assignees, which shall be effective as a full and final accord and satisfaction of, and as a bar to,
14 all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
15 liabilities, and demands of any nature, character or kind, known or unknown, suspected or unsuspected,
16 arising out of alleged or actual exposure to acrylamide in Covered Products manufactured, imported,
17 sold, or distributed by Dairy Queen, each of its Releasees, and, to the extent sold by any of them, each
18 of its Downstream Releasees.

19 **4.3 Dairy Queen's Release of EHA**

20 Dairy Queen, on its own behalf, and on behalf of its past and current agents, representatives,
21 attorneys, successors, and assignees, hereby waives any and all claims against EHA, its attorneys and
22 other representatives, for any and all actions taken, or statements made (or those that could have been
23 taken or made), by EHA and its attorneys and other representatives, whether in the course of
24 investigating claims or otherwise seeking to enforce Proposition 65 against Dairy Queen in this
25 matter, and/or with respect to the Covered Products.

26 **5. COURT APPROVAL**

27 This Consent Judgment shall be submitted to the Court for entry by noticed motion. If this
28 Consent Judgment is not approved by the Court, it shall be of no force or effect and may not be used

1 by the Attorney General or Defendant for any purpose. In addition, if this Consent Judgment is not
2 entered by the Court within one year of the date it has been signed by the Parties, it shall be of no force
3 or effect and shall never be introduced into evidence or otherwise used in any proceeding for any
4 purpose other than to determine the rights or obligations of a Party as a result of the fact that the Consent
5 Judgment was not approved.

6 **6. SEVERABILITY**

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

9 **7. GOVERNING LAW**

10 The terms of this Consent Judgment shall be governed by the laws of the state of California and
11 apply within the state of California. In the event that Proposition 65 is repealed, preempted or is
12 otherwise rendered inapplicable by reason of law generally, or as to the Covered Products, Dairy Queen
13 may provide written notice to EHA of any asserted change in the law, and shall have no further
14 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Covered
15 Products are so affected.

16 **8. NOTICE**

17 When any Party is entitled to receive any notice under this Consent Judgment, the notice shall
18 be sent by: (i) personal delivery; (ii) first-class, registered, or certified mail, return receipt requested;
19 (iii) overnight courier service; or (iv) electronic mail to the following:

20 For Dairy Queen:

21 Amanda Semaan
22 Tarifa B. Laddon
23 Faegre Drinker Biddle & Reath LLP
24 1800 Century Park East, STE 1500
25 Los Angeles, CA 90067
26 amanda.semaan@faegredrinker.com
27 tarifa.laddon@faegredrinker.com

For EHA:

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

28 Cynthia Klaus
Sr. Attorney
Sara Broze
Sr. Paralegal
American Dairy Queen Corporation
8000 Tower, Suite 700

8331 Norman Center Drive
Bloomington, MN 55437
cyndi.klaus@idq.com
sara.broze@idq.com

Any Party may modify the person and address to whom the notice is to be sent by sending the other Party notice by certified mail, return receipt requested and/or other verifiable form of written or electronic communication.

9. COUNTERPARTS; FACSIMILE SIGNATURES

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

10. POST EXECUTION ACTIVITIES

EHA agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f) to the extent that they apply to this Consent Judgment. The Parties further acknowledge that, pursuant to Health and Safety Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which motion EHA shall draft and file. In furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, including those of their counsel, to support the entry of this Consent Judgment and not to unreasonably oppose or delay court approval. For purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion for approval, responding to any objection that any third-party may make, and appearing at the hearing before the Court if so requested. If this Consent Judgment is not approved by the Court in its entirety, the Parties shall meet and confer to determine whether to modify the terms of the Consent Judgment and to resubmit it for approval. In meeting and conferring, the Parties agree to undertake any actions reasonably necessary to amend and/or modify this Consent Judgment in order to further the mutual intention of the Parties in entering into this Consent Judgment.

11. MODIFICATION

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

1 **12. AUTHORITY TO EXECUTE**

2 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the Party
3 he or she represents to stipulate to this Consent Judgment, to enter into and execute the Consent
4 Judgment on behalf of the Party represented, and to legally bind that Party.

5 **13. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

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

10 **14. ATTORNEYS' FEES**

11 Except as otherwise provided in this Consent Judgment, each Party shall bear its own attorneys'
12 fees and costs.

13 **16. CONSTRUCTION**


14 The Parties, including their counsel, have participated in the preparation of this Consent
15 Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This Consent
16 Judgment was subject to revision and modification by the Parties and has been accepted and approved
17 as to its final form by all Parties and their counsel. Accordingly, any uncertainty or ambiguity existing
18 in this Consent Judgment shall not be interpreted against any Party as a result of the manner of the
19 preparation of this Consent Judgment. Each Party to this Consent Judgment agrees that any statute or
20 rule of construction providing that ambiguities are to be resolved against the drafting Party should not
21 be employed in the interpretation of this Consent Judgment and, in this regard, the Parties hereby waive
22 California Civil Code section 1654.

23 **16. ENTIRE AGREEMENT**

24 This Consent Judgment contains the sole and entire agreement and understanding of the Parties
25 with respect to the entire subject matter herein, and any and all prior discussions, negotiations,
26 commitments, and understandings related hereto. No representations, oral or otherwise, express or
27 implied, other than those contained herein have been made by any Party. No other agreements, oral or
28 otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.

1
2 **AGREED TO:**

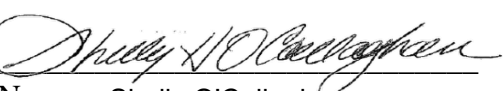
3 Date: August 31, 2020

4
5
6 By: 
7 ENVIRONMENTAL HEALTH
8 ADVOCATES, INC.

AGREED TO:

Date: August 19, 2020

AMERICAN DAIRY QUEEN
CORPORATION

By: 
Name: Shelly O'Callaghan
Title: General Counsel

9
10
11 **IT IS SO ORDERED.**

12 Date: _____

13
14 JUDGE OF THE SUPERIOR COURT

EXHIBIT A

ACTION REQUIRED: THIS COMMUNICATION APPLIES ONLY TO RESTAURANTS LOCATED IN CALIFORNIA

American Dairy Queen Corporation has entered into a consent judgement with Environmental Health Advocates, Inc. regarding the presence of acrylamide in ice cream cake cones sold at Dairy Queen restaurants in California, a true and correct copy of which is attached hereto.

Under the terms of this consent judgment, all Dairy Queen restaurants in California are required to post the warning message identified in section 2.2 of the consent judgment using either of the following two methods, which are identified in section 2.3 of the consent judgment:

- **At the entry of each restaurant.** A sign no smaller than 8 and ½ by 11-inches, printed in no smaller than 28-point type placed so that it is readable and conspicuous to customers as they enter each public entrance to the restaurant; or
- **At each point of sale, including drive-thru speaker boxes and windows where applicable.** A sign no smaller than 5 by 5 inches, printed in no smaller than 20-point type placed at each point of sale, including drive-thru speaker boxes and windows where applicable, so as to assure that it is readable and conspicuous to consumers as they order and/or pay for menu items. If electing this method, signs must be located either at or on the counter where food is purchased or on a wall either adjacent and parallel to the counter or clearly visible to consumers standing at the counter to order food. For drive-thrus, the sign must be affixed to the speaker box, not to the drive-thru menu board.

The signs may not be located at any of the following locations:

- On an entrance or exit door;
- On a window;
- On a restroom door;
- In a restroom;
- In a hallway that leads only to restrooms; or
- On a refuse container

Please remove any old Proposition 65 signage and replace it with the version referenced herein. The signs noted above are available at Joliet for purchase. You can find the signs on the left hand tab of their webpage under regulatory or at: <https://dqusa.jolietpattern.com/index.php/regulatory.html>. Note that since Proposition 65 has specific requirements for sign size and font size, only the signs from Joliet should be used in order to be in compliance with Proposition 65.

Your compliance with this instruction is mandatory if you are to benefit from the protection in the consent judgment described below and will be checked at least annually during visits paid by your Business Consultant. You must continue to post the warning message referenced herein unless and until you receive written instructions from Dairy Queen to the contrary.

Please contact your Business Consultant with any questions you may have.

IMPORTANT: ALTHOUGH YOU WERE NOT SUED BY THE CALIFORNIA ATTORNEY GENERAL OR THE PRIVATE PLAINTIFF, AMERICAN DAIRY QUEEN CORPORATION HAS OBTAINED A CONDITIONAL RELEASE ON YOUR BEHALF. FOR THAT RELEASE TO BE EFFECTIVE, YOU MUST COMPLY WITH THE TERMS OF THIS COMMUNICATION. IF YOU DO NOT, YOU RISK BEING SUED BY THE CALIFORNIA ATTORNEY GENERAL OR BY PRIVATE PARTIES IN CALIFORNIA ACTING IN HIS STEAD.