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16 Attorneys for Plaintiff
17 Environmental Health Advocates, Inc.

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

20 ENVIRONMENTAL HEALTH ADVOCATES,
21 INC., a California corporation

22 Plaintiff,

23 v.

24 NOTHING BUNDT FRANCHISING, LLC
25 DBA NOTHING BUNDT CAKES, a Nevada
26 corporation; and DOES 1 through 100,
27 inclusive,

28 Defendants.

Case No.:

[PROPOSED] CONSENT JUDGMENT AS
TO NOTHING BUNDT FRANCHISING,
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"), on the one hand, and Nothing Bundt Franchising, LLC ("Defendant" or "NBF") on the other
5 hand, with EHA and NBF individually referred to as a "Party" and collectively as the "Parties."

6 **1.2 Plaintiff**

7 EHA is an organization in California, 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.

10 **1.3 Defendant**

11 NBF 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 alleges that NBF manufactures, imports, sells, and distributes for sale in California, cakes
16 that contain acrylamide. EHA further alleges that NBF does so without providing a sufficient health
17 hazard warning as required by Proposition 65 and related regulations. Pursuant to Proposition 65,
18 acrylamide is listed as a chemical known to cause cancer and reproductive harm. NBF denies that
19 warnings are required under Proposition 65 for any exposures to acrylamide in the Products, and NBF
20 maintains that it has complied with all applicable federal and state laws, including but not limited to
21 Proposition 65.

22 **1.5 Product Description**

23 For purposes of this Consent Judgment "Product" or "Products" are defined as Chocolate
24 Chocolate Chip Bundt Cakes, Classic Vanilla Bundt Cakes, Red Velvet Bundt Cakes, White Chocolate
25 Raspberry Bundt Cakes, Confetti Bundt Cakes, Carrot Bundt Cakes, Lemon Bundt Cakes, Marble
26 Bundt Cakes, Pecan Praline Bundt Cakes, Gluten-Free Chocolate Chip Cookie Bundt Cakes, Peanut
27 Butter Chocolate Swirl Bundt Cakes, Chocolate Turtle Bundt Cakes, Strawberries & Cream Bundt
28 Cakes, Pumpkin Spice Bundt Cakes, Peppermint Chocolate Chip Bundt Cakes, Blueberry Bliss Bundt

1 Cakes, Snickerdoodle Bundt Cakes, and Salted Caramel Bundt Cakes manufactured, imported, sold,
2 or distributed for sale in California by NBF and Releasees, defined *infra*.

3 **1.6 Notice of Violation**

4 On August 15, 2019 EHA served NBF, the California Attorney General, and all other required
5 public enforcement agencies with a 60-Day Notice of Violation of California Health and Safety Code
6 section 25249.6 *et seq.* ("Notice"). The Notice alleged that NBF violated Proposition 65 by failing to
7 sufficiently warn consumers in California of the health hazards associated with exposures to
8 acrylamide contained in its "Chocolate Chocolate Chip Bundt Cakes." On January 24, 2020, EHA
9 served NBF, the California Attorney General, and all other required public enforcement agencies with
10 an amended 60-Day Notice of Violation identifying the other Products referenced herein.

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

13 **1.7 Complaint**

14 On _____, EHA filed a Complaint against Defendant for the alleged violations
15 of Health and Safety Code section 25249.6 that are the subject of the Notice ("Complaint").

16 **1.8 No Admission**

17 By stipulating to the entry of this Consent Judgment and agreeing to provide the relief and
18 remedies specified herein, NBF does not admit that it has violated, or threatened to violate, Proposition
19 65 or any other law or legal duty, and NBF does not admit that the chemical acrylamide in food poses
20 any risk to human health.

21 Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,
22 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment
23 be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law.
24 This Section shall not, however, diminish or otherwise affect NBF's obligations, responsibilities, and
25 duties under this Consent Judgment, subject to subsequent modifications thereof or Court orders
26 regarding any such obligation, responsibility, and/or duty.

27 ///

28 ///

1 **1.9 Jurisdiction**

2 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
3 Court has jurisdiction over NBF as to the allegations in the Complaint, that venue is proper in the
4 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
5 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

6 **1.10 Effective Date and Compliance Date**

7 For purposes of this Consent Judgment, the term "Effective Date" means the date on which the
8 Court grants the motion for approval of this Consent Judgment, as discussed in Section 5. Due to the
9 fact that the Products are subject to other regulatory requirements and any reformulation must ensure
10 compliance with these other applicable regulatory requirements, the Compliance Date is the date that
11 is six (6) months after the Effective Date.

12 **2. INJUNCTIVE RELIEF**

13 **2.1 Clear and Reasonable Warnings**

14 Commencing on the Compliance Date, and continuing thereafter, NBF agrees to only
15 manufacture for sale, purchase for sale, import for sale, or distribute for sale in or into California the
16 Product that is sold with a health hazard warning as provided for in Section 2.2 if such a warning is
17 required for the Product under Section 25249.6 of Proposition 65, absent reformulation of one or more
18 of the Products such that those Products that are sold in California or distributed for sale in California
19 shall not exceed 280 ppb on average for acrylamide.

20 **2.2 General Warning Requirements**

21 NBF agrees that each warning shall be prominently displayed on a label, labeling, or sign, and
22 displayed with such conspicuousness, as compared with other words, statements, designs, or devices
23 as to render it likely to be read and understood by an ordinary individual under customary conditions
24 before purchase or use.

25 For purposes of this Consent Judgment, a clear and reasonable warning for the Product shall
26 consist of a warning that it (a) a product-specific warning provided on a posted sign, shelf tag or shelf
27 sign at each point of display of the Product; (b) a product-specific warning provided via any electronic
28 device or process that automatically provides the warning to the purchaser prior to or during the

1 purchase of the Product, without requiring the purchaser to seek out the warning or (c) affixed to the
2 packaging, label, tag, or directly to each Product sold in California that contains the following
3 statements:

- 4 1) **WARNING:** Consuming this product can expose you to
5 chemicals including Acrylamide, which is known to the State
6 of California to cause cancer, birth defects or other
7 reproductive harm. For more information go to
8 www.P65Warnings.ca.gov/food.

9 2.3 Sell-Through Period

10 Notwithstanding anything else in this Consent Judgement, the Products that are manufactured
11 on or prior to the Effective Date and six (6) months thereafter shall be subject to release of liability
12 pursuant to this Consent Judgment, without regard to when such products were, or are in the future,
13 distributed or sold to customers. As a result, the obligations of NBF, or any Releasees (if applicable),
do not apply to these Products manufactured on or prior to the Compliance Date.

14 3. MONETARY SETTLEMENT TERMS

15 3.1 Settlement Amount

16 Defendant shall pay sixty-three thousand dollars (\$63,000.00) in settlement and total
17 satisfaction of all the claims referred to in the Notices, the Complaint, and this Consent Judgment.
18 This includes civil penalties in the amount of seven thousand dollars (\$7,000.00) pursuant to Health
19 and Safety Code section 25249.7(b) and attorneys' fees and costs in the amount of fifty-six thousand
20 dollars (\$56,000.00) pursuant to Code of Civil Procedure section 1021.5 and Health and Safety Code
21 section 25249 et seq.

22 3.2 Civil Penalty

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

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

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

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

For United States Postal Delivery:

Mike Gyuries
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 Gyuries
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

NBF agrees to provide EHA's counsel with a copy of the check payable to OEHHHA simultaneous with its penalty payment to EHA.

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

- "Environmental Health Advocates, Inc." whose address and tax identification number shall be provided within five (5) days after this Consent Judgment is fully executed by the parties
- "Glick Law Group" (EIN: 47-1838518) at address provided in Section 3.2;
- "Nicholas & Tomasevic" (EIN: 46-3474065) at address provided in Section 3.3; and

- 1 • “Office of Environmental Health Hazard Assessment at 1001 I Street, Sacramento, CA
2 95814.

3 **3.3 Attorneys’ Fees and Costs**

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

8 Defendant shall provide its payment to EHA’s counsel in two checks, divided equally, payable
9 to Glick Law Group, PC (\$28,000.00) and Nicholas & Tomasevic, LLP (\$28,000.00) respectively.
10 The addresses for these two entities are:

11 Noam Glick
12 Glick Law Group
13 225 Broadway, Suite 2100
14 San Diego, CA 92101

15 Craig Nicholas
16 Nicholas & Tomasevic, LLP
17 225 Broadway, Suite 2100
18 San Diego, CA 92101

19 **3.4 Timing**

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

21 **4. CLAIMS COVERED AND RELEASED**

22 **4.1 EHA’s Public Release of Proposition 65 Claims**

23 For any claim or violation arising under Proposition 65 alleging a failure to warn about
24 exposures to acrylamide from Products or related products manufactured, imported, sold, or
25 distributed by NBF prior to the Effective Date, EHA, acting on its own behalf and in the public interest,
26 releases NBF of any and all liability. This includes NBF’s owners, parents, subsidiaries, affiliated
27 entities under common ownership, its directors, officers, agents, employees, attorneys, and each entity
28 to whom NBF directly or indirectly distributes or sells the Products, including but not limited to,
 downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members and
 licensees, (collectively, the “Releasees”). Releasees include defendant, its parent, and all subsidiaries

1 and affiliates thereof and their respective employees, agents, and assigns that sell NBF's Products.
2 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with
3 respect to the alleged or actual failure to warn about exposures to acrylamide from Products
4 manufactured, imported, sold, or distributed by NBF, or any other claim based on the facts or conduct
5 alleged in the Complaint as to such Products, after the Effective Date. This Consent Judgment is a full,
6 final and binding resolution of all claims that were or could have been asserted against NBF and/or
7 Releasees for failure to provide warnings for alleged exposures to acrylamide contained in Products.

8 **4.2 EHA's Individual Release of Claims**

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

15 **4.3 Defendant's Release of EHA**

16 NBF, on its own behalf, hereby waives any and all claims against EHA and its attorneys and
17 other representatives, for any and all actions taken or statements made by EHA and its attorneys and
18 other representatives, whether in the course of investigating claims, otherwise seeking to enforce
19 Proposition 65 against it, in this matter or with respect to the Products.

20 **5. COURT APPROVAL**

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

24 **6. SEVERABILITY**

25 Subsequent to the Court's approval and entry of this Consent Judgment, if any provision is
26 held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely
27 affected.
28

1 **7. GOVERNING LAW**

2 The terms of this Consent Judgment shall be governed by the laws of the state of California
3 and apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise
4 rendered inapplicable for reasons, including but not limited to changes in the law, then Defendant may
5 provide written notice to EHA of any asserted change, and shall have no further injunctive obligations
6 pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.

7 **8. NOTICE**

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

11 For NBF:

12 Laura Biery
13 Honigman LLP
14 2290 First National Building
15 660 Woodward Avenue
16 Detroit, MI 48226-3506

11 For EHA:

12 Noam Glick
13 Glick Law Group, PC
14 225 Broadway, 21st Floor
15 San Diego, CA 92101

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

17 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

18 This Consent Judgment may be executed in counterparts and by facsimile signature, each of
19 which shall be deemed an original, and all of which, when taken together, shall constitute one and the
20 same document.

21 **10. POST EXECUTION ACTIVITIES**

22 EHA agrees to comply with the reporting form requirements referenced in Health and Safety
23 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
24 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which
25 motion EHA shall draft and file. In furtherance of obtaining such approval, the Parties agree to
26 mutually employ their best efforts, including those of their counsel, to support the entry of this
27 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
28 purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for

1 approval, responding to any objection that any third-party may make, and appearing at the hearing
2 before the Court if so requested.

3 **11. MODIFICATION**

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

7 **12. AUTHORIZATION**

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

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


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

15 **14. ENTIRE AGREEMENT**

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

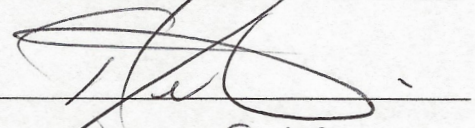
21 **AGREED TO:**

22
23 Date: 3/2/2020

24 By: 
25 Environmental Health Advocates, Inc.,
26 individually and acting on behalf of the
27 public interest
28

AGREED TO BY (DEFENDANT)

Date: 2-28-20

By: 
J. K. Smith [print name]