

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 FoodMatch, Inc. (“FoodMatch”), on the other hand, with EHA and FoodMatch each individually referred to as a “Party” and collectively as the “Parties.” EHA is a corporation in the State of California, and it alleges it serves 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. EHA alleges that FoodMatch 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

Acrylamide is listed pursuant to Proposition 65 as a chemical known to cause cancer and birth defects or other reproductive harm, at certain levels, respectively. EHA alleges that FoodMatch manufactures, sells, and/or distributes for sale in California, the Product (as defined below) that contains acrylamide at levels that require a warning under Proposition 65, but that FoodMatch does not provide such a warning.

1.3 Product Description

The product covered by this Settlement Agreement is defined as, and expressly limited to, Divina Green Olive & Parmesan Flatbread manufactured, sold or distributed for sale in California by FoodMatch (“the Product(s”).

1.4 Notice of Violation

On April 3, 2020, EHA served FoodMatch, Bristol Farms, the California Attorney General and other requisite public enforcers with a 60-Day Notice of Violation (“Notice”), alleging that FoodMatch and others violated Proposition 65 when they failed to provide a Proposition 65-compliant warning for acrylamide in connection with 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

FoodMatch denies each and every material, factual, and legal allegation in the Notice and maintains that all of the products it manufactured, sold and/or distributed, including those for sale in California and including the Products, have been, and are, in compliance with all applicable laws, including Proposition 65. Nothing in this Settlement Agreement shall be construed as an admission by FoodMatch 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 FoodMatch of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by FoodMatch. This Section shall not, however, diminish or otherwise affect FoodMatch obligations, responsibilities, and duties under this Settlement Agreement.

1.6 Effective Date

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

2. INJUNCTIVE RELIEF

2.1 Reformulation or Clear and Reasonable Warnings

Commencing on the Effective Date, and continuing thereafter, FoodMatch agrees to either: (a) manufacture for sale in California, distribute for sale in California, and sell in California only units of the Products that contain acrylamide concentrations of 350 parts per billion ("ppb") or less (as used in this Section 2.1, “distribute for sale in California” means to directly ship the Product into California or to sell Products to a distributor FoodMatch knows will sell the Product to consumers in California); or (b) for such Products that contain acrylamide in a concentration exceeding 350 ppb, FoodMatch shall provide one of the following Proposition 65 warnings as provided for in Section 2.2.

2.2 General Warning Requirements

FoodMatch agrees that each warning shall 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. Each warning shall be provided in a manner such that the consumer or user understands to which *specific* Product the warning applies, so as to minimize the risk of consumer confusion.

For purposes of this Settlement Agreement, a clear and reasonable warning for the Product shall consist of a warning affixed to the packaging, label, tag, or directly to each Product sold in California by FoodMatch that contains one the following statements:

- 1) **⚠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.
- 2) **⚠WARNING:** Cancer [and Reproductive Harm] – www.P65Warnings.ca.gov/food.

The bracketed phrases concerning reproductive toxicity are required only to the extent the levels of acrylamide or other Proposition 65-listed chemicals require such a warning. Further, the triangle may be in black and white, to the extent yellow is not otherwise used on the package design. The same warning on the Product shall be posted on any websites where the Product is sold to consumers in California.

(i) Changes in Warning Regulations or Statutes

In the event that the Office of Environmental Health Hazard Assessment 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, FoodMatch 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, or required

only at specific levels, a lack of warning by FoodMatch will not thereafter be a breach of this Agreement, to the extent FoodMatch is in compliance with such regulations or statutes.

2.3 Grace Period for Existing Inventory of Products

The injunctive requirements of Section 2 shall not apply to Products that are already in the stream of commerce as of the Effective Date, which Products are expressly subject to the releases provided in Section 4.1.

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, FoodMatch agrees to pay three thousand dollars (\$3,000.00) 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 the California Office of Environmental Health Hazard Assessment (“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, FoodMatch shall issue two separate checks for the initial civil penalty payment to (a) “OEHHA” in the amount of two thousand two hundred and fifty dollars (\$2,250.00) and (b) Environmental Health Advocates, Inc., in the amount of seven hundred and fifty dollars (\$750.00).

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:

Tegan Robinson
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, FoodMatch agrees to pay twenty-five thousand dollars (\$25,000.00) to EHA and its counsel for all fees and costs incurred in investigating, bringing this matter to the attention of FoodMatch's negotiating a settlement. FoodMatch's payment shall be delivered in the form of two checks: (1) one check for twelve thousand five hundred dollars (\$12,500.00) payable to "Glick Law Group"; and (2) one check for twelve thousand five hundred dollars (\$12,500.00) 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

FoodMatch 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 FoodMatch cannot issue any settlement payments pursuant to Sections 3.1 and 3.2 above until after FoodMatch receives the requisite W-9 forms from EHA's counsel.

4. CLAIMS COVERED AND RELEASED

4.1 EHA's Release of FoodMatch, Inc.

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

In further consideration of the promises and agreements herein contained, EHA on its own behalf and 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 FoodMatch 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 in connection with acrylamide in the Products. EHA further covenants that neither it nor its counsel is actively participating in any investigation of the Product or any other FoodMatch products, nor presently aware of any such investigation by others. Nothing in this provision or otherwise shall be deemed to in any way limit, restrict, or impact EHA's counsel's right to practice law.

4.2 FoodMatch Inc.'s Release of EHA

FoodMatch, 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

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

4.4 Deemed Compliance with Proposition 65. The Parties agree that compliance by FoodMatch with this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposure to acrylamide in the Products.

4.5. Public Benefit. It is FoodMatch's understanding that the commitments it has agreed to herein, and actions to be taken by FoodMatch under this Settlement Agreement, would confer a significant benefit to the general public, as set forth in Code of Civil Procedure § 1021.5 and Cal. Admin. Code tit. 11, § 3201. As such, it is the intent of FoodMatch that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to FoodMatch's or Releasees failure to provide a warning concerning exposure to acrylamide in the Products it has manufactured, distributed, sold, or offered for sale in California, or will manufacture, distribute, sell,

or offer for sale in California, such private party action would not confer a significant benefit on the general public as to those Products addressed in this Settlement Agreement, provided that FoodMatch is in material compliance with this Settlement Agreement.

At FoodMatch's request, EHA agrees to engage in good faith negotiations regarding entering into a court-approved Consent Judgment consistent with the injunctive relief terms in this Agreement. Any such Consent Judgment should, among other things, reimburse EHA for reasonable attorneys' fees and costs in preparation of any reasonably necessary pleadings, motions and supporting paperwork, and hearings.

5. 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.

6. 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. To the extent there are any disputes under this Settlement Agreement, either party may file suit in a California court of competent jurisdiction, after meeting and conferring in good faith.

7. 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 FoodMatch, Inc.:

Brandon Gross, Vice President
FoodMatch, Inc.
575 8th Ave, 23rd Floor
New York, NY 10018

With a copy to:

Bao Vu
Stoel Rives, LLP
Three Embarcadero Center, Suite 1120
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.

8. 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.

9. 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).

10. MODIFICATION

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

11. 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.

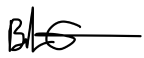
AGREED TO:

AGREED TO:

Date: 10/07/20

Date: 10/07/20

By: 
ENVIRONMENTAL HEALTH
ADVOCATES, INC.

By:  Brandon Gross
FOODMATCH, INC.