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9

10 Attorneys for Plaintiff
Environmental Health Advocates, Inc.

11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **IN AND FOR THE COUNTY OF ALAMEDA**

14 ENVIRONMENTAL HEALTH ADVOCATES,
INC., a California Corporation,

15 Plaintiff,

16 v.

17 BAY VALLEY FOODS, LLC, a Delaware
18 corporation,

19 Defendant.
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Case No.:

[PROPOSED] CONSENT JUDGMENT AS
TO BAY VALLEY FOODS, LLC.

(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 one hand, and Bay Valley Foods, LLC (“Defendant” or “BVF”) on the other hand, with
5 EHA and BVF individually referred to as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 EHA is a California corporation acting in the interest of the general public. EHA seeks to
8 promote awareness of exposures to toxic chemicals and to improve human health by reducing or
9 eliminating hazardous substances.

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 EHA alleges that BVF manufactures, imports, sells, and distributes for sale in California
16 certain graham crackers that contain acrylamide. EHA further alleges that BVF does so without
17 providing a sufficient health hazard warning as required by Proposition 65 and related regulations.
18 Pursuant to Proposition 65, acrylamide is listed as a chemical known to cause cancer and reproductive
19 harm. BVF denies that warnings are required under Proposition 65 for any exposures to acrylamide in
20 the Products, and BVF maintains that it has complied with all applicable federal and state laws,
21 including but not limited to Proposition 65.

22 **1.5 Product Description**

23 For purposes of this Consent Judgment “Product” or “Products” are defined as those graham
24 cracker products listed in Exhibit A that are manufactured, imported, sold, or distributed for sale in
25 California by BVF. BVF may update from time to time the list of graham cracker products to be
26 covered in this Consent Judgment as “Additional Products” by providing written notice to EHA and
27 updating Exhibit A to include such products.

1 **1.6 Notices of Violation**

2 On November 12, 2019 EHA served BVF, Ralphs Grocery Company, the California Attorney
3 General, and all other required public enforcement agencies with a 60-Day Notice of Violation of
4 California Health and Safety Code section 25249.6 *et seq.* (“2019 Notice”). The 2019 Notice alleged
5 that BVF violated Proposition 65 by failing to sufficiently warn consumers of alleged exposures to
6 acrylamide in the Kroger Honey Graham Crackers.

7 On or around April 27, 2020, EHA served BVF, Ralphs Grocery Company, Walmart Stores,
8 Inc. the California Attorney General, and all other required public enforcement agencies with an
9 amended 60-Day Notice of Violation of California Health and Safety Code section 25249.6 *et seq.*
10 (“2020 Amended Notice”). The Amended Notice alleged that BVF violated Proposition 65 by failing
11 to sufficiently warn consumers in California of alleged exposures to acrylamide in Graham Crackers
12 manufactured by Bay Valley, including but not limited to the Kroger Honey Graham Crackers and
13 Great Valley Cinnamon Graham Crackers.

14 The 2019 Notice and 2020 Amended Notice are referred to collectively herein as the “Notices.”

15 **1.7 Complaint**

16 EHA filed a Complaint against Defendant for the alleged violations of Health and Safety Code
17 section 25249.6 asserted in the 2019 Notice (“Complaint”). Upon entry of this Consent Judgment, the
18 Complaint shall be deemed amended *nunc pro tunc* additionally to include allegations asserted in the
19 2020 Amended Notice with respect to the Products.

20 **1.8 No Admission**

21 By stipulating to the entry of this Consent Judgment and agreeing to provide the relief and
22 remedies specified herein, BVF does not admit that is has violated, or threatened to violate, Proposition
23 65 or any other law or legal duty, and BVF does not admit that the chemical acrylamide in food poses
24 any risk to human health.

25 Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,
26 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment
27 be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law.
28 This Section shall not, however, diminish or otherwise affect BVF’s obligations, responsibilities, and

1 duties under this Consent Judgment, subject to subsequent modifications thereof or Court orders
2 regarding any such obligation, responsibility, and/or duty.

3 **1.9 Jurisdiction**

4 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
5 Court has jurisdiction over BVF as to the allegations in the Complaint, that venue is proper in the
6 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
7 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

8 **1.10 Effective Date and Compliance Date**

9 For purposes of this Consent Judgment, the term "Effective Date" means the date on which
10 notice of entry of this Consent Judgment by the Court is served on BFV. For the Products, the
11 Compliance Date is the date that is six (6) months after the Effective Date. For the Additional Products
12 that are added to Exhibit A, the Compliance Date shall be the date that is twelve (12) months after the
13 Effective Date or sixty (60) days after BFV issues an updated Exhibit A, whichever is later.

14 **2. INJUNCTIVE RELIEF**

15 **2.1 Reformulation of the Product**

16 Any Products that are manufactured by BVF on and after the Compliance Date that are
17 thereafter sold in California or distributed for sale in California shall not exceed 280 ppb on average
18 for acrylamide ("Reformulation Level"), as set forth in this Section 2. As used in this Section 2.1,
19 "distributed for sale in California" means to directly ship a Product into California or to sell a Product
20 to a distributor that BVF knows will sell the Product in California.

21 **2.2 Testing**

22 (a) Compliance with the Reformulation Level shall be determined using LC-MC/MS
23 (Liquid Chromatograph-Mass Spectrometry), GC/MS (Gas Chromatography/Mass Spectrometry), or
24 any other testing method agreed upon by the Parties. Any testing for purposes of Section 2.1 shall be
25 performed by any laboratory accredited by the State of California, a federal agency, or a nationally
26 recognized organization.

27 (b) For purposes of determining compliance with the Reformulation Level, the average of
28 at least three samples drawn from three different production lots of each type of Product (or from as

1 many lots or batches as are available if there are fewer than three), but no more than ten samples drawn
2 from ten different product lots of each type of Product, shall be controlling.

3 **2.3 Sell-Through Period**

4 Notwithstanding anything else in this Consent Judgment, the Products that are manufactured
5 on or prior to the Compliance Date shall be subject to release provisions of Section 4, without regard
6 to when such products were, or are in the future, distributed or sold to customers. As a result, the
7 obligations in Section 2.1 and 2.2 do not apply to Products manufactured prior to the Compliance
8 Date.

9 **3. MONETARY SETTLEMENT TERMS**

10 **3.1 Settlement Amount**

11 Defendant shall pay Seventy-Five Thousand dollars (\$75,000) in settlement and total
12 satisfaction of all the claims referred to in the Notices, the Complaint, and this Consent Judgment.
13 This includes civil penalties in the amount of Eight Thousand dollars (\$8,000) pursuant to Health and
14 Safety Code section 25249.7(b) and attorney's fees and costs in the amount of Sixty-Seven Thousand
15 dollars (\$67,000) pursuant to Code of Civil Procedure section 1021.5 and Health and Safety Code
16 section 25249 et seq.

17 **3.2 Civil Penalty**

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

22 All payments owed to EHA, shall be delivered to the following payment address:

23 Noam Glick
24 Glick Law Group
25 225 Broadway, Suite 2100
San Diego, CA 92101

26 All payments owed to OEHHA (EIN: 68-0284486) shall be delivered directly to OEHHA
27 (Memo line "Prop 65 Penalties) at the following addresses:
28

1 For United States Postal Delivery:

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

7 For Non-United States Postal Service Delivery:

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

13 BVF agrees to provide EHA's counsel with a copy of the check payable to OEHHA
14 simultaneous with its penalty payment to EHA.

15 The Parties will exchange completed IRS 1099, W-9, or other forms as required. Relevant
16 information for Glick Law Group and N&T are set out below:

- 17 • "Environmental Health Advocates" whose address and tax identification number shall
18 be provided within five (5) days after this Consent Judgment is fully executed by the
19 Parties;
- 20 • "Glick Law Group" (EIN: 47-1838518) at address provided in Section 3.2;
- 21 • "Nicholas & Tomasevic" (EIN: 46-3474065) at address provided in Section 3.3; and
- 22 • "Office of Environmental Health Hazard Assessment at 1001 I Street, Sacramento, CA
23 95814.

24 **3.3 Attorney's Fees and Costs**

25 The portion of the settlement attributable to attorneys' fees and costs shall be paid to EHA's
26 counsel, who are entitled to attorney's fees and costs incurred by it in this action, including but not
27 limited to investigating potential violations, bringing this matter to Defendant's attention, as well as
28 litigating and negotiating a settlement in the public interest.

Defendant shall provide its payment to EHA's counsel in two checks, divided equally, payable
to Glick Law Group, PC (\$33,500) and Nicholas & Tomasevic, LLP (\$33,500) respectively. The
addresses for these two entities are:

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

Craig Nicholas
Nicholas & Tomasevic, LLP
225 Broadway, 19th Floor
San Diego, CA 92101

3.4 Timing

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

4. CLAIMS COVERED AND RELEASED

4.1 EHA's Public Release of Proposition 65 Claims

This Consent Judgment is a full, final, and binding resolution between, on the one hand, EHA, on behalf of itself and its attorneys, investigators, agents, heirs, and assigns (collectively referred to as "EHA Releasers") and on behalf of the public in the public interest, and, on the other hand, BVF and its parents, subsidiaries, affiliated entities under common ownership, its directors, officers, principals, agents, employees, attorneys, insurers, accountants, predecessors, successors, and assigns ("BVF Entities"), and each entity to whom BVF directly or indirectly distributes, ships, or sells the Products including but not limited to downstream distributors, wholesalers, customers, retailers (including but not limited to Ralphs Grocery Company and Walmart Stores, Inc.), franchisees, cooperative members, and licensees, and their owners, directors, officers, agents, principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors, and assigns (collectively referred to as the "Releasees"), of all claims that have been or could have been asserted under Proposition 65 for any exposures to acrylamide from the Products manufactured, purchased, distributed, or sold by BVF before the Compliance Date. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to any exposures to acrylamide from Products manufactured, purchased, sold, or distributed by BVF on and after the Compliance Date.

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

2 EHA, in its individual capacity, on behalf of itself and the EHA Releasers, also waives all
3 rights to institute or participate in, directly or indirectly, any form of legal action, and discharges and
4 releases all claims, actions, causes of action (in law or in equity), suits, liabilities, demands,
5 obligations, damages, costs, fines, penalties, losses, expenses, and fees (including, but not limited to,
6 investigation fees, expert fees, and attorney’s fees), and expenses (collectively, “Claims”) as to all
7 Releasees under Proposition 65 or any statutory or common law from the alleged failure to provide
8 warnings for any exposures to acrylamide, or for causing any exposures to acrylamide, in the
9 Products and Additional Products that are manufactured, purchased sold, or distributed by BVF,
10 provided that such products comply with Section 2 of this Consent Judgment. The release in this
11 Section 4.2 is effective as a full and final accord and satisfaction, as a bar to all Claims of any nature,
12 character or kind, whether known or unknown, or suspected or unsuspected. EHA acknowledges that
13 it is familiar with Section 1542 of the California Civil Code, which provides as follows:

14 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
15 THAT THE CREDITOR OR RELEASING PARTY DOES NOT
16 KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT
17 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.

18 EHA understands and acknowledges the significance and consequence of this waiver of California
19 Civil Code section 1542.

20 **4.3 BVF’s Release of EHA**

21 BVF, on its own behalf, and on behalf of the BVF Entities, hereby waives any and all claims
22 against EHA and its attorneys and other representatives, for any and all actions taken or statements
23 made by EHA and its attorneys and other representatives, whether in the course of investigating
24 claims, otherwise seeking to enforce Proposition 65 against it, in this matter or with respect to the
25 Products. The release in this Section 4.3 is effective as a full and final accord and satisfaction, as a
26 bar to all Claims of any nature, character or kind, whether known or unknown, or suspected or
27 unsuspected. BVF acknowledges that it is familiar with Section 1542 of the California Civil Code,
28 which provides as follows:

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

8 BVF understands and acknowledges the significance and consequence of this waiver of California
9 Civil Code section 1542.

10 **4.4** Nothing in Section 4 affects or limits the right of any Party to enforce the terms of this
11 Consent Judgment.

12 **5. COURT APPROVAL**

13 **5.1** This Consent Judgment is not effective until it is approved and entered by the Court
14 and shall be null and void if it is not approved and entered by the Court within one year after it has
15 been fully submitted to the Court by the Parties, or by such additional time as the Parties may agree to
16 in writing.

17 **6. SEVERABILITY**

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

21 **7. GOVERNING LAW**

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

27 **8. NOTICE**

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

1 For BVF:

2 Sarah Esmaili
3 Arnold & Porter
4 Three Embarcadero Center, 10th Floor
San Francisco, CA 94111

For EHA:

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

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

7 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

11 **10. POST EXECUTION ACTIVITIES**

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

21 **11. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES; ENFORCEMENT**

22 **11.1** If a dispute arises with respect to either Party's compliance with the terms of this
23 Consent Judgment entered by the Court, the Party alleging a violation of the Consent Judgment shall
24 provide the other Party written notice of the alleged violation. The Parties shall meet and confer in
25 person, by telephone, and/or in writing and endeavor to resolve the dispute in an amicable manner.
26 No action or motion may be filed in the absence of such a good faith attempt to resolve the dispute
27 beforehand.

1 **11.2** If EHA alleges a violation of Section 2, the written notice shall, at a minimum, set
2 forth the following for each Product item issue in the notice: (a) the date the Product was purchased;
3 (b) the location at which the Product was purchased; (c) a description of the Product giving rise to the
4 alleged violation, including the name and address of the retail entity from which the sample was
5 obtained and pictures of the product packaging from all sides, which identifies the product lot; (d) all
6 test data obtained by EHA regarding the Product and supporting documentation sufficient for
7 validation of test results, including any laboratory reports, quality assurance reports, and quality
8 control reports associated with testing of the Product. EHA shall not bring an enforcement action or
9 institute a judicial proceeding as to compliance with Section 2 if BVF demonstrates it has complied
10 with the requirements of Section 2. BVF is entitled to designate such information as confidential.

11 **11.3** In the event that meet and confer efforts are unsuccessful, the Party alleging a
12 violation may initiate a judicial proceeding to enforce this Consent Judgment no earlier than 60 days
13 after issuing the written notice specified in this Section 11. In the event that a Party initiates such a
14 judicial proceeding, the prevailing Party shall be entitled to recover its reasonable attorneys' fees and
15 costs.

16 **12. MODIFICATION**

17 **12.1 Modification.** This Consent Judgment may be modified only by: (i) a written
18 agreement of the Parties and entry of a modified consent judgment thereon by the Court; or (ii) a
19 successful motion or application of any Party, and the entry of a modified consent judgment thereon
20 by the Court.

21 **12.2 Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
22 attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the
23 Consent Judgment.

24 **12.3 Change in Proposition 65.** If Proposition 65 or its implementing regulations (including
25 but not limited to the published "no significant risk level" for acrylamide set forth at Cal. Code Regs.,
26 tit. 27, section 25705, subdivision (c)(2) or any "alternative risk level" adopted by regulation or court
27 decision) are changed from their terms as they exist on the date of entry of this Consent Judgment, or
28 if OEHHA takes some other final regulatory action that determines that warnings for acrylamide are

1 not required or modifies the standard for warnings for acrylamide, then BVF may seek to modify this
2 Consent Judgment.

3 **12.4 Other Court Decisions.** If a final decision of a court determines that warnings for
4 acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide exposures are
5 preempted or otherwise unlawful or unconstitutional, then BVF may move to modify this Consent
6 Judgment to conform to such ruling in order to avoid unfair, inconsistent, or anti-competitive results.

7 **12.5. Federal Agency Action and Preemption.** If a court of competent jurisdiction or an
8 agency of the federal government, including, but not limited to, the U.S. Food and Drug
9 Administration, states through any guidance, regulation or legally binding act that federal law has
10 preemptive effect on any of the requirements of this Consent Judgment, then BVF may seek to modify
11 this Consent Judgment in accordance with the procedure for noticed motions set forth in Section 12.1
12 to bring it into compliance with or avoid conflict with federal law.

13 **12.6 Scientific Studies.** If an agency of the federal government, including, but not limited
14 to the U.S. Food and Drug Administration, states through any guidance, regulation, or other legally
15 binding act, following a review of scientific studies and following public notice and comment, a cancer
16 potency estimate for acrylamide that equates to a no significant risk level higher than 0.2 micrograms
17 per day, then BVF may seek to modify this Consent Judgment.

18 **12.7** Before filing any motion to modify the Consent Judgment, BVF shall provide written
19 notice to EHA to initiate the meet and confer procedure in Section 12.2. If the Parties do not agree on
20 the proposed modification during informal meet and confer efforts, BVF may file a motion to modify
21 the Consent Judgment within sixty (60) days of the date of the written notice that BVF provides to
22 EHA under this Section 12. Any modification of this Consent Judgment shall have no effect on
23 Defendant's financial obligations as provided herein.

24 **13. ENTIRE AGREEMENT**

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

3 **14. RETENTION OF JURISDICTION**

4 This Court shall retain jurisdiction of this matter to implement or modify the Consent
5 Judgment. Notwithstanding the provisions of Section 12, nothing in this Consent Judgment limits or
6 affects the Court's authority to modify this Consent Judgment as provided by law

7 **15. AUTHORIZATION**

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

10 **AGREED TO:**

**AGREED TO BY BAY VALLEY FOODS,
LLC**

11
12 Date: 04/29/2020

Date: 5/5/20

13 By: Noam Glick
14 Noam Glick, on behalf of Environmental
15 Health Advocates, Inc.

By: Thomas E. O'Neil
THOMAS E. O'NEIL [print name]

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

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18 Dated: _____

19 _____
JUDGE OF THE SUPERIOR COURT

EXHIBIT A

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Products:

Kroger Honey Graham Crackers

Great Value Cinnamon Graham Crackers