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10 ENVIRONMENTAL HEALTH ADVOCATES, INC.

11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **IN AND FOR THE COUNTY OF ALAMEDA**

14 ENVIRONMENTAL HEALTH ADVOCATES,
INC.,

15 Plaintiff,

16 v.

17 SELECT HARVEST USA, LLC,

18 Defendant.
19
20

Case No.:

[PROPOSED] CONSENT JUDGMENT AS
TO SELECT HARVEST USA, LLC

(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”) and Select Harvest USA, LLC (“Select Harvest”). EHA and Select Harvest are referred to
5 individually as a “Party” and collectively as the “Parties.”

6 **1.2 Notices**

7 **1.2.1** On October 18, 2019, EHA issued a 60-day notice letter (“Notice”) under
8 Cal. Health & Safety Code § 25249.7 (“Proposition 65”) to Select Harvest in which it asserted a
9 claim under Proposition 65 for alleged exposures to acrylamide in Select Harvest USA California
10 Almonds Oven Roasted/No Salt (“Select Harvest Notice”).

11 **1.2.2** On October 15, 2019, EHA issued a 60-day notice letter (“Notice”) under
12 Cal. Health & Safety Code § 25249.7 (“Proposition 65”) to Costco Wholesale Corporation
13 (“Costco”) in which it asserted a claim under Proposition 65 for alleged exposures to acrylamide in
14 Kirkland Signature Dry Roasted Almonds (“Costco Notice”).

15 **1.2.3** On April 17, 2020, EHA issued a supplemental 60-Day Notice of Violation in
16 which it asserted a claim under Proposition 65 for alleged exposures to acrylamide in roasted
17 almonds (“Supplemental Notice”).

18 **1.2.4** The notices of violation listed in Sections 1.2.1, 1.2.2., and 1.2.3 are
19 collectively referred to as the Notices.

20 **1.3 Complaint**

21 EHA’s Complaint against Select Harvest alleges violations of Health and Safety Code section
22 25249.6 asserted in the Select Harvest Notice. Upon entry of this Consent Judgment, the Complaint
23 shall be deemed amended *nunc pro tunc* additionally to include the allegations asserted in the Costco
24 Notice and the Supplemental Notice.

25 **1.4 Covered Products**

26 The products covered in this Consent Judgment are all roasted almond products, including but
27 not limited to, the roasted almond products identified in the Notices, that that are manufactured,
28

1 purchased, distributed, or sold by Select Harvest and which are sold in California (collectively, the
2 “Covered Products”).

3 **1.5 No Admission**

4 The Parties enter into this Consent Judgment in order to achieve a settlement of the
5 Proposition 65 claims arising from or relating to the allegations asserted in the Notices for the
6 purpose of avoiding prolonged litigation. Nothing in this Consent Judgment shall be construed as an
7 admission of EHA or Select Harvest of any fact, issue of law, or violation of law, nor shall
8 compliance with this Consent Judgment constitute or be construed as an admission by Select Harvest
9 of any fact, issue of law or violation of law. Nothing in this Consent Judgment or any document
10 referred to herein, shall be construed as giving rise to any presumption or inference of admission or
11 concession by Select Harvest as to any fault, wrongdoing or liability whatsoever. Nothing in this
12 Consent Judgment nor compliance with this Consent Judgment shall constitute or be construed as an
13 admission by any of the Parties or by any of their respective officers, directors, shareholders,
14 employees, agents, parent companies, subsidiaries, divisions, franchisees, licensees, customers,
15 suppliers, distributors, wholesalers, or retailers of any fact, issue of law, or violation of law. This
16 Consent Judgment is the product of negotiation and compromise and is accepted by the Parties solely
17 for purposes of settling, compromising, and resolving issues disputed with respect to the claims in the
18 Notices and shall not be used for any purpose except to enforce the terms of this Consent Judgment.
19 The Parties agree that this Section shall not diminish or otherwise affect the obligations,
20 responsibilities, and duties of the Parties under this Consent Judgment.

21 **1.6 Effective Date; Compliance Date**

22 The Effective Date of this Consent Judgment is the date of entry of the Consent Judgment by
23 the Court. The Compliance Date is the date that is eighteen (18) months after the Effective Date.

24 **2. SELECT HARVEST’S DUTIES**

25 **2.1** Except as otherwise provided herein, any Covered Products that are manufactured by
26 Select Harvest on and after the Compliance Date that Select Harvest thereafter sells in California or
27 distributes for sale in California shall not exceed 225 parts per billion (“Reformulation Limit”) as set
28 forth in Section 2.3, unless such Covered Products comply with the warning requirements of Section

1 2.2. As used in this Section 2, “distribute for sale in California” means to directly ship a Covered
2 Product into California for sale in California or to sell a Covered Product to a distributor that Select
3 Harvest knows will sell such product in California.

4 **2.2 Warnings**

5 **2.2.1** If Select Harvest provides warnings under Section 2.1, Covered Products may
6 be sold in California with one of the following warning statements:

7 **Option 1:**

8 **WARNING:** Consuming this product can expose you to chemicals including acrylamide,
9 which is known to the State of California to cause cancer [and birth defects or other
10 reproductive harm]. For more information go to www.P65Warnings.ca.gov/food.

11 **Option 2:**

12 **WARNING:** Reproductive Harm – www.P65Warnings.ca.gov/food

13 The warning in Option 2 may be used only if the warning appears on the product container or
14 labeling. The word “**WARNING**” shall be displayed in all capital letters and bold print. This
15 warning statement shall be prominently displayed on the Covered Product, on the packaging of the
16 Covered Product, or on a placard, shelf tag, or sign provided that the statement is displayed with such
17 conspicuousness, as compared with other words, statements or designs as to render it likely to be read
18 and understood by an ordinary individual prior to sale. If the warning statement is displayed on the
19 Covered Product’s label, it must be set off from other surrounding information.

20 **2.2.2** The warning requirements set forth herein are imposed pursuant to the terms of
21 this, and are recognized by the Parties as not being the exclusive manner of providing a warning for
22 the Covered Products. Warnings may be provided as specified in the Proposition 65 regulations for
23 food in effect as of the Effective Date (Title 27, California Code of Regulations, section 25601, *et*
24 *seq.*) or as such regulations may be amended in the future, or pursuant to a settlement agreement or
25 consent judgment involving acrylamide. In addition, Select Harvest may follow the notification
26 procedure set out in Title 27, California Code of Regulations, section 25600.2 or a similar procedure
27 where Select Harvest instructs its distributor or retailer customers to provide warnings for the
28 Covered Products consistent with Section 2.2.

1 **2.3 Testing**

2 **2.3.1** Compliance with the Reformulation Limit shall be determined using LC-
3 MS/MS (Liquid Chromatograph-Mass Spectrometry), GC/MS (Gas Chromatography/Mass
4 Spectrometry), or any other testing method agreed upon by the Parties. For purposes of determining
5 compliance with the Reformulation Limit, the average of at least three samples drawn from three
6 different production lots or batches of each type of Covered Product (or from as many lots or batches
7 as are available if there are fewer than three), but no more than ten samples drawn from ten different
8 product lots or batches of each type of Covered Product, shall be controlling.

9 **2.4** Covered Products that were put into the stream of commerce by Select Harvest before
10 the Compliance Date are not subject to the obligations of Section 2 but are nonetheless subject to the
11 release provisions of Section 6.

12 **3. SETTLEMENT PAYMENT**

13 **3.1** In full satisfaction of all potential civil penalties, additional settlement payments,
14 attorney's fees and costs (including, but not limited to, fees and costs incurred by attorneys, experts,
15 and investigators), Select Harvest shall pay a total settlement amount of fifty-five thousand (\$55,000).
16 This includes civil penalties in the amount of five thousand (\$5,000) pursuant to Health and Safety
17 Code section 25249.7(b) and attorney's fees and costs in the amount of fifty thousand (\$50,000).
18 pursuant to Code of Civil Procedure section 1021.5 and Health and Safety Code section 25249 et seq.

19 **3.2** The portion of the settlement attributable to civil penalties shall be allocated according
20 to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the
21 penalty paid to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and
22 the remaining twenty-five percent (25%) of the penalty paid to EHA.

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

24 Noam Glick
25 Glick Law Group
26 225 Broadway, Suite 2100
27 San Diego, CA 92101
28

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

3 For United States Postal Delivery:

4 Mike Gyurics
5 Fiscal Operations Branch Chief
6 Office of Environmental Health Hazard Assessment
7 P.O. Box 4010
8 Sacramento, CA 95812-4010

9 For Non-United States Postal Service Delivery:

10 Mike Gyurics
11 Fiscal Operations Branch Chief
12 Office of Environmental Health Hazard Assessment
13 1001 I Street
14 Sacramento, CA 95814

15 Select Harvest agrees to provide EHA's counsel with a copy of the check payable to OEHHA
16 simultaneous with its penalty payment to EHA.

17 The Parties, including EHA, will exchange completed IRS 1099, W-9, or other forms as
18 required. Relevant information for Glick Law Group, Nicholas & Tomasevic, and EHA are set out
19 below:

- 20 • Environmental Health Advocates, Inc., whose address and tax identification number shall
21 be provided within five (5) days after this Consent Judgement is fully executed by the
22 Parties;
- 23 • "Glick Law Group" (EIN: 47-1838518) at address provided in Section 3.2;
- 24 • "Nicholas & Tomasevic" (EIN: 46-3474065) at address provided in Section 3.3; and
- 25 • "Office of Environmental Health Hazard Assessment" at 1001 I Street, Sacramento, CA
26 95814.

27 3.3 Attorney's Fees and Costs

28 The portion of the settlement attributable to attorneys' fees and costs 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 Defendant's attention, as well as
litigating and negotiating a settlement in the public interest.

1 Defendant shall provide its payment to EHA's counsel in two checks, divided equally,
2 payable to Glick Law Group, PC twenty five thousand (\$25,000) and Nicholas & Tomasevic, LLP
3 twenty five thousand (\$25,000) respectively. The 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 payments will be issued by the later of: (1) ten days from the Effective
14 Date; or (2) August 10, 2020.

15 **4. ENFORCEMENT**

16 **4.1** Before seeking any judicial enforcement, the Parties shall attempt in good faith to meet
17 and confer to resolve any dispute arising under this Consent Judgment.

18 **4.2** EHA may not bring any 60-day notice or enforcement action concerning acrylamide in
19 the Covered Products if the packaging of the Covered Product is marked or labeled with the statement
20 "Not for sale in California" or equivalent language. If Settling Defendant marks or labels a Covered
21 Product with such a statement, Select Harvest shall include a letter to each of its retailer or distributor
22 customers receiving that Covered Product notifying the customer that the Covered Product may not be
23 sold in California. In addition, if Select Harvest demonstrates compliance with the Reformulation
24 Limit under Section 2, Plaintiff shall not be entitled to bring any 60-day notice or enforcement action
25 concerning acrylamide in the Covered Product at issue.

26 **5. APPLICATION**

27 This Consent Judgment may apply to, be binding upon, and benefit the Parties and their
28 predecessors, successors, and assigns. This Consent Judgment shall have no application to any
Covered Product which is distributed or sold outside the State of California.

1 **6. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

2 **6.1 EHA’s Public Release of Claims**

3 This Consent Judgment is a full, final, and binding resolution between, on the one hand, EHA,
4 on behalf of itself and its attorneys, investigators, agents, heirs, and assigns (collectively referred to
5 as “EHA Releasors”) and on behalf of the public in the public interest, and, on the other hand, Select
6 Harvest and its parents, subsidiaries, affiliated entities under common ownership, its directors,
7 officers, principals, agents, employees, attorneys, insurers, accountants, predecessors, successors, and
8 assigns (“Select Harvest Entities”), and each entity to whom Select Harvest directly or indirectly
9 distributes, ships, or sells the Covered Products including but not limited to downstream distributors,
10 wholesalers, customers, retailers (including but not limited to Costco and Grocery Outlet Inc.),
11 franchisees, cooperative members, and licensees, and their owners, directors, officers, agents,
12 principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors, and
13 assigns (collectively referred to as the “Releasees”), of all claims, actions, causes of action (in law or
14 in equity), suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, expenses,
15 and fees (including, but not limited to, investigation fees, expert fees, and attorney’s fees), and
16 expenses (collectively, “Claims”) that have been or could have been asserted under Proposition 65 for
17 any exposures to acrylamide from the Covered Products manufactured, distributed, or sold by Select
18 Harvest prior to the Compliance Date. Compliance with the terms of this Consent Judgment
19 constitutes compliance with Proposition 65 with respect to any exposures to acrylamide from
20 Covered Products manufactured, sold, or distributed by Select Harvest on and after the Compliance
21 Date.

22 **6.2 EHA’s Release of Claims**

23 EHA, in its individual capacity, on behalf of itself and the EHA Releasors, also waives all
24 rights to institute or participate in, directly or indirectly, any form of legal action, and discharges and
25 releases all Claims as to all Releasees under Proposition 65 or any statutory or common law from the
26 alleged failure to provide warnings for any exposures to acrylamide, or for causing any exposures to
27 acrylamide, in the Covered Products manufactured, sold, or distributed by Select Harvest, provided
28 that Select Harvest complies with Section 2 of this Consent Judgment.

1 It is possible that other Claims not known to the Parties, arising out of the facts alleged in the
2 Notice, and relating to the Covered Products, will develop or be discovered. EHA, in its individual
3 capacity, and on behalf of herself the EHA Releasors, acknowledges that this Consent Judgment is
4 expressly intended to cover and include all such Claims. EHA, on behalf of itself the EHA
5 Releasors, acknowledges that the claims released in Sections 6.1 and 6.2 above may include unknown
6 claims, and nevertheless waives California Civil Code section 1542 as to any such unknown claims.
7 California Civil Code section 1542 reads as follows:

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

12 EHA acknowledges and understands the significance and consequences of this specific waiver
13 of California Civil Code section 1542. The release in this Section 6.2 is effective as a full and final
14 accord and satisfaction, as a bar to all Claims of any nature, character or kind, whether known or
15 unknown, or suspected or unsuspected. EHA acknowledges that it is familiar with Section 1542 of
16 the California Civil Code, which provides as follows:

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

21 EHA understands and acknowledges the significance and consequence of this waiver of California
22 Civil Code section 1542

23 **6.3** Select Harvest, on its own behalf, and on behalf of the Select Harvest Entities, hereby
24 waives any and all claims against EHA and the EHA Releasors, for any and all actions taken or
25 statements made by EHA and its attorneys and other representatives, whether in the course of
26 investigating claims, otherwise seeking to enforce Proposition 65 against it, in this matter or with
27 respect to the Covered Products.
28

1 **6.4** Nothing in Section 6 affects or limits the right of any Party to enforce the terms of this
2 Consent Judgment.

3 **7. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

4 In the event that any of the provisions of this Consent Judgment are held by a court to be
5 unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.

6 **8. GOVERNING LAW**

7 The terms and conditions of this Consent Judgment shall be governed by and construed in
8 accordance with the laws of the State of California.

9 **9. MODIFICATION**

10 **9.1** If, despite using commercially reasonable and good faith efforts, Select Harvest has not
11 achieved compliance with the Reformulation Limit as to any Covered Products by the Compliance
12 Date, then Select Harvest may request that the Parties meet and confer as to an appropriate
13 modification of this Consent Judgment. To be effective, any such modification must be approved by
14 this Court pursuant to Paragraph 14 herein, and EHA agrees not to oppose such modification except for
15 good cause shown. Such modification could include: (a) an extension of the Compliance Date; or (b)
16 any other modification that the Parties agree is appropriate and in the public interest. Grounds for an
17 extension or other modification may include, but are not limited to, that, despite Select Harvest's good
18 faith efforts to reduce acrylamide, it is not Feasible for one or more Covered Products to meet the
19 Reformulation Limit. "Feasible" means capable of being accomplished in a successful manner, taking
20 into account economic, commercial, and technological factors. The term "Feasible" includes, but is not
21 limited to, a consideration of the following factors: availability and reliability of a supply of
22 ingredients used in the Covered Products; safety, taste, or other performance characteristics of the
23 Covered Products; and cost and commercial considerations in changes to sourcing, harvesting, storage,
24 preparation, or roasting methods or equipment for the Covered Products.

25 **9.2** If a final decision of a court determines that warnings for acrylamide exposures or that
26 enforcement of Proposition 65 claims for acrylamide exposures are preempted or otherwise unlawful
27 or unconstitutional in a manner that applies to the Covered Products or products similar to the Covered
28

1 Products, then Select Harvest shall be entitled to request a Court order modifying this Consent
2 Judgment. EHA agrees not to oppose such modification except for good cause shown.

3 **9.3** If Proposition 65 or its implementing regulations (including but not limited to the “safe
4 harbor no significant risk level” for acrylamide set forth at Cal. Code Regs., tit. 27, section 25705,
5 subdivision (c)(2) or any “alternative risk level” adopted by regulation or court decision) are changed
6 from their terms in a manner that impacts the Reformulation Limit, or if OEHHA takes some other
7 final regulatory action for products similar to the Covered Product in a manner that impacts the
8 Reformulation Limit, then Select Harvest may request a Court order modifying the Reformulation
9 Limit in the Consent Judgment accordingly. EHA agrees not to oppose such modification except for
10 good cause shown.

11 **9.4** If there is any other change in law, regulation or guidance for which Select Harvest
12 believes a modification to this Consent Judgment is appropriate, including but not limited to a
13 determination that warnings for acrylamide in foods or in products similar to the Covered Products are
14 not required under Proposition 65 or a change in the safe harbor warning regulations, Select Harvest
15 may request a Court order modifying this Consent Judgment accordingly. EHA agrees not to oppose
16 such modification except for good cause shown.

17 **9.5** If there is a court-approved consent judgment that sets an acrylamide standard for
18 roasted almonds, Select Harvest shall be entitled to sell or distribute the Covered Products without
19 prior notice to Plaintiff as long as Select Harvest meets such acrylamide standard.

20 **9.6** If a dispute should arise concerning the terms of Section 9, then the Parties shall meet
21 and confer in good faith to attempt to resolve the dispute, but if it cannot be resolved in that manner,
22 either Party may present the dispute to the court for resolution. Any modification of this Consent
23 Judgment shall have no bearing on any financial terms contained herein.

24 **10. PROVISION OF NOTICE**

25 All notices required to be given to either Party to this Consent Judgment by the other shall
26 be in writing and sent to the following agents listed below via email and first-class mail.
27
28

1 **For EHA:**
2 Noam Glick
3 Glick Law Group, PC
4 225 Broadway, 21st Floor
5 San Diego, CA 92101

6 **For Select Harvest:**

7 Sarah Esmaili
8 ARNOLD & PORTER KAYE SCHOLER LLP
9 Three Embarcadero Center, 10th Floor
10 San Francisco, CA 94111
11 Telephone: (415) 471-3283
12 Facsimile: (415) 471-3400
13 Email: sarah.esmaili@arnoldporter.com

14 **11. EXECUTION AND COUNTERPARTS**

15 This Consent Judgment may be executed in counterparts, which taken together shall be
16 deemed to constitute one document. A facsimile or .pdf signature shall be construed to be as valid
17 as the original signature.

18 **12. DRAFTING**

19 The terms of this Consent Judgment have been reviewed by the respective counsel for each
20 Party prior to its signing, and each Party has had an opportunity to fully discuss the terms and
21 conditions with legal counsel. The Parties agree that, in any subsequent interpretation and
22 construction of this Consent Judgment, no inference, assumption, or presumption shall be drawn,
23 and no provision of this Consent Judgment shall be construed against any Party, based on the fact
24 that one of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all or any
25 portion of the Consent Judgment. It is conclusively presumed that all of the Parties participated
26 equally in the preparation and drafting of this Consent Judgment.

27 **13. COURT APPROVAL**

28 If this Consent Judgment is not entered by the Court, it shall be of no force or effect.

29 **14. RETENTION OF JURISDICTION**

30 This Court shall retain jurisdiction of this matter to implement or modify the Consent
31 Judgment. Notwithstanding the provisions of Section 9, nothing in this Consent Judgment limits or
32 affects the Court's authority to modify this Consent Judgment as provided by law

