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9 Attorneys for Plaintiff
 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.,
 15 Plaintiff,
 16 v.
 17 FERRARA CANDY COMPANY,
 18 Defendant.

Case No.: []

[PROPOSED] CONSENT JUDGMENT AS
 TO FERRARA CANDY COMPANY

1 **1. DEFINITIONS**

2 **1.1** The “Complaint” means the Complaint in the above-captioned matter.

3 **1.2** The Compliance Date means eighteen months from the Effective Date.

4 **1.3** The “Products” means Girl Scout S’Mores (“S’Mores”) and Keebler Chips Deluxe
5 Rainbow cookies (“Chocolate Chip Cookies”) manufactured, distributed, or sold by Defendant.

6 **1.4** “Effective Date” means the date on which notice of entry of this Consent Judgment
7 by the Court is served upon Defendant.

8 **1.5** “Defendant” refers to Ferrara Candy Company and its parent companies,
9 subsidiaries, and affiliated companies under common ownership.

10 **2. INTRODUCTION**

11 **2.1 Allegations**

12 Plaintiff alleges that Defendant manufactures, sells, and distributes Products for sale in
13 California that contain acrylamide. Plaintiff further alleges that Defendant has not provided warnings
14 under Proposition 65 for alleged exposures to acrylamide in the Products. Defendant denies that
15 warnings are required under Proposition 65 for any exposures to acrylamide in the Products, and
16 Defendant maintains that it has complied with all applicable federal and state laws, including but not
17 limited to Proposition 65.

18 **2.2 The Parties**

19 Defendant has ten or more employees and has manufactured, distributed, or sold the Products
20 in the year preceding the filing of the Complaint. In July 2019, Kellogg Company completed its sale
21 of various products to Ferrero International S.A. Defendant, a company related to Ferrero
22 International S.A., manufactures, markets, advertises, and sells the Products on behalf of Ferequity
23 Inc., a subsidiary of Ferrero International S.A.. The term “Kellogg” refers to Kellogg Company and
24 Kellogg Sales Company.

25 **2.3 Notices of Violation**

26 On April 22, 2020 Plaintiff issued 60-Day Notices of Violation of California Health and Safety
27 Code section 25249.6 *et seq.* claiming violations of Proposition 65 for alleged exposures to acrylamide
28

1 in the Products (“Notices”) by Defendant and other companies. The Notices were served on
2 Defendant, the California Attorney General, and all other required California public prosecutors.

3 **2.4 No Admission**

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

8 Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,
9 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment
10 be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law.
11 This Section shall not, however, diminish or otherwise affect Defendant’s obligations, responsibilities,
12 and duties under this Consent Judgment.

13 **2.5 Jurisdiction**

14 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
15 Court has jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in
16 the County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
17 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

18 **2. INJUNCTIVE RELIEF**

19 **2.1** Any Products that are manufactured or purchased by Defendant on and after the
20 Compliance Date that it thereafter sells in California or distributes for sale in California shall either
21 (1) not exceed 280 parts per billion (“ppb”) acrylamide, as set forth in Section 2.2 (“Acrylamide
22 Limit”) or (2) comply with the warning requirements of Section 2.4.

23 **2.1.1.** As used in this Section 2.1, distribution for sale in California refers to directly
24 shipping a Product into California or to sell a Product to a distributor that Defendant knows will sell
25 the Product in California.

26 **2.2 Testing**

27 (a) Compliance with the 280 ppb acrylamide limit shall be determined using LC-MS/MS
28 (Liquid Chromatograph-Mass Spectrometry), GC/MS/MS (Gas Chromatography/Mass

1 Spectrometry), or any other testing method agreed upon by the Parties. Any testing for purposes of
2 Section 2.1 shall be performed by any laboratory accredited by the State of California, a federal
3 agency, or a nationally recognized accrediting organization.

4 (b) The Acrylamide Limit is determined by randomly selecting and testing, over no less
5 than a ten-day period, one sample from up to four lots of Products produced at locations that supply
6 such Products to California (“Sampling Data”). The mean and standard deviation shall be calculated
7 using the Sampling Data. Any data points that are more than three standard deviations outside the
8 mean shall be discarded once, and the mean and standard deviation recalculated using the remaining
9 data points. The arithmetic mean determined in accordance with this procedure shall be used to
10 measure compliance with the Acrylamide Limit.

11 **2.3 Sell-Through Period**

12 Notwithstanding anything else in this Consent Judgement, the Products that are manufactured
13 on or prior to the Compliance Date shall be subject to release of liability pursuant to this Consent
14 Judgement, without regard to when such products were, or are in the future, distributed or sold to
15 customers. As a result, the obligations in Section 2 do not apply to these Products manufactured on or
16 prior to the Compliance Date.

17 **2.4 Warnings**

18 If Defendant provides warnings under Section 2.1, Products may be sold in California with one
19 of the following warning statements:

20 **Option 1:**

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

24 **Option 2:**

25 **WARNING:** Cancer [and Reproductive Harm] – www.P65Warnings.ca.gov/food

26 The warning in Option 2 may be used only if the warning appears on the product container or
27 labeling. Terms in bracketing are optional. The word “**WARNING**” shall be displayed in all capital
28 letters and bold print. This warning statement shall be prominently displayed on the Product, on the

1 packaging of the Product, or on a placard, shelf tag, or sign, provided that the statement is displayed
2 with such conspicuousness, as compared with other words, statements, or designs as to render it likely
3 to be read and understood by an ordinary individual prior to sale. If the warning statement is displayed
4 on the Product's label, it must be set off from other surrounding information and enclosed in a text
5 box. If the warning statement is displayed on a placard, shelf tag, or sign where the Product is offered
6 for sale, the warning placard or sign must enable an ordinary individual to easily determine which
7 Products the warning applies to, and to differentiate between the Products and other products to which
8 the warning statement does not apply. For sales by Defendant on the internet or by catalog where the
9 consumer is not physically present, the warning statement shall be displayed in such a manner that it
10 is likely to be read and understood by an ordinary individual prior to the authorization of or actual
11 payment

12 **3. MONETARY SETTLEMENT TERMS**

13 **3.1 Settlement Amount**

14 Defendant shall pay one hundred thirty-five thousand dollars (\$135,000) in settlement and total
15 satisfaction of all the claims referred to in the Notices, the Complaint, and this Consent Judgment.
16 This includes civil penalties in the amount of fifteen thousand dollars (\$15,000) pursuant to Health
17 and Safety Code section 25249.7(b) and attorney's fees and costs in the amount of one hundred twenty
18 thousand dollars (\$120,000) pursuant to Code of Civil Procedure section 1021.5 and Health and Safety
19 Code section 25249 et seq.

20 **3.2 Civil Penalty**

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

25 All payments owed to Plaintiff shall be delivered to the following payment address:

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

1 All payments owed to OEHHA (EIN: 68-0284486) shall be delivered directly to OEHHA (Memo
2 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 Defendant agrees to provide Plaintiff’s counsel with a copy of the check payable to OEHHA
16 simultaneous with its penalty payment to Plaintiff.

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

- 20 • “Environmental Health Advocates, Inc.” whose address and tax identification number
21 shall be provided within five (5) days after this Consent Judgement is fully executed
22 by the 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,
26 CA 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 Plaintiff’s
counsel, who are entitled to attorney’s fees and costs incurred by it in this action, including but not

1 limited to investigating potential violations, bringing this matter to Defendant’s attention, as well as
2 litigating and negotiating a settlement in the public interest.

3 Defendant shall provide its payment to Plaintiff’s counsel in two checks, divided equally,
4 payable to Glick Law Group, PC (\$60,000) and Nicholas & Tomasevic, LLP (\$60,000) respectively.

5 The addresses for these two entities are:

6 Noam Glick
7 Glick Law Group
8 225 Broadway, Suite 2100
9 San Diego, CA 92101

10 Craig Nicholas
11 Nicholas & Tomasevic, LLP
12 225 Broadway, 19th Floor
13 San Diego, CA 92101

14 **3.4 Timing**

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

16 **4. CLAIMS COVERED AND RELEASED**

17 **4.1 Plaintiff’s Public Release of Proposition 65 Claims**

18 This Consent Judgment is a full, final, and binding resolution between, on the one hand,
19 Plaintiff, on behalf of itself and its attorneys, investigators, agents, heirs, and assigns (collectively
20 referred to as “Plaintiff Releasors”) and on behalf of the public in the public interest, and, on the other
21 hand, Defendant and its parents, subsidiaries, affiliated entities under common ownership, its directors,
22 officers, principals, agents, employees, attorneys, insurers, accountants, predecessors, successors, and
23 assigns (“Defendant Entities”), other companies variously named in the Notices (Little Brownie
24 Bakers and CVS Pharmacy, Inc.), and each entity to whom Defendant directly or indirectly distributes,
25 ships, or sells the Products including but not limited to downstream distributors, wholesalers,
26 customers, retailers, franchisees, cooperative members, licensors, licensees, and their owners,
27 directors, officers, agents, principals, employees, attorneys, insurers, accountants, representatives,
28 predecessors, successors, and assigns (collectively referred to as the “Releasees”), of all claims,
actions, causes of action (in law or in equity), suits, liabilities, demands, obligations, damages, costs,

1 fines, penalties, losses, expenses, and fees (including, but not limited to, investigation fees, expert fees,
2 and attorney's fees), and expenses (collectively, "Claims") that have been or could have been asserted
3 under Proposition 65 for any exposures to acrylamide from the Products manufactured, purchased,
4 distributed, or sold by Defendant or Kellogg before the Compliance Date. Compliance with the terms
5 of this Consent Judgment constitutes compliance with Proposition 65 with respect to any exposures to
6 acrylamide from Products manufactured, purchased, sold, or distributed by Defendant on and after the
7 Compliance Date.

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

9 Plaintiff, in its individual capacity, on behalf of itself and the Plaintiff Releasors, also waives
10 all rights to institute or participate in, directly or indirectly, any form of legal action, and discharges
11 and releases all Claims as to all Releasees under Proposition 65 or any statutory or common law from
12 the alleged failure to provide warnings for any exposures to acrylamide, or for causing any exposures
13 to acrylamide, in the Products and in wafer and chocolate chip cookie products manufactured,
14 purchased, distributed, or sold by Defendant or Kellogg. The release in this Section 4.2 is effective as
15 a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
16 expenses, attorney's fees, damages, losses, claims, liabilities, and demands by Plaintiff of any nature,
17 character or kind, whether known or unknown, or suspected or unsuspected. Plaintiff acknowledges
18 that it is familiar with Section 1542 of the California Civil Code, which provides as follows:

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

26 Plaintiff understands and acknowledges the significance and consequence of this waiver of California
27 Civil Code section 1542.

28 **4.3 Defendant's Release of Plaintiff**

Defendant, on its own behalf, and on behalf of Releasees as well as its past and current agents,
representatives, attorneys, successors, and assignees, hereby waives any and all claims against Plaintiff
and its attorneys and other representatives, for any and all actions taken or statements made by Plaintiff

1 and its attorneys and other representatives, whether in the course of investigating claims, otherwise
2 seeking to enforce Proposition 65 against it, in this matter or with respect to the Products.

3 **5. COURT APPROVAL**

4 This Consent Judgment is not effective until it is approved and entered by the Court and shall
5 be null and void if it is not approved and entered by the Court within six months after it has been fully
6 submitted to the Court by the Parties, or by such additional time as the Parties may agree to in writing.

7 **6. SEVERABILITY**

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

11 **7. GOVERNING LAW**

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

18 **8. NOTICE**

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

22 For Defendant:

23 Sarah Esmaili
24 Arnold & Porter
25 Three Embarcadero Center, 10th Fl
26 San Francisco, CA 94111

For Plaintiff:

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

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

1 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

5 **10. POST EXECUTION ACTIVITIES**

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

15 **11. ENFORCEMENT**

16 Prior to bringing any motion or order to show cause to enforce the terms of this Consent
17 Judgment, a Party seeking to enforce the Consent Judgment shall provide the other Party written
18 notice of the alleged violation. The Parties shall meet and confer in an effort to try to reach
19 agreement on an appropriate cure for the alleged violation. Plaintiff shall not bring an enforcement
20 action or institute a judicial proceeding if Defendant demonstrates it has complied with the
21 requirements of Section 2. Defendant is entitled to designate such information as confidential.

22 In the event that meet and confer efforts are unsuccessful, the Party alleging a violation may
23 initiate a judicial proceeding to enforce this Consent Judgment no earlier than 60 days after issuing
24 the written notice specified in Section 11. In the event that Plaintiff proves a violation of Section 2 in
25 a judicial proceeding to enforce the Consent Judgment, the Court may order appropriate injunctive
26 relief, including but not limited to ordering that Defendant cease selling any affected Products in
27 California without a clear and reasonable warning pursuant to Proposition 65. In any enforcement
28

1 proceeding regarding this Consent Judgment, Defendant may assert any and all defenses that are
2 available.

3 **12. MODIFICATION**

4 **12.1 Modification.** This Consent Judgment may be modified only by: (i) a written
5 agreement of the Parties and entry of a modified consent judgment thereon by the Court; or (ii) a
6 successful motion or application of any Party, and the entry of a modified consent judgment thereon
7 by the Court.

8 **12.2 Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
9 attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the
10 Consent Judgment.

11 **12.3 Change in Proposition 65.** If Proposition 65 or its implementing regulations
12 (including but not limited to the published "no significant risk level" for acrylamide set forth at Cal.
13 Code Regs., tit. 27, section 25705, subdivision (c)(2) or any "alternative risk level" adopted by
14 regulation or court decision) are changed from their terms as they exist on the date of entry of this
15 Consent Judgment, or if OEHHA takes some other final regulatory action that determines that
16 warnings for acrylamide are not required or modifies the standard for warnings for acrylamide, then
17 Defendant may seek to modify this Consent Judgment. Any such modification shall have no effect on
18 Defendant's financial obligations as provided herein.

19 **12.4 Other Court Decisions.** If a final decision of a court determines that warnings for
20 acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide exposures are
21 preempted or otherwise unlawful or unconstitutional, then Defendant may move to modify this Consent
22 Judgment to conform to such ruling in order to avoid unfair, inconsistent, or anti-competitive results.
23 Any such modification shall have no effect on Defendant's financial obligations as provided herein.

24 **12.5. Federal Agency Action and Preemption.** If a court of competent jurisdiction or an
25 agency of the federal government, including, but not limited to, the U.S. Food and Drug
26 Administration, states through any guidance, regulation or legally binding act that federal law has
27 preemptive effect on any of the requirements of this Consent Judgment, then Defendant may seek to
28 modify this Consent Judgment in accordance with the procedure for noticed motions set forth in Section

1 12.1 to bring it into compliance with or avoid conflict with federal law. Any such modification shall
2 have no effect on Defendant’s financial obligations as provided herein.

3 **12.6 Scientific Studies.** If an agency of the federal government, including, but not limited
4 to the U.S. Food and Drug Administration, states through any guidance, regulation, or other legally
5 binding act, following a review of scientific studies and following public notice and comment, a cancer
6 potency estimate for acrylamide that equates to a no significant risk level higher than 0.2 micrograms
7 per day, then Defendant shall be entitled to seek a modification of this Consent Judgment. Any such
8 modification shall have no effect on Defendant’s financial obligations as provided herein.

9 **12.8** Before filing any motion to modify the Consent Judgment, Defendant shall provide
10 written notice to Plaintiff to initiate the meet and confer procedure in Section 12.2. If the Parties do
11 not agree on the proposed modification during informal meet and confer efforts, Defendant may file a
12 motion to modify the Consent Judgment within sixty (60) days of the date of the written notice that
13 Defendant provides to Plaintiff under this Section 12.

14 **13. RETENTION OF JURISDICTION**

15 This Court shall retain jurisdiction of this matter to implement or modify the Consent
16 Judgment. Notwithstanding the provisions of Section 12, nothing in this Consent Judgment limits or
17 affects the Court’s authority to modify this Consent Judgment as provided by law.

18 **12. AUTHORIZATION**

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

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

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


26 **14. ENTIRE AGREEMENT**

27 This Consent Judgment contains the sole and entire agreement and understanding of the Parties
28 with respect to the entire subject matter herein, and any and all prior discussions, negotiations,

1 commitments, and understandings related hereto. No representations, oral or otherwise, express or
2 implied, other than those contained herein have been made by any Party. No other agreements, oral
3 or otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.

4 **AGREED TO:**

5 Date: 11/12/2020

6 By: 

7 Kim Embry [print name]
8 ENVIRONMENTAL HEALTH
9 ADVOCATES, INC.

4 **AGREED TO:**

5 Date: 11/12/2020

6 By: 

7 Natalie Hagstrom [print name]
8 FERRARA CANDY COMPANY

10 Date: 11/12/2020

11 By: 

12 Joyce McCarthy [print name]
13 FERRARA CANDY COMPANY

14
15
16 **IT IS SO ORDERED, ADJUDGED, AND DECREED:**

17 Dated: _____

18 _____
19 Judge of the Superior Court