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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 EVERGREEN USA LLC, a New Jersey  
18 corporation, and DOES 1 through 100,  
inclusive,

19 Defendants.  
20

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, Inc.,  
4 (“EHA”), on the one hand, and Evergreen USA, LLC (“Defendant” or “Evergreen”) on the other hand,  
5 with EHA and Evergreen each individually referred to as a “Party” and collectively referred to as the  
6 “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

12 Evergreen is a “person in the course of doing business” for purposes of the Safe Drinking Water  
13 and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.6 *et seq.* (“Proposition  
14 65”).

15 **1.4 General Allegations**

16 EHA alleges that Evergreen manufactures, imports, sells, and distributes for sale Wafer Cookies  
17 that contain acrylamide. EHA further alleges that Evergreen does so without providing a sufficient  
18 health hazard warning as required by Proposition 65 and related Regulations. Pursuant to Proposition  
19 65, acrylamide is listed as a chemical known to cause cancer and reproductive harm.

20 **1.5 Covered Products**

21 For purposes of this Consent Judgment “Covered Products” means all wafer cookie products  
22 that are manufactured, imported, sold, or distributed by Defendant Releasees, defined below, for sale  
23 in California.

24 **1.6 Releasees**

25 “Releasees” means and includes: Evergreen, its parents, subsidiaries, affiliated entities,  
26 directors, officers, employees, agents, shareholders, successors, assigns, insurers, and attorneys (the  
27 “Defendant Releasees”) and all entities to which Defendant Releasees directly or indirectly distribute  
28 or sell Covered Products, including but not limited to distributors, wholesalers, customers, retailers,

1 franchisees, licensors, and licensees, including but not limited to 99 Cent Only Stores.

2 **1.7 Notices of Violation**

3 On October 8, 2019, EHA served Evergreen, 99 Cent Only Stores, the California Attorney  
4 General, and all other required public enforcement agencies with a 60-Day Notice of Violation of  
5 California Health and Safety Code section 25249.6 *et seq.* (“Notice”). The Notice alleged that  
6 Evergreen violated Proposition 65 by failing to sufficiently warn consumers in California of the health  
7 hazards associated with exposures to acrylamide contained in its “Bite Size Wafers with Cocoa”. On  
8 March 11, 2020, EHA served Evergreen, 99 Cent Only Stores, the California Attorney General, and all  
9 other required public enforcement agencies with an amended 60-Day Notice of Violation identifying  
10 “All Wafer Products” manufactured, imported or distributed by Evergreen and sold in California.

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

13 **1.8 Complaint**

14 On \_\_\_\_\_, EHA filed a Complaint against Evergreen alleging the violations of  
15 Health and Safety Code section 25249.6 that are the subject of the Notice (“Complaint”).

16 **1.9 No Admission**

17 Evergreen denies the material factual and legal allegations of the Notice and Complaint, and  
18 maintains that all of the products it has manufactured, imported, sold, and/or distributed for sale in  
19 California, including Covered Products, have been, and are, in compliance with all laws. Nothing in  
20 this Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue  
21 of law, or violation of law, nor shall compliance with this Consent Judgment be construed as an  
22 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall  
23 not, however, diminish or otherwise affect Evergreen’s obligations, responsibilities, and duties under  
24 this Consent Judgment.

25 **1.10 Jurisdiction**

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

1 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this  
2 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

3 **1.11 Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” means that date certain  
5 falling six calendar months after the date on which the Court grants the motion for approval and entry  
6 of this Consent Judgment, as discussed in Section 5.

7 **2. INJUNCTIVE RELIEF**

8 **2.1 Reformulation of the Covered Products**

9 Commencing on the Effective Date, and continuing thereafter, Defendant Releasees shall only  
10 manufacture, ship, sell, or offer for sale Covered Products that: (a) contain an average acrylamide  
11 concentration by weight (the “Average Level”) of 115 parts per billion or less; or (b) are labeled with  
12 a clear and reasonable warning pursuant to Section 2.2. The Average Level shall be determined: (a) by  
13 randomly selecting and testing at least one sample each from five different lots of the product (or the  
14 maximum number of lots available for testing if less than five) during a testing period of at least 60  
15 days; and (b) using tests performed by a laboratory accredited by the State of California, a federal  
16 agency, or a nationally recognized accrediting organization, using LC-MS/MS (Liquid  
17 Chromatograph-Mass Spectrometry). The Parties agree that Defendant Releasees are not under any  
18 obligation to continue routine testing.

19 **2.2 Clear and Reasonable Warnings**

20 Commencing on the Effective Date and continuing thereafter, Defendant Releasees shall, for  
21 all Covered Products that do not contain an Average Level of 115 parts per billion or less, provide clear  
22 and reasonable warnings as set forth in Proposition 65 and related Regulations.

23 In the event that the Office of Environmental Health Hazard Assessment promulgates one or  
24 more regulations requiring or permitting warning text, permitting the absence of warning text, and/or  
25 permitting methods of transmission different than those set forth above, Defendant Releasees shall be  
26 entitled to use, at their discretion, such other warning text and/or method of transmission without being  
27 deemed in breach of this Consent Judgment.

1           **2.3     Sell-Through Period**

2           Notwithstanding anything else in this Settlement Agreement, Covered Products that were  
3           manufactured before the Effective Date shall be subject to a full release of all liability pursuant to this  
4           Consent Judgment, without regard to when such Covered Products were, or are in the future, distributed  
5           or sold to customers. The obligations of Defendant Releasees, do not apply to Covered Products  
6           manufactured before the Effective Date. Claims concerning those earlier manufactured products are  
7           released, nonetheless.

8           **2.4     Court Approval of Less Onerous Compliance Measures**

9           If a California court approves a Proposition 65 consent judgment concerning acrylamide for  
10          one or more competitors of any Defendant Releasee that provides for materially less onerous  
11          compliance measures, the Court, upon application by Evergreen, shall modify this Consent Judgment  
12          to replace the more onerous compliance measures set forth herein with those less onerous compliance  
13          measures.

14       **3.       MONETARY SETTLEMENT TERMS**

15           **3.1     Settlement Amount**

16          Evergreen shall pay sixty thousand dollars (\$60,000.00) in settlement and total satisfaction of  
17          all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes civil  
18          penalties in the amount of six thousand dollars (\$6,000) pursuant to Health and Safety Code section  
19          25249.7(b) and attorney’s fees and costs in the amount of fifty-four thousand dollars (\$54,000) pursuant  
20          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 (“OEHHA”), and the remaining  
25          twenty-five percent (25%) of the penalty paid to EHA individually.

26          All payments owed to EHA shall be made payable to the Glick Law Group Client Trust  
27          Account, and shall be delivered to the following address:  
28

1 Noam Glick  
2 Glick Law Group  
3 225 Broadway, Suite 2100  
4 San Diego, CA 92101

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

7 For United States Postal Service Delivery:

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

13 For Non-United States Postal Service Delivery:

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

19 Evergreen agrees to provide EHA's counsel with a copy of the check payable to OEHHA,  
20 simultaneous with its penalty payments to EHA.

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

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

### 28 **3.3 Attorney's Fees and Costs**

The portion of the settlement attributable to attorney's fees and costs (\$54,000) shall be paid to EHA'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 Evergreen's attention, as well as litigating and negotiating a settlement in the public interest.

1 Evergreen shall provide its payment to EHA's counsel in two checks, divided equally, payable  
2 to Glick Law Group, PC (\$27,000) and Nicholas & Tomasevic, LLP (\$27,000) respectively. The  
3 addresses for these two entities are:

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

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

### 12 **3.4 Timing**

13 The above-mentioned checks will be issued within fourteen (14) days of the date the Court  
14 grants EHA's motion to approve this Consent Judgment.

## 15 **4. CLAIMS COVERED AND RELEASED**

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

17 EHA, acting for the general public, releases each and all Releasees from all claims arising  
18 under Proposition 65, based on exposure to and/or failure to warn about exposure to, acrylamide from  
19 Covered Products manufactured, imported, sold, or distributed before the Effective Date.

20 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition  
21 65 with respect to all alleged or actual failure(s) to warn about exposures to acrylamide from Covered  
22 Products that are manufactured, imported, sold, or distributed after the Effective Date. This Consent  
23 Judgment is a full, final and binding resolution of all claims that were or could have been asserted  
24 against Releasees for exposure to acrylamide from Covered Products and/or failure to warn about  
25 exposure to acrylamide from Covered Products.

### 26 **4.2 EHA's Individual Release of Claims**

27 EHA, in hits individual capacity, hereby releases each and all Releasees, which shall be a full  
28 and final accord and satisfaction of, as well as a bar to, all actions, causes of action, obligations, costs,  
expenses, attorney's fees, damages, losses, claims, liabilities, and demands of every nature, character,  
and kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual

1 exposures to acrylamide in Covered Products manufactured, imported, sold, or distributed by Releasees  
2 before the Effective Date, and/or that were or could have been alleged or asserted in the Complaint.

3 **4.3 EHA's Individual Waiver of Civil Code Section 1542**

4 It is possible that other claims not known to EHA arising out of the facts alleged in the Notice  
5 and relating to the Covered Products will develop or be discovered. EHA, on behalf of itself only, on  
6 one hand, and Defendant, on the other hand, acknowledge that this Settlement Agreement is expressly  
7 intended to cover and include all such claims up through the Effective Date, including all rights of action  
8 therefor. EHA acknowledges that the claims released in Section 4.2 above, may include unknown claims,  
9 and nevertheless waives California Civil Code § 1542 as to any such unknown claims. California Civil  
10 Code § 1542 reads as follows:

11  
12 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE  
13 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO  
14 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE  
15 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE  
16 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE  
17 DEBTOR OR RELEASED PARTY.

18 EHA acknowledges and understands the significance and consequences of this specific waiver  
19 of California Civil Code § 1542.

20 **4.4 Evergreen's Release of EHA**

21 Evergreen, for itself and the Defendant Releasees, hereby waives any and all claims against  
22 EHA and its attorneys and other representatives, for any and all actions taken or statements made by  
23 EHA and its attorneys and other representatives, whether in the course of investigating claims or  
24 otherwise, committed or omitted in the process of seeking to enforce Proposition 65 against it with  
25 respect to Covered Products through the date of Evergreen's execution of this Stipulation.

26 **5. COURT APPROVAL**

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



1 **6. SEVERABILITY**

2 Subsequent to the Court’s approval and entry of this Consent Judgment, if any provision is held  
3 by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected,  
4 except for the release set forth in 4.1, which is not severable.

5 **7. GOVERNING LAW AND CHANGES IN PROPOSITION 65 OR FEDERAL LAW.**

6 The terms of this Consent Judgment shall be governed by the laws of the state of California as  
7 applied within the state. If Proposition 65 is repealed, or is otherwise rendered inapplicable for any  
8 reason, including but not limited to changes in the law, then Evergreen shall have no further obligations  
9 pursuant to this Consent Judgment with respect to, and to the extent that, the Covered Products are so  
10 affected. If OEHHA takes some other final regulatory action for products similar to the Covered  
11 Products in a manner that impacts the reformulation levels set forth in paragraph 2.1 or that determines  
12 that warnings for acrylamide are not required for such products, Defendant may seek to modify this  
13 Consent Judgment to modify the reformulation levels.

14 If an agency of the federal government, including, but not limited to the U.S. Food and Drug  
15 Administration, states through any guidance, regulation, or other legally binding act, following a  
16 review of scientific studies and following public notice and comment, a cancer potency estimate for  
17 acrylamide that equates to a no significant risk level higher than 0.2 micrograms per day, then Settling  
18 Defendants shall be entitled to seek a modification of this Consent Judgment to be relieved of their  
19 obligations to meet any requirements of this Consent Judgment that are inconsistent with such a change.  
20 The Parties recognize that the reformulation levels set forth in paragraph 2.1 are based on a compromise  
21 of a number of issues, and that a change to the “no significant risk level” for acrylamide would not  
22 necessarily entitle a Party to a modification of the terms of this Consent Judgment corresponding in a  
23 linear relationship with such a change.

24 If a court of competent jurisdiction or an agency of the federal government, including, but not  
25 limited to the U.S. Food and Drug Administration, states through any guidance, regulation, or other  
26 legally binding act that federal law has preemptive effect on any of the requirements of this Consent  
27 Judgment, then Defendants shall be entitled to seek a modification of this Consent Judgment pursuant  
28 to the procedure set forth in paragraph 11.

1 **8. NOTICE**

2 Unless otherwise specified herein, all correspondence and notice required or permitted by this  
3 Consent Judgment shall be in writing and sent: (1) by personal delivery or by US Mail (first-class,  
4 registered, or certified mail, return receipt requested), or by a recognized overnight courier, to the  
5 physical address provided below, (2) with copies, not themselves constituting notice, emailed to each  
6 email address provided below:

7 If to Evergreen:

8 Amy Alderfer  
9 Cozen O'Connor  
10 1299 Ocean Ave., #900  
11 Santa Monica, CA 90401

If to EHA:

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

11 Any Party may, from time to time, specify in writing to the other, a change of mailing or email  
12 addresses to which notices and other communications shall be sent. Any and all Notices shall be  
13 effective only if sent in compliance with this section, and after the emailed copies have been sent  
14 without reported error.

15 **9. COUNTERPARTS; DIGITAL SIGNATURES**

16 This Consent Judgment may be executed in counterparts and executed by digital, faxed, or  
17 otherwise reproduced signature. Each counterpart shall be deemed an original, and all counterparts  
18 taken together shall constitute one and the same document.

19 **10. POST EXECUTION ACTIVITIES**

20 EHA agrees to comply with the reporting form requirements referenced in Health and Safety  
21 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code  
22 section 25249.7(f), a noticed motion is required to obtain judicial approval of this proposed settlement,  
23 which motion EHA shall draft and file. In furtherance of obtaining such approval, the Parties agree to  
24 mutually employ commercially reasonable efforts, including those of their counsel, to support the entry  
25 of this agreement as judgment, and to obtain judicial approval of their settlement in a timely manner.  
26 For purposes of this Section, “commercially reasonable efforts” shall include, at a minimum,  
27 supporting the motion for approval, responding to any objection that any third-party may make, and  
28 appearing at the hearing before the Court if so requested.

1 **11. MODIFICATION**

2 This Consent Judgment may be modified by: (i) a written agreement of the Parties and entry of  
3 a modified consent judgment thereon by the Court; or (ii) a successful motion or application of any  
4 Party, and the entry of a modified consent judgment thereon by the Court. The Court shall retain  
5 jurisdiction of this matter to implement or modify the Consent Judgment.

6 **12. AUTHORIZATION**

7 The undersigned are authorized to execute this Consent Judgment and acknowledge that they  
8 have read, understand, and agree to all of the terms and conditions contained herein.

9  
10 **AGREED TO:**

**AGREED TO:**

11 Date: 4/20/20

Date: 04.16.2020

12  
13 By:   
14 ENVIRONMENTAL HEALTH  
15 ADVOCATES, INC.

16  
17 By:   
18 EVERGREEN USA LLC

19  
20 **IT IS SO ORDERED.**

21 Date: \_\_\_\_\_

22  
23  
24  
25  
26  
27  
28  
JUDGE OF THE SUPERIOR COURT