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Attorneys for Plaintiff
Key Sciences LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

KEY SCIENCES LLC,

Plaintiff,

vs.

GOURMET NUT INC., a New York
corporation; and
DOES 1-10,

Defendants.

CASE NO. 21STCV08305

**[PROPOSED] STIPULATED CONSENT
JUDGMENT**

Judge: Mark V. Mooney

Dept: 68

Complaint filed: March 3, 2021

1. DEFINITIONS

1.1. The “Complaint” means the operative complaint in the above-captioned matter, filed on March 3, 2021.

1.2. The “Covered Product(s)” means Gourmet Nut Power Up Protein Packed Trail Mix that is imported, sold, shipped, delivered, distributed or supplied for sale by Gourmet Nut Inc., whether sold under the brand name Gourmet Nut or any other brand or private label at all grocery, retail, and other locations and sales channels, including but not limited to the Internet, regardless of size, shape, or name given to them.

1.3. The “Listed Chemical” means Acrylamide.

1.4. The “Effective Date” of this Stipulated Consent Judgment (“Consent Judgment”) means the date on which this Consent Judgment is approved by the Court.

1 **2. INTRODUCTION**

2 2.1. **Parties.** The Parties to this Consent Judgment are Key Sciences LLC (“Plaintiff”
3 or “Key Sciences”) and Gourmet Nut, Inc. (“Defendant” or “Gourmet Nut”). Key Sciences and
4 Defendant (collectively, the “Parties” and individually, a “Party”) enter into this Consent
5 Judgment to settle claims asserted by Key Sciences against Defendant as set forth in the
6 Complaint.

7 2.2. **General Allegations.** Key Sciences alleges that Defendant has manufactured,
8 distributed, and/or sold the Covered Product containing the Listed Chemical without providing a
9 sufficient health hazard warning as required by Proposition 65 and its related Regulations.

10 2.3. **Notice of Violation.** On February 14, 2020, Key Sciences served a 60-day notice
11 of violation of Proposition 65 on the California Attorney General, the District Attorneys of every
12 county in California, the City Attorneys of every California city with a population greater than
13 750,000, and to Defendant, alleging that Defendant violated Proposition 65 by exposing persons
14 in California to the Listed Chemical in the Covered Product without first providing a clear and
15 reasonable Proposition 65 warning (the “Notice”). The Notice is designated with Attorney
16 General number 2020-00371. No designated governmental entity has filed a complaint against
17 Defendant with regard to the Covered Product or the alleged violations.

18 2.4. **Jurisdiction.** For purposes of this Consent Judgment only, the Parties stipulate
19 that this Court has jurisdiction over the allegations of violations contained in the Complaint and
20 personal jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper
21 in the County of Los Angeles, and that this Court has jurisdiction to enter and enforce this
22 Consent Judgment as a full and final resolution of all claims which were or could have been
23 raised in the Complaint based on the facts alleged therein and in the Notice with respect to
24 Covered Product manufactured, distributed, and/or sold by or on behalf of Defendant.
25 Additionally, for purposes of this Consent Judgment, Defendant is deemed a person in the course
26 of doing business in California and subject to the provisions of the Safe Drinking Water and
27

Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 et seq.
 (“Proposition 65”).

2.5. **No Admission.** Defendant denies the allegations in the Notice and Complaint, and maintains that all the products it has manufactured, imported, sold, and/or distributed for sale in California, including the Covered Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment is or shall be construed as an admission by the Parties of any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an admission by the Parties of any fact, finding, conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy, argument, or defense the Parties may have in any other pending or future legal proceedings. This Consent Judgment is the product of negotiation and compromise and is accepted by the Parties solely for purposes of settling, compromising, and resolving issues disputed in this action.

3. INJUNCTIVE RELIEF

3.1. **Remedial Duties.** Defendant agrees, promises, and represents that commencing on the Effective Date, and continuing thereafter, it will only manufacture, import, distribute, sell, or offer for sale in California (a) Covered Products that are Reformulated Products pursuant to Section 3.2, or (b) Covered Products that are labeled with a clear and reasonable warning pursuant to Section 3.3. As used in this Section 3.1, “distributed for sale in California” means to directly ship Covered Products into California or to sell Covered Products to a distributor Gourmet Nut knows to do business in California or to which Gourmet Nut will sell Covered Products in California.

3.2. **Reformulation Standard.** “Reformulated Products” are those Covered Products for which the level of the Listed Chemical does not exceed 75 parts per billion (“Reformulation Standard”)

3.3. **Clear and Reasonable Warnings.** Defendant shall provide clear and reasonable warnings on any Covered Products that it manufactures, distributes, sells, or offers for sale in

California that exceed the Reformulation Standard set forth in Section 3.2 above with respect to the Listed Chemical's level. The warnings shall be affixed to the packaging of or directly on the label of the Covered Products, and be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. Any warning on the label must be set off from other surrounding information and enclosed in a box. Where a Covered Product's packaging or label used to provide a warning includes Consumer Information in a language other than English, the warning must also be provided in that language in addition to English. "Consumer Information" includes warnings, directions for use, ingredient lists, and nutritional information. "Consumer Information" does not include the brand name, product name, company name, location of manufacture, or product advertising. The Parties agree that product labeling stating that:

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

shall constitute compliance with Proposition 65 with respect to the Listed Chemical in the Covered Product.

3.4. Sell-Through Period. Notwithstanding anything else in this Consent Judgment, Covered Products that are manufactured on or prior to the Effective Date shall be subject to release of liability pursuant to this Consent Judgment, without regard to when such Covered Products were, or are in the future, distributed or sold to customers. As a result, the obligation of Gourmet Nut or any Releasees (if applicable) do not apply to Covered Products manufactured on or prior to the Effective Date.

4. MONETARY SETTLEMENT TERMS

4.1. Total Settlement Amount. Within three (3) days of the Effective Date, Defendant shall make a total payment of **\$35,000.00** ("Total Settlement Amount") in full

satisfaction of all claims referred to in the Notice and the Complaint and including civil penalties pursuant to Health and Safety Code section 25249.7(b), and attorney's fees and costs (including, but not limited to, fees and costs incurred by attorneys, experts, and investigators), by separate checks to be issued as indicated below.

4.2. **Allocation.** The Total Settlement Amount shall be apportioned and paid by Defendant as follows:

4.2.1. **Civil Penalty.** \$17,500.00 shall be considered a civil penalty pursuant to California Health and Safety Code section 25249.7(b)(1). Defendant shall issue a check for 75% (\$13,125.00) of the civil penalty to the Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety Code section 25249.12(c). Defendant shall issue a check for 25% (\$4,375.00) of the civil penalty to Key Sciences, LLC.

4.2.2. **Attorneys' Fees and Costs.** \$17,500 shall be considered attributable to attorney's fees and costs. Defendant shall issue a check for \$17,500.00 to Key Science's counsel, "Davitt, Lalley, Dey & McHale, P.C." (herein "DLDM"), who are entitled to attorneys' fees and costs incurred by it in this action as reimbursement of Key Sciences' attorney's fees and costs (including but not limited to expert and investigative costs) incurred in bringing this action.

4.3. **Delivery of Payment.**

4.3.1. OEHHA's check shall be delivered to:

Office of Environmental Health Hazard Assessment
Attn: Mike Gyurics
1001 I Street, Mail Stop 12-B
Sacramento, CA 95812-4010

1 Concurrently with the payment to OEHHA, Defendant shall provide Key Sciences with
2 written confirmation that the payment to OEHHA was delivered.

3 4.3.2. All checks for Key Sciences' and DLDM shall be delivered to:

4 Kyle Wallace
5 Davitt, Lalley, Dey & McHale, P.C.
6 1411 Cortez Street #21948
7 Denver, CO 80221

8 **5. ENFORCEMENT**

9 5.1. The Parties agree that any legal action to enforce this Consent Judgment shall be
10 brought in Los Angeles County Superior Court. The Parties agree that Los Angeles County
11 Superior Court has subject matter jurisdiction over the enforcement of this Consent Judgment
12 and personal jurisdiction over Defendant, and that venue is proper in Los Angeles County. A
13 Party may enforce any of the terms and conditions of this Consent Judgment only after that Party
14 first provides 30 days notice to the Party allegedly failing to comply with the terms and
15 conditions of this Consent Judgment and attempts to resolve such Party's failure to comply in an
16 open and good faith manner.

17 5.2. Prior to bringing any motion, order to show cause, or other proceeding to enforce
18 the terms of this Consent Judgment other than for failure to make payment, Key Sciences shall
19 provide a Notice of Violation ("NOV") to the Defendant. The NOV shall include for the Covered
20 Product(s): the date(s) the alleged violation(s) was observed and the location at which the
21 Covered Products were offered for sale and shall be accompanied by all test data obtained by
22 Key Sciences regarding the Covered Products, and any other evidence or support for the
23 allegations in the NOV.

24 5.3. Defendant shall, within thirty (30) days following such NOV, provide Key
25 Sciences with documentation that that meets one of the following conditions:

26 5.3.1. The Covered Products were manufactured, imported, sold, distributed, or
27 shipped by Defendant for sale in California before the Effective Date, or

5.3.2. Since receiving the NOV Defendant has taken corrective action by either (i) requesting that its customers or stores in California, as applicable, remove the Covered Products identified in the NOV from sale in California and destroy or return the Covered Products to Defendant or vendor, as applicable, or (ii) providing a clear and reasonable warning for the Covered Product identified in the NOV pursuant to Section 3 above.

5.3.3. Key Sciences shall take no further action to enforce the alleged violation(s) of this Consent Judgment if the documentation called for in this section satisfies the requirements of Sections 5.3.1 or 5.3.2 above.

5.4. If after 30 days pass from the date Key Sciences serves an NOV a dispute remains as to compliance with the terms and conditions of this Consent Judgment then the Parties shall meet and confer pursuant to Section 13.1 below to resolve the matter for a period of no less than an additional 30 days before Key Sciences may take any further legal action to enforce this Consent Judgment.

5.5. In any proceeding brought by either Party to enforce this Consent Judgment, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs.

6. BINDING EFFECT; CLAIMS COVERED AND RELEASED

6.1. **Public Release.** This Consent Judgment is a full, final, and binding resolution between Key Sciences, on behalf of itself and in the public interest, and Gourmet Nut, of all claims and causes of action that were brought against Gourmet Nut based on the allegations described in the Complaint and Notice regarding the Covered Product. Key Sciences, on behalf of itself and its owners, principals, shareholders, officers, directors, employees, agents, parents, subsidiaries, successors, assigns, investigators, and attorneys (collectively, the “Key Sciences Releasers”), and in the public interest, hereby discharges and releases Defendant and its officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, franchisees, licensees, suppliers only for Covered Products sold to Gourmet Nut, and all downstream entities in the distribution chain, including but not limited to customers, distributors, wholesalers, and

retailers, and the predecessors, successors, and assigns of any of them (collectively, “Released Parties”), and waives all rights to institute or participate in (directly or indirectly) any form of action against the Released Parties, for any and all claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees, costs, and expenses asserted, or that could have been asserted from the handling, use, or consumption of the Covered Products, as to any alleged violation of Proposition 65 or its implementing regulations arising from the failure to provide Proposition 65 warnings for the Listed Chemical in Covered Products manufactured, distributed, or sold prior to the Effective Date. Compliance with the terms of this Consent Judgment shall be deemed to constitute compliance with Proposition 65 by any Released Party regarding alleged exposures to the Listed Chemical in the Covered Products after the Effective Date.

6.2. **Key Science's Individual Release of Claims.** Key Sciences, on behalf of itself and the Key Sciences Releasors only, and not on behalf of the public interest, hereby discharges and releases the Released Parties, and waives all rights to institute or participate in (directly or indirectly) any form of action against the Released Parties, for any and all claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees, costs, and expenses asserted, or that could have been asserted for any exposures to the Listed Chemical from the handling, use, or consumption of the Covered Product or for any failure to warn for the Listed Chemical in the Covered Product.

6.3. It is possible that other claims not known to the Parties, arising out of the facts alleged in the Notice or Complaint, and relating to the Covered Product, will develop or be discovered. Key Sciences, on behalf of itself and the Key Sciences Releasors only (and not on behalf of the public interest), acknowledges that this Consent Judgment is expressly intended to cover and include all such claims up through and including the Effective Date, including all rights of action therefore. Key Sciences acknowledges that the claims released in Section 6.2, above, may include unknown claims, and nevertheless waives California Civil Code section 1542 as to any such unknown claims. California Civil Code section 1542 reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS

1 THAT THE CREDITOR OR RELEASING PARTY DOES NOT
2 KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT
3 THE TIME OF EXECUTING THE RELEASE AND THAT, IF
4 KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY
5 AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR
6 OR RELEASED PARTY.

7 6.4. Key Sciences acknowledges and understand the significance and consequences of
8 this specific waiver of California Civil Code section 1542.

9 6.5. **Gourmet Nut's Release of Key Sciences.** Defendant its past and current agents,
10 representatives, attorneys, successors, and/or assignees, hereby waives and releases with respect
11 to the Covered Product all rights to institute or participate in, directly or indirectly, and fully
12 releases and discharges Key Sciences and its owners, parents, subsidiaries, affiliates, sister and
13 related companies, employees, shareholders, principals, officers, directors, insurers, attorneys,
14 predecessors, successors, agents, and assigns from any and all claims, including unknown and
15 unsuspected claims as described in paragraph 6.3 above, that arise from the institution,
16 prosecution, assertion, or settlement of the Notice and Complaint or the claims asserted therein.

17 **7. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

18 7.1 Subsequent to the Court's approval and entry of this Consent Judgment, in the event
19 that any of the provisions of this Consent Judgment are held by a court to be unenforceable, the
20 validity of the remaining enforceable provisions shall not be adversely affected.

21 **8. GOVERNING LAW**

22 8.1. The terms and conditions of this Consent Judgment shall be governed by and
23 construed in accordance with the laws of the State of California. If Proposition 65 is repealed,
24 amended, modified, or is otherwise rendered inapplicable for any reason, including but not
25 limited to changes in the law regarding concentration levels for acrylamide, then Gourmet Nut
26 may provide written notice to Key Sciences of any asserted change, and shall have no further
27 injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that,
28 the Covered Products are so affected.

1 **9. MODIFICATION**

2 9.1. This Consent Judgment after its entry by the Court may be modified by
3 stipulation of the Parties with the approval of the Court or by an order of this Court on noticed
4 motion by a Party in accordance with law. Any Party seeking to modify this Consent Judgment
5 must notify the other Party in writing, and the Parties shall thereafter attempt in good faith to
6 meet and confer prior to filing a motion to modify the Consent Judgment. If the Parties are
7 unable to resolve their dispute informally within sixty (60) days after the date of the written
8 notification, the Party that issued the written notification to seek the modification may bring a
9 motion or proceeding to seek judicial relief as to the requested modification.

10 9.2. In any stipulated modification to the Consent Judgment, the Party requesting the
11 modification shall prepare the draft motion or application to modify the Consent Judgment.

12 **10. PROVISION OF NOTICE**

13 10.1. All notices required to be given to either Party to this Consent Judgment by the
14 other shall be in writing and sent to the following agents listed below via email and first-class
15 mail. Any Party may, from time to time, specify in writing to the other, a change of address to
16 which notices and other communications shall be sent.

17 For Key Sciences, LLC:

18 Peter T. Sato (SBN 238486)
19 Davitt, Lalley, Dey & McHale, PC
20 2710 Gateway Oaks Dr., Suite 150N
21 Sacramento, CA 95833
Email: peter.sato@dldmlaw.com

22 For Defendant:

23 Martin Hahn
24 Hogan Lovells US LLP
25 Columbia Square
26 555 Thirteenth Street, NW
Washington, D.C. 20004
Email: martin.hahn@hoganlovells.com

1 **11. EXECUTION AND COUNTERPARTS**

2 11.1. This Consent Judgment may be executed in counterparts, which taken together
3 shall be deemed to constitute one document. A facsimile or .pdf signature shall be construed to
4 be as valid as the original signature.

5 **12. DRAFTING**

6 12.1. The terms of this Consent Judgment have been reviewed by the respective counsel
7 for each Party prior to its signing, and each Party has had an opportunity to fully discuss the
8 terms and conditions with legal counsel. The Parties agree that, in any subsequent interpretation
9 and construction of this Consent Judgment, no inference, assumption, or presumption shall be
10 drawn, and no provision of this Consent Judgment shall be construed against any Party, based on
11 the fact that one of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all
12 or any portion of the Consent Judgment. It is conclusively presumed that all of the Parties
13 participated equally in the preparation and drafting of this Consent Judgment.

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

15 13.1. If a dispute arises with respect to either Party's compliance with the terms of this
16 Consent Judgment, the Parties shall meet and confer in person, by telephone, and/or in writing
17 and endeavor to resolve the dispute in an amicable manner. No action or motion may be filed in
18 the absence of such a good faith attempt to resolve the dispute beforehand.

19 **14. ENTIRE AGREEMENT, AUTHORIZATION**

20 14.1. This Consent Judgment contains the sole and entire agreement and understanding
21 of the Parties with respect to the entire subject matter herein, and any and all prior discussions,
22 negotiations, commitments, and understandings related hereto. No representations, oral or
23 otherwise, express or implied, other than those contained herein have been made by any Party.
24 No other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to
25 exist or to bind any Party.

26 14.2. Each signatory to this Consent Judgment certifies that he or she is fully authorized
27 by the Party he or she represents to stipulate to this Consent Judgment.

1 **15. COURT APPROVAL**

2 15.1. Key Sciences shall file a motion seeking approval of this Consent Judgment
3 pursuant to California Health & Safety Code § 25249.7(f). This Consent Judgment will not be
4 effective until it is approved by the Court. Upon entry of the Consent Judgment, Key Sciences
5 and Defendant waive their respective rights to a hearing or trial on the allegations of the
6 Complaint.

7 15.2. The Parties shall make all reasonable efforts possible to have the Consent
8 Judgment approved by the Court. For purposes of this Section, “reasonable efforts” shall
9 include, at minimum, cooperating with the drafting and filing of the necessary moving papers,
10 and supporting the motion for judicial approval.

11 15.3. If this Consent Judgment is not approved in full by the Court, (a) this Consent
12 Judgment and any and all prior agreements between the Parties merged herein shall terminate
13 and become null and void, and the actions shall revert to the status that existed prior to the
14 execution date of this Consent Judgment; (b) no term of this Consent Judgment or any draft
15 thereof, or of the negotiation, documentation, or other part or aspect of the Parties’ settlement
16 discussions, shall have any effect, nor shall any such matter be admissible in evidence for any
17 purpose in this Action, or in any other proceeding; and (c) the Parties agree to meet and confer to
18 determine whether to modify the terms of the Consent Judgment and to resubmit it for approval.

19 **16. DISMISSAL**

20 16.1. Within ten days of the Effective Date, Key Sciences shall dismiss without
21 prejudice the claims in the Complaint as to the Doe Defendants.

22 **17. SERVICE ON THE ATTORNEY GENERAL**

23 17.1. Key Sciences shall serve a copy of this Consent Judgment, signed by the parties,
24 on the California Attorney General so that the Attorney General may review this Consent
25 Judgment prior to its approval by the Court. No sooner than forty-five (45) days after the
26 Attorney General has received the aforementioned copy of this Consent Judgment, and in the
27

1 absence of any written objection by the Attorney General to the terms of this Consent Judgment,
2 may the Court approve this Consent Judgment.

3 **18. ATTORNEY FEES**

4 18.1. Except as specifically provided in section 4.2.2 and 5.5, each party shall bear its
5 own costs and attorney fees in connection with this action.

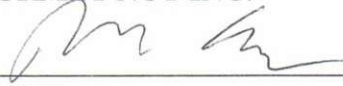
6 **19. RETENTION OF JURISDICTION**

7 19.1. This Court shall retain jurisdiction of this matter to implement, enforce, or modify
8 the Consent Judgment under Code of Civil Procedure § 664.6.

9 **IT IS SO STIPULATED:**

10 Dated: 4/23, 2021

GOURMET NUT INC.


11 
Signature

12 Morris Elbzy
13 Printed Name

14 President
15 Title

16
17 Dated: April 28, 2021

KEY SCIENCES LLC

18 
Signature

19 Lao Tizer
20 Printed Name

21 Owner
22 Title

23 **APPROVED AS TO FORM:**


1 Dated: April 28, 2021

DAVITT, LALLEY, DEY & MCHALE, PC

2 By: 
3 Peter T. Sato
4 Attorneys for Key Sciences LLC

5 Dated: April 28, 2021

HOGAN LOVELLS US LLP

6
7 By: 
8 Christopher J. Cox
9 Attorneys for The Defendant Gourmet Nut
10 Inc.

11 **ORDER AND JUDGMENT**

12 Based upon the Parties' Stipulation, and good cause appearing, this Consent Judgment is
13 approved and Judgment is hereby entered according to its terms.

14
15 **IT IS SO ORDERED, ADJUDGED, AND DECREED.**

16
17 Dated: _____
18 Judge of the Superior Court