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18 Environmental Health Advocates, Inc.

19 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

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

23 Plaintiff,

24 v.

25 KENOVER MARKETING CORPORATION,
26 a New Jersey corporation, DOES 1 through
27 100, inclusive,

28 Defendants.

Case No. RG20070024

ASSIGNED FOR ALL PURPOSES TO
JUDGE Stephen Pulido
DEPARTMENT 517

[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 Kenover Marketing Corporation (“Defendant” or “Kenover”) on the
5 other hand, with EHA and Kenover each individually referred to as a “Party” and collectively referred
6 to as the “Parties.”¹

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

15 **1.4 General Allegations**

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

20 **1.5 Notices of Violation**

21 On February 24, 2020, EHA served Kenover, Whole Foods Market California, Inc., the
22 California Attorney General, and all other required public enforcement agencies with a 60-Day Notice
23 of Violation of California Health and Safety Code section 25249.6 *et seq.* (the “Flatbread Notice”).
24 The Flatbread Notice alleged that Kenover violated Proposition 65 by failing to sufficiently warn
25 consumers in California of the health hazards associated with exposures to acrylamide contained in its
26

27
28

¹ Kenover is a New York corporation, not a New Jersey corporation as stated in the caption.

1 “Absolutely Gluten Free Everything Flatbread.”

2 On March 9, 2020, EHA served Kenover, Whole Foods Market California, Inc., the California
3 Attorney General, and all other required public enforcement agencies with another 60-Day Notice of
4 Violation of California Health and Safety Code section 25249.6 *et seq.* (the “Cracker Notice”). The
5 Cracker Notice alleged that Kenover violated Proposition 65 by failing to sufficiently warn consumers
6 in California of the health hazards associated with exposures to acrylamide contained in its “Absolutely
7 Gluten-Free Crackers.”

8 No public enforcer has commenced or is otherwise prosecuting an action to enforce the
9 violations alleged in the Flatbread Notice or Cracker Notice (hereinafter, the “Notices”).

10 **1.6 “Covered Products” Description**

11 “Covered Products” as used in this Settlement Agreement is defined as, and expressly limited
12 to, Absolutely Gluten-Free Everything Flatbread and Absolutely Gluten-Free Crackers that contain
13 acrylamide and that are manufactured, sold, imported, or distributed for sale in California by Kenover.

14 **1.7 Complaint**

15 On August 6, 2020, EHA filed a Complaint against Kenover, and others, for the alleged
16 violations of Proposition 65 that are the subject of the Notices (“Complaint”).

17 **1.8 No Admission**

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

26 **1.9 Jurisdiction**

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

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 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” means the date on which the
5 Court grants the motion for approval of this Consent Judgment, as discussed in Section 5.

6 **2. INJUNCTIVE RELIEF**

7 **2.1 Clear and Reasonable Warnings**

8 Under certain circumstances, as detailed below, Kenover shall (if required to do so by this
9 Consent Judgment) cause a warning to be provided for Covered Products. Such warning shall be
10 required only for Covered Products manufactured on or after 180 days following the entry of this
11 Consent Judgment and offered for sale in California.

12 (a) Kenover shall not distribute for sale in California any Covered Products unless the label,
13 as defined by Cal. Code Regs. tit. 27, § 25600.1, contains a clear and reasonable warning that complies
14 with Proposition 65 warning regulations, including Cal. Code Regs. tit. 27, § 25600 *et seq.*

15 (b) The parties agree that Kenover shall be in compliance with this Section 2 if it uses (but
16 is not required to use) the following warning:

17 **WARNING: CONSUMING THIS PRODUCT CAN EXPOSE YOU TO**
18 **CHEMICALS INCLUDING ACRYLAMIDE, WHICH ARE KNOWN TO THE**
19 **STATE OF CALIFORNIA TO CAUSE CANCER. FOR MORE INFORMATION**
20 **GO TO WWW.P65WARNINGS.CA.GOV/FOOD.**

21 (c) Kenover’s responsibilities to provide the warning described in this Section 2 shall
22 continue so long as Proposition 65 remains in full force and effect or until a warning is no longer
23 required because, for example: (1) a safe use determination governs one or more of the Covered
24 Products; (2) the amendment of either Proposition 65 or its implementing regulations (including
25 through final rulemaking by OEHHA) removes the warning obligation; or (3) the Food and Drug
26 Administration has determined that the warnings required by this Consent Judgment render any
27 Covered Product misbranded under federal law or otherwise violate federal law (unless a final and
28 binding Court of Appeals or Supreme Court decision applicable to California directly establishes that

1 the FDA does not have the authority to preempt Proposition 65). Kenover may move the Court for a
2 determination that the warning is no longer required.

3 **2.2 Grace Period for Existing Inventory of Covered Products**

4 The injunctive requirements of Section 2.1 shall not apply to Covered Products that are already
5 in the stream of commerce as of the Effective Date or that are manufactured before 180 days following
6 the entry of this Consent Judgment, which Covered Products are expressly subject to the releases
7 provided in Section 4.1.

8 **2.3 Duties Limited to California**

9 This Consent Judgment shall have no effect on products manufactured for sale outside
10 California, or offered for sale outside California.

11 **3. MONETARY SETTLEMENT TERMS**

12 **3.1 Settlement Amount**

13 Kenover shall pay sixty-five thousand dollars (\$65,000) in settlement and total satisfaction of
14 all the claims referred to in the Notices, the Complaint, and this Consent Judgment. This includes civil
15 penalties in the amount of sixty-five hundred dollars (\$6,500) pursuant to Health and Safety Code
16 section 25249.7(b) and attorney's fees and costs in the amount of fifty-eight thousand five hundred
17 dollars (\$58,500) pursuant to Code of Civil Procedure section 1021.5.

18 **3.2 Civil Penalty**

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

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

24 Environmental Health Advocates
25 225 Broadway, Suite 1900
26 San Diego, CA 92101

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

28 For United States Postal Service Delivery:

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

6 For Non-United States Postal Service Delivery:

7 Mike Gyurics
8 Fiscal Operations Branch Chief
9 Office of Environmental Health Hazard Assessment
10 1001 I Street
11 Sacramento, CA 95814

12 Kenover agrees to provide EHA's counsel with a copy of the check payable to OEHHA,
13 simultaneous with its penalty payments to EHA.

14 Plaintiff and its counsel will provide completed IRS 1099, W-9, or other tax forms as required.

15 Relevant information is set out below:

- 16 • "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.3;
- 17 • JURISPRUDENT DEFERRAL SOLUTIONS, LLC (EIN: 47-1572843) at the address
18 provided in Section 3.3.

19 **3.3 Attorney's Fees and Costs**

20 The portion of the settlement attributable to attorney's fees and costs (\$58,500) shall be paid to
21 EHA's counsel, who are entitled to attorney's fees and costs incurred by it in this action, including but
22 not limited to investigating potential violations, bringing this matter to Kenover's attention, as well as
23 litigating and negotiating a settlement in the public interest.

24 Each firm may, at counsel's option, elect to have all or part of the Court-approved Attorney's
25 Fees allocated to a structured settlement permitting payment of such fees to be made in a series of
26 periodic payments. If a firm elects to have its award of all or a portion of the Court-approved Attorney's
27 Fees in a structured settlement, their interest in such funds will be assigned to an independent third
28 party to make payment of Attorney's Fees to Counsel.

Kenover shall provide its payment to EHA's counsel in two checks, divided equally, payable
to Glick Law Group, PC (\$29,250) and to JURISPRUDENT DEFERRAL SOLUTIONS,
LLC per Deferred Payment Agreement entered into by and between Nicholas & Tomasevic,

1 LLP and JurisPrudent Deferral Solutions, LLC, (\$29,250) respectively. The addresses for these two
2 entities are:

3 Noam Glick
4 Glick Law Group
5 225 Broadway, Suite 1900
6 San Diego, CA 92101

7 JurisPrudent Deferral Solutions, LLC.
8 RE: Nicholas & Tomasevic, LLP
9 200 Providence Road, Suite 100
10 Charlotte, NC 28207

11 **3.4 Timing**

12 The above-mentioned checks shall be issued within fourteen (14) days after the Effective Date.

13 **4. CLAIMS COVERED AND RELEASED**

14 **4.1 EHA's Public Release of Proposition 65 Claims**

15 For any claim or violation arising under Proposition 65 alleging a failure to warn about
16 exposures to acrylamide from the Covered Products or any other products or brands that are
17 manufactured, sold, imported, or distributed for sale in California by Kenover (the "Products"), EHA,
18 acting for the general public, releases Kenover of any and all liability. This includes Kenover and its
19 owners, parents, subsidiaries, and affiliated entities under common ownership; the directors, officers,
20 agents, employees, attorneys, and assigns of each of the foregoing, including Kenover; and each entity
21 to which Kenover directly or indirectly distributes or sells Products, including but not limited to
22 downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and
23 licensees (collectively, the "Releasees"). Compliance with the terms of this Consent Judgment
24 constitutes compliance with Proposition 65 with respect to the alleged or actual failure to warn about
25 exposures to acrylamide from Products manufactured, imported, sold, or distributed by Kenover after
26 the Effective Date. This Consent Judgment is a full, final, and binding resolution of all claims that
27 were or could have been asserted against Kenover and/or Releasees for failure to provide warnings
28 for alleged exposure to acrylamide contained in Products.

1 **4.2 EHA's Individual Release of Claims**

2 EHA, in its individual capacity, also provides a release to Kenover and/or Releasees, which
3 shall be a full and final accord and satisfaction of, as well as a bar to, all actions, causes of action,

1 obligations, costs, expenses, attorney's fees, damages, losses, claims, liabilities, and demands of every
2 nature, character, and kind, whether known or unknown, suspected or unsuspected, arising out of or
3 relating to any Products manufactured, imported, sold, or distributed by Kenover before the Effective
4 Date.

5 EHA and EHA's counsel represent and warrant that they have not filed and are not
6 contemplating filing, that they are not aware of any other person who has filed or is contemplating
7 filing, and that they have not engaged and do not intend to engage in any advertising or solicitation to
8 locate additional persons to file, any form of complaint against Kenover and/or Releasees.

9 **4.3 Kenover's Release of EHA**

10 Kenover hereby waives any and all claims against EHA and its attorneys and other
11 representatives, for any and all actions taken or statements made by EHA and its attorneys and other
12 representatives in this matter, whether in the course of investigating claims or otherwise seeking to
13 enforce Proposition 65 against it.

14 **5. COURT APPROVAL**

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

18 **6. SEVERABILITY**

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

21 **7. GOVERNING LAW**

22 The terms of this Consent Judgment shall be governed by the laws of the state of California as applied
23 within the state of California. In the event that Proposition 65 is repealed, or is otherwise rendered
24 inapplicable for reasons including but not limited to changes in the law, then Kenover may provide
25 written notice to EHA of any asserted change, and shall have no further injunctive obligations pursuant
26 to this Consent Judgment with respect to, and to the extent that, the Products are so affected.8.

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1 **NOTICE**

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

5 <u>If to Kenover Marketing Corporation:</u>	<u>If to EHA:</u>
6 Ashley Simonsen	Jake Schulte
7 Covington & Burling LLP	Nicholas & Tomasevic, LLP
8 1999 Avenue of the Stars	225 Broadway, 19th Floor
Los Angeles, CA 90067	San Diego, CA 92101

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

11 **9. COUNTERPARTS; DIGITAL SIGNATURES**

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

15 **10. POST EXECUTION ACTIVITIES**

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

25 **11. MODIFICATION**

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

1 **12. AUTHORIZATION**

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

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

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

9 **14. ENTIRE AGREEMENT**

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

16 **AGREED TO:**

AGREED TO:

17
18 Date: 10/29/2020

Date: 10/29/2020

19
20 By: 
21 ENVIRONMENTAL HEALTH
22 ADVOCATES, INC.

By: 
KENOVER MARKETING CORPORATION

23
24 **IT IS SO ORDERED.**

25
26 Date: _____

JUDGE OF THE SUPERIOR COURT

28