

## SETTLEMENT AGREEMENT

### **1. INTRODUCTION**

#### **1.1 Parties**

This Settlement Agreement is entered into by and between Environmental Health Advocates, Inc. (“EHA”), on the one hand, and Mary’s Gone Crackers (“MGC”), on the other hand, with EHA and MGC each individually referred to as a “Party” and collectively as the “Parties.” EHA is a corporation in the State of California serving in the interest of the general public by seeking to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products. MGC employs ten or more individuals and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code § 25249.6 *et seq.* (“Proposition 65”).

#### **1.2 General Allegations**

EHA alleges that MGC manufactures, sells, and distributes for sale in California, cayenne pepper crackers (*i.e.*, Mary’s Gone Crackers Real Thin Crackers™ Cayenne Pepper) that contain Acrylamide and that it does so without first providing the health hazard warning required by Proposition 65. Acrylamide is listed pursuant to Proposition 65 as a chemical known to cause cancer and birth defects or other reproductive harm.

#### **1.3 Product Description**

The product covered by this Settlement Agreement is defined as, and expressly limited to, Mary’s Gone Crackers Real Thin Crackers™ Cayenne Pepper, that contains Acrylamide and that is manufactured, sold or distributed for sale in California by MGC (the “Product(s)”).

#### **1.4 Notice of Violation**

On March 13, 2020, EHA served MGC, Whole Foods, the California Attorney General, and other requisite public enforcers with a 60-Day Notice of Violation (“Notice”), alleging that MGC and others violated Proposition 65 when they failed to warn its customers and consumers in California of the health risks associated with exposures to Acrylamide from the Product.

To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently

prosecuting an action to enforce the violations alleged in the Notice.

**1.5 No Admission**

MGC denies the material, factual, and legal allegations in the Notice and maintains that all the products it sold and/or distributed for sale in California, including the Product, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by MGC of any fact, finding, conclusion, issue of law or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by MGC of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by MGC. This Section shall not, however, diminish or otherwise affect MGC’s obligations, responsibilities, and duties under this Settlement Agreement.

**1.6 Compliance Date**

For purposes of this Settlement Agreement, the term “Compliance Date” shall mean ninety (90) days following the execution of this Settlement Agreement by the Parties.

**2. INJUNCTIVE RELIEF**

**2.1 Removal of Product from California Market**

Notwithstanding Product manufactured on or prior to the Compliance Date as provided for in Section 2.2, MGC will no longer sell the Product in California once the sell-through material is sold.

(i) Changes in Warning Regulations or Statutes

If the Office of Environmental Health Hazard Assessment (“OEHHHA”) or another authorized agency promulgates one or more regulations requiring or permitting warning text and/or methods of transmission different than those set forth above, or legislation is enacted by the California legislature, United States Congress or voters with such requirements or permission, MGC shall be entitled to use, at its discretion, such other warning text and/or method of transmission without being deemed in breach of this Agreement. If regulations or legislation are enacted providing that warnings as to Acrylamide in this product are no longer required, a lack of warning by MGC will not thereafter be a breach of this Agreement.

**2.2 Sell-Through Period**

Notwithstanding anything else in this Settlement Agreement, Products that are manufactured on or prior to the Compliance Date shall be subject to release of liability pursuant to this Settlement Agreement, without regard to when such Products were, or are in the future, distributed or sold to customers. As a result, the obligation of MGC, or any Releasees (if applicable), do not apply to Products manufactured on or prior to the Compliance Date.

**3. MONETARY SETTLEMENT TERMS**

**3.1 Civil Penalty Payment**

Pursuant to Health and Safety Code § 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, MGC agrees to pay two thousand five hundred dollars (\$2,500.00) in civil penalties. The penalty payment will be allocated in accordance with California Health and Safety Code §§ 25249.12(c)(1) & (d), with 75% of the penalty amount paid to OEHHA and the remaining 25% of the penalty amount retained by EHA. Within ten (10) days of the date this Settlement Agreement is executed by the Parties, MGC shall issue two separate checks for the initial civil penalty payment to (a) OEHHA in the amount of one thousand eight hundred and seventy-five dollars (\$1,875.00) and (b) EHA in the amount of six hundred and twenty-five dollars (\$625.00).

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

For United States Postal Service Delivery:

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

All penalty payments owed to EHA shall be sent to:

Environmental Health Advocates  
225 Broadway, Suite 2100  
San Diego, CA 92101

### **3.2 Attorney Fees and Costs**

The Parties reached an accord on the compensation due to EHA and its counsel under the private attorney general doctrine and principles of contract law. Under these legal principles, within ten (10) days of the date this Settlement Agreement is executed by the Parties, MGC agrees to pay twenty-two thousand five hundred dollars (\$22,500.00) to EHA and its counsel for all fees and costs incurred in prosecuting this matter. MGC's payment shall be delivered in the form of two checks: (1) one check for eleven thousand two hundred and fifty dollars (\$11,250.00) payable to "Glick Law Group"; and (2) one check for eleven thousand two hundred and fifty dollars (\$11,250.00) payable to "Nicholas & Tomasevic LLP."

### **3.3 Payment Address**

All payments required under this Section shall be delivered to:

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

Craig Nicholas  
Nicholas & Tomasevic, LLP  
225 Broadway, Suite 1900  
San Diego, CA 92101

### **3.4 Tax Documentation**

MGC agrees to provide a completed IRS 1099 for its payments to, and EHA agrees to provide IRS W-9 forms for each of the payees under this Settlement Agreement. The Parties acknowledge that MGC cannot issue any settlement payments pursuant to Section 3.1 and 3.2 above until after MGC receives the requisite W-9 forms from EHA's counsel.

## **4. CLAIMS COVERED AND RELEASED**

### **4.1 EHA's Release of Mary's Gone Crackers**

This Settlement Agreement is a full, final, and binding resolution between EHA, on its own behalf and not on behalf of the public, and MGC of any violation of Proposition 65 that was or could have been asserted by EHA, on its own behalf, on behalf of its past and current agents, representatives, attorneys, successors and assignees, against MGC and each of its respective parents, subsidiaries, affiliated entities under common ownership, directors, officers, members, employees, attorneys, each upstream entity from whom the Product was purchased by MGC, and each entity to whom MGC directly or indirectly distributes or sells the Product, including, but not limited to, its downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members and licensees (“Releasees”), based on the failure to warn about exposures to Acrylamide in the Product manufactured, sold or distributed for sale in California by MGC before the Compliance Date, as alleged in the Notice.

In further consideration of the promises and agreements herein contained, EHA on its own behalf and not on behalf of the public, on behalf of its past and current agents, representatives, attorneys, successors and assignees hereby waives any and all rights it may have to institute or participate in, directly or indirectly, any form of legal action and releases all claims against MGC and Releasees including, without limitation, all actions and causes of action, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses including, but not exclusively, investigation fees, expert fees and attorney fees arising under Proposition 65 with respect to the alleged or actual failure to warn about exposures to Acrylamide in the Product manufactured, distributed, sold or offered for sale by MGC, before the Compliance Date.

#### **4.2 Mary’s Gone Crackers’ Release of EHA**

MGC, on its own behalf and on behalf of its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against EHA and its attorneys and other representatives, for any and all actions taken or statements made by EHA and its attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Product.

#### **4.3 California Civil Code Section 1542**

*J.M.*

It is possible that other claims not known to the Parties arising out of the facts alleged in the Notice and relating to the Product will develop or be discovered. EHA on behalf of itself only, on one hand, and MGC on behalf of itself only, on the other hand, acknowledge that this Settlement Agreement is expressly intended to cover and include all such claims up through the Compliance Date. The Parties acknowledge that the claims released in Sections 4.1 and 4.2 may include unknown claims, and nevertheless waive 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 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.**

**5. NON-DISPARAGEMENT**

The Parties agree not to make any statements, written or verbal, or cause or encourage others to make any statements, written or verbal, that defame, disparage, or in any way criticize the personal or business reputation, practices, or conduct of EHA, MGC, EHA's Counsel, MGC's Counsel, Released Parties, their affiliates, employees, directors, officers, or attorneys. The Parties acknowledge and agree that this prohibition extends to statements, written or verbal, made to anyone, including but not limited to, the news media, investors, potential investors, any board of directors or advisory board of directors, industry analysts, competitors, strategic partners, vendors, and employees (past, present, and future).

*S.M.*

EHA and EHA's Counsel agree to remove and/or refrain from posting any references to this matter, or any related advertising, on any web sites, blogs, or other publicly accessible social media where they may be posted. This section is not intended to limit and shall not affect EHA's Counsel's ability to serve this Settlement Agreement to the California Attorney General pursuant to Cal. Code Regs., tit 11, § 3003(c) or to advertise as permitted under any applicable ethical rule or rule of professional responsibility.

**6. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any provision of this Settlement Agreement is held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

**7. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California.

**8. NOTICE**

Unless specified herein, all correspondence and notice required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (a) personal delivery; (b) first-class, registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any Party by the other at the following addresses:

For Mary’s Gone Crackers:

Robert Niemann  
Keller and Heckman, LLP  
Three Embarcadero Center, STE 1420  
San Francisco, CA 94111

For EHA:

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

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

**9. COUNTERPARTS; FACSIMILE SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or portable document format (PDF) signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

**10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

EHA and its attorneys agree to comply with the reporting form requirements referenced in

California Health and Safety Code § 25249.7(f).

**11. INTEGRATION**

This Agreement represents the only agreement between the Parties regarding the subject matter hereof, and supersedes all prior agreements, proposals, representations, arrangements, or understandings, written or oral, with respect thereto.

**12. MODIFICATION**

This Settlement Agreement may be modified only by written agreement of the Parties.

**13. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood, and agree to all of the terms and conditions of this Settlement Agreement.

**AGREED TO:**

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Date: August 12, 2020

Date: August 18, 2020

By: *Ron Blech*  
ENVIRONMENTAL HEALTH  
ADVOCATES, INC.

By: *S. Matsui*  
MARY'S GONE CRACKERS  
*President & CEO*  
*Shuji "Sergio" Matsui*