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9 Key Sciences LLC

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF LOS ANGELES**

12 KEY SCIENCES LLC,
13 Plaintiff,

14 vs.

15 NATURE'S PATH FOODS USA INC., a
16 Wyoming corporation; and
17 DOES 1-10,
18 Defendants.

CASE NO. 20STCV28026

**[PROPOSED] STIPULATED CONSENT
JUDGMENT**

Judge: Michael L. Stern
Dept: 62

Complaint filed: July 24, 2020

19 **1. DEFINITIONS**

20 1.1. The "Complaint" means the operative complaint in the above-captioned matter.

21 1.2. The "Covered Product(s)" means the frozen waffle products sold as Nature's Path
22 Organic Waffles, including without limitation, Organic Waffles - Gluten Free Buckwheat
23 Wildberry (210g) (herein "WAFFLES 1") and Nature's Path Organic Homestyle Waffles -
24 Gluten Free (210 g) (herein "WAFFLES 2") sold or supplied by Nature's Path Foods USA Inc.
25 ("Defendant").

26 1.3. The "Listed Chemical" means Acrylamide.

27 1.4. The "Effective Date" of this Stipulated Consent Judgment ("Consent Judgment")
28 means the date on which this Consent Judgment is approved by the Court.

1 **2. INTRODUCTION**

2 2.1. The Parties to this Consent Judgment are Key Sciences, LLC (“Key Sciences”)
3 and Defendant. Key Sciences and Defendant (collectively, the “Parties” and individually, a
4 “Party”) enter into this Consent Judgment to settle claims asserted by Key Sciences against
5 Defendant as set forth in the Complaint.

6 2.2. Defendant has manufactured (including having arranged for manufacture by third
7 parties), distributed, and/or sold the Covered Products.

8 2.3. On May 8, 2020, Key Sciences served a 60-day notice of violation of Proposition
9 65 on the California Attorney General, the District Attorneys of every county in California, the
10 City Attorneys of every California city with a population greater than 750,000, and to Defendant,
11 alleging that Defendant violated Proposition 65 by exposing persons in California to the Listed
12 Chemical in the WAFFLES 1 without first providing a clear and reasonable Proposition 65
13 warning (the “First Notice”). The First Notice is designated with Attorney General number
14 2020-01170. No designated governmental entity has filed a complaint against Defendant with
15 regard to the WAFFLES 1 or the alleged violations related to Covered Products.

16 2.4. On May 8, 2020, Key Sciences served a 60-day notice of violation of Proposition
17 65 on the California Attorney General, the District Attorneys of every county in California, the
18 City Attorneys of every California city with a population greater than 750,000, and to Defendant,
19 alleging that Defendant violated Proposition 65 by exposing persons in California to the Listed
20 Chemical in the WAFFLES 2 without first providing a clear and reasonable Proposition 65
21 warning (the “Second Notice”). The Second Notice is designated with Attorney General number
22 2020-01171. No designated governmental entity has filed a complaint against Defendant with
23 regard to the WAFFLES 2 or the alleged violations related to Covered Products.

24 2.5. The “Notices” means the First Notice and Second Notice.

25 2.6. For purposes of this Consent Judgment only, the Parties stipulate that this Court
26 has jurisdiction over the allegations of violations contained in the Complaint and personal
27 jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper in the
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1 County of Los Angeles, and that this Court has jurisdiction to enter and enforce this Consent
2 Judgment as a full and final resolution of all claims which were or could have been raised in the
3 Complaint based on the facts alleged therein and in the Notices with respect to Covered Products
4 manufactured, distributed, and/or sold by or on behalf of Defendant. Additionally, for purposes
5 of this Consent Judgment, Defendant is deemed a person in the course of doing business in
6 California and subject to the provisions of the Safe Drinking Water and Toxic Enforcement Act
7 of 1986, California Health & Safety Code §§ 25249.6 et seq. (“Proposition 65”).

8 2.7. Defendant denies the allegations in the Notices and Complaint, and nothing in this
9 Consent Judgment is or shall be construed as an admission by the Parties of any fact, conclusion
10 of law, issue of law, or violation of law, nor shall compliance with the Consent Judgment
11 constitute or be construed as an admission by the Parties of any fact, conclusion of law, issue of
12 law, or violation of law. Nothing in this Consent Judgment shall prejudice, waive or impair any
13 right, remedy, argument, or defense the Parties may have in any other pending or future legal
14 proceedings. This Consent Judgment is the product of negotiation and compromise and is
15 accepted by the Parties solely for purposes of settling, compromising, and resolving issues
16 disputed in this action.

17 **3. INJUNCTIVE RELIEF**

18 3.1. Remedial Duties: Defendant agrees that within 120 days of the Effective Date
19 (“Compliance Date”), and continuing thereafter, it will only manufacture or arrange for
20 manufacture for sale in California (a) Covered Products that are Reformulated Products pursuant
21 to Section 3.2, or (b) Covered Products that are labeled with a clear and reasonable warning
22 pursuant to Section 3.3.

23 3.2. Reformulation Standard: “Reformulated Products” are those Covered Products for
24 which the level of the Listed Chemical does not exceed 280 parts per billion (“Reformulation
25 Standard”) when tested as packaged in accordance with generally accepted methods for the
26 testing of the presence of acrylamide in foods.

1 3.3. Clear and Reasonable Warnings: To the extent Defendant is required to provide
2 warnings in accordance with Section 3.1, warnings shall be affixed to the packaging of or
3 directly on the Covered Products, and be placed with such conspicuousness as compared with
4 other words, statements, designs, or devices as to render it likely to be read and understood by an
5 ordinary individual under customary conditions before purchase or use. Any warning on the
6 packaging or label must set off from other surrounding information and be enclosed in a box.
7 Where a Covered Product’s packaging or label used to provide a warning includes Consumer
8 Information in a language other than English, the warning must also be provided in that language
9 in addition to English. “Consumer Information” includes warnings, directions for use, ingredient
10 lists, and nutritional information. “Consumer Information” does not include the brand name,
11 product name, company name, location of manufacture, or product advertising. The Parties
12 agree that product labeling stating that:

13 “WARNING: Consuming this product can expose you to chemicals including
14 acrylamide, which is known to the State of California to cause cancer [and birth
15 defects or other reproductive harm.]¹ For more information go to
16 www.P65Warnings.ca.gov/food.”

17 shall constitute compliance with Proposition 65 with respect to the Listed Chemical in the
18 Covered Product. At Defendant’s option, it may also use the short form warning, “Cancer [and
19 Reproductive Harm] - www.P65Warnings.ca.gov” if provided in accordance with 27 Cal. Code
20 Regs. § 25603(b) et seq., as amended. Nothing in this section prevents Defendant from
21 providing other factual information regarding the source and presence of acrylamide on Covered
22 Products’ labels, website or other media. Covered Products manufactured on or before the
23 Compliance Date are exempt from this requirement.

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27 _____
28 ¹ The language in brackets must be added if the Covered Product contains
acrylamide in levels that exceed the Maximum Allowable Dose Level.

1 **4. SETTLEMENT PAYMENT**

2 4.1. **Total Settlement Amount.** Within ten (10) days of the Effective Date,
3 Defendant shall make a total payment of \$65,000.00 (“Total Settlement Amount”) in full
4 satisfaction of all potential civil penalties, additional settlement payments, attorney’s fees and
5 costs (including, but not limited to, fees and costs incurred by attorneys, experts, and
6 investigators), by separate checks to be issued as indicated below.

7 4.2. **Allocation.** The Total Settlement Amount shall be apportioned and paid by
8 Defendant as follows:

9 4.2.1. **Civil Penalty.** \$31,848.52 shall be considered a civil penalty pursuant to
10 California Health and Safety Code section 25249.7(b)(1). Defendant shall
11 issue a check for 75% (\$23,886.39) of the civil penalty to the Office of
12 Environmental Health Hazard Assessment (“OEHHA”) for deposit in the
13 Safe Drinking Water and Toxic Enforcement Fund in accordance with
14 California Health and Safety Code section 25249.12(c). Defendant shall
15 issue a check for 25% (\$7,962.13) of the civil penalty to Key Sciences,
16 LLC.

17 4.2.2. **Attorneys’ Fees.** Defendant shall issue a check for \$33,151.48 to “Davitt,
18 Lalley, Dey & McHale, P.C.” (herein “DLDM”) as reimbursement of Key
19 Sciences’ attorney’s fees and costs (including but not limited to expert and
20 investigative costs) incurred in bringing this action.

21 4.3. **Delivery of Payment.**

22 4.3.1. OEHHA’s check shall be delivered to:

23 Office of Environmental Health Hazard Assessment
24 Attn: Mike Gyurics
25 1001 I Street, Mail Stop 12-B
26 Sacramento, CA 95812-4010

27 Concurrently with the payment to OEHHA, Defendant shall provide Key Sciences with
28 written confirmation that the payment to OEHHA was delivered.

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2 4.3.2. All checks for Key Sciences' and DLDM shall be delivered to:

3 Kyle Wallace
4 Davitt, Lalley, Dey & McHale, P.C.
5 1411 Cortez Street #21948
6 Denver, CO 80221

7 **5. ENFORCEMENT**

8 5.1. The Parties agree that any legal action to enforce this Consent Judgment shall be
9 brought in Los Angeles County Superior Court. The Parties agree that Los Angeles County
10 Superior Court has subject matter jurisdiction over the enforcement of this Consent Judgment
11 and personal jurisdiction over Defendant, and that venue is proper in Los Angeles County. The
12 Plaintiff has exclusive right to enforce the terms of the consent judgment and may enforce any of
13 the terms and conditions of this Consent Judgment only after that Party first provides 30 days
14 notice identifying a material noncompliance with the terms and conditions of this Consent
15 Judgment and attempts to resolve such Party's failure to comply in an open and good faith
16 manner. Notwithstanding the immediately preceding sentence Key Sciences may bring a motion
17 or an action to enforce any breach of the settlement payment terms in Section 4 upon five (5)
18 days written notice by Key Sciences to the Defendant.

19 5.2. Prior to bringing any motion, order to show cause, or other proceeding to enforce
20 the terms of this Consent Judgment other than for failure to make payment, Key Sciences shall
21 serve a Notice of Violation ("NOV") to the Defendant via electronic mail to the Parties identified
22 in Section 10. The NOV shall include for the Covered Product(s): the date(s) the alleged
23 violation(s) was observed and the location at which the Covered Products were offered for sale
24 and shall be accompanied by all test data obtained by Key Sciences regarding the Covered
25 Products, and any other evidence or support for the allegations in the NOV.

26 5.3. Defendant shall, within thirty (30) days following service of such NOV, provide
27 Key Sciences with documentation that that meets one of the following conditions:
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1 5.3.1. The Covered Products were shipped by Defendant for sale in California
2 before the Compliance Date or are otherwise exempt, or

3 5.3.2. Since receiving the NOV Defendant has taken corrective action by either
4 (i) requesting that its customers or stores in California, as applicable,
5 remove the specific lot of Covered Products identified in the NOV from
6 sale in California and destroy or return the identified Covered Products to
7 Defendant or vendor, as applicable, or (ii) providing a clear and
8 reasonable warning for the Covered Products identified in the NOV
9 pursuant to Section 3 above.

10 5.3.3. Key Sciences shall take no further action to enforce the alleged
11 violation(s) of this Consent Judgment if the documentation called for in
12 this section satisfies the requirements of Sections 5.3.1 or 5.3.2 above.

13 5.4. After 45 days pass from the date Key Sciences serves an NOV, if a dispute
14 remains as to compliance with the terms and conditions of this Consent Judgment then the
15 Parties shall meet and confer pursuant to Section 13.1 below to resolve the matter for a period of
16 no less than an additional 30 days before Key Sciences may take any further legal action to
17 enforce this Consent Judgment.

18 5.5. In any proceeding brought by either Party to enforce this Consent Judgment, the
19 prevailing party shall be entitled to recover its reasonable attorney's fees and costs.

20 **6. BINDING EFFECT; CLAIMS COVERED AND RELEASED**

21 6.1. This Consent Judgment is a full, final, and binding resolution between Key
22 Sciences, on behalf of itself and in the public interest, and Defendant, of all claims and causes of
23 action that were brought against Defendant based on the allegations described in the Complaint
24 and Notices regarding the Covered Product. Key Sciences, on behalf of itself and its owners,
25 principals, shareholders, officers, directors, employees, agents, parents, subsidiaries, successors,
26 assigns, investigators, and attorneys (collectively, the "Key Sciences Releasers"), and in the
27 public interest, hereby discharges and releases Defendant and its officers, directors, shareholders,
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1 employees, agents, parent companies, subsidiaries, divisions, franchisees, licensees, and all
2 downstream entities in the distribution chain, including but not limited to suppliers, customers,
3 distributors, wholesalers, and retailers, and the predecessors, successors, and assigns of any of
4 them (collectively, “Released Parties”), and waives all rights to institute or participate in
5 (directly or indirectly) any form of action against the Released Parties, for any and all claims,
6 actions, causes of action, suits, demands, liabilities, damages, penalties, fees, costs, and expenses
7 asserted, or that could have been asserted from the handling, use, or consumption of the Covered
8 Products, as to any alleged violation of Proposition 65 or its implementing regulations arising
9 from the failure to provide Proposition 65 warnings for the Listed Chemical in Covered Products
10 manufactured, distributed, or sold prior to the Compliance Date. Compliance with the terms of
11 this Consent Judgment shall be deemed to constitute compliance with Proposition 65 by any
12 Released Party regarding alleged exposures to the Listed Chemical in the Covered Products after
13 the Effective Date.

14 6.2. Key Sciences, on behalf of itself and the Key Sciences Releasors only, and not on
15 behalf of the public interest, hereby discharges and releases the Released Parties, and waives all
16 rights to institute or participate in (directly or indirectly) any form of action against the Released
17 Parties, for any and all claims, actions, causes of action, suits, demands, liabilities, damages,
18 penalties, fees, costs, and expenses asserted, or that could have been asserted for any exposures
19 to the Listed Chemical from the handling, use, or consumption of the Covered Products or for
20 any failure to warn for the Listed Chemical in the Covered Product.

21 6.3. It is possible that other claims not known to the Parties, arising out of the facts
22 alleged in the Notices or Complaint, and relating to the Covered Product, will develop or be
23 discovered. Key Sciences, on behalf of itself and the Key Sciences Releasors only (and not on
24 behalf of the public interest), acknowledges that this Consent Judgment is expressly intended to
25 cover and include all such claims up through and including the Effective Date, including all
26 rights of action therefore. Key Sciences acknowledges that the claims released in Section 6.2,
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1 above, may include unknown claims, and nevertheless waives California Civil Code section
2 1542 as to any such unknown claims. California Civil Code section 1542 reads as follows:

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

11 6.4. Key Sciences acknowledges and understand the significance and consequences of
12 this specific waiver of California Civil Code section 1542.

13 6.5. Defendant and its past and current agents, representatives, attorneys, successors,
14 and/or assignees, hereby waives and releases all rights to institute or participate in, directly or
15 indirectly, and fully releases and discharges Key Sciences and its owners, parents, subsidiaries,
16 affiliates, sister and related companies, employees, shareholders, principals, officers, directors,
17 insurers, attorneys, predecessors, successors, agents, and assigns from any and all claims,
18 including unknown and unsuspected claims as described in paragraph 6.3 above, that arise from
19 the institution, prosecution, assertion, or settlement of the Notices and Complaint or the claims
20 asserted therein.

21 **7. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

22 7.1 In the event that any of the provisions of this Agreement are held by a court to be
23 unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.

24 **8. GOVERNING LAW**

25 8.1. The terms and conditions of this Consent Judgment shall be governed by and
26 construed in accordance with the laws of the State of California.

27 **9. MODIFICATION**

28 9.1. This Consent Judgment after its entry by the Court may be modified by
stipulation of the Parties with the approval of the Court or by an order of this Court on noticed
motion by a Party in accordance with law, or as set forth herein. Any Party seeking to modify

1 this Consent Judgment must notify the other Party in writing, and the Parties shall thereafter
2 attempt in good faith to meet and confer with the other Party prior to filing a motion to modify
3 the Consent Judgment. If the Parties are unable to resolve their dispute informally within sixty
4 (60) days after the date of the written notification, the Party that issued the written notification to
5 seek the modification may bring a motion or proceeding to seek judicial relief as to the requested
6 modification.

7 9.2. In any stipulated modification to the Consent Judgment, the Party requesting the
8 modification shall prepare the draft motion or application to modify the Consent Judgment.

9 9.3. If Proposition 65 is repealed, amended, modified, or is otherwise rendered
10 inapplicable for any reason, including but not limited to changes in the law regarding
11 concentration levels for acrylamide or regulatory changes regarding warnings for acrylamide in
12 food products, then Nature's Path shall provide written notice to Key Sciences of any asserted
13 change, and shall have no further injunctive obligations pursuant to this Consent Judgment with
14 respect to, and to the extent that, the Covered Products are so affected. For example, if OEHHA
15 finalizes its proposed regulation regarding the presence of acrylamide in the Covered Products to
16 a level that is higher than 280 parts per billion, this Consent Judgment shall be deemed modified
17 to align with the value in the final regulation.

18 9.4. If a court of competent jurisdiction or an agency of the federal government,
19 including, but not limited to the U.S. Food and Drug Administration, states through any
20 communication, regulation, or legally binding act, that federal law has preemptive effect on any
21 of the requirements of this Consent Judgment, including, but not limited to precluding
22 Defendant from providing any of the warnings set forth in this Consent Judgment or the
23 manner in which such warnings are given, then Nature's Path shall provide written notice to
24 Key Sciences of any asserted change and this Consent Judgment shall be deemed modified to
25 bring it into compliance with or avoid conflict with federal law, including common law.
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1 **10. PROVISION OF NOTICE**

2 10.1. All notices required to be given to either Party to this Consent Judgment by the
3 other shall be in writing and sent to the following agents listed below via email and first-class
4 mail.

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6 For Key Sciences, LLC:

7 Peter T. Sato
8 Davitt, Lalley, Dey & McHale, PC
9 2710 Gateway Oaks Dr., Suite 150N
10 Sacramento, CA 95833
11 Email: peter.sato@dldmlaw.com

12 For Defendant:

13 Neil Mandleman
14 Nature's Path Foods USA, Inc.
15 9100 Van Horne Way
16 Richmond, BC V6X IW3
17 Canada
18 Email: NMandleman@naturespath.com

19 William F. Tarantino
20 Morrison & Foerster LLP
21 425 Market Street
22 San Francisco, CA 94105-2482
23 Email: Wtarantino@mofocom

24 **11. EXECUTION AND COUNTERPARTS**

25 11.1. This Consent Judgment may be executed in counterparts, which taken together
26 shall be deemed to constitute one document. A facsimile or .pdf signature shall be construed to
27 be as valid as the original signature.

28 **12. DRAFTING**

12.1. The terms of this Consent Judgment have been reviewed by the respective counsel
for each Party prior to its signing, and each Party has had an opportunity to fully discuss the
terms and conditions with legal counsel. The Parties agree that, in any subsequent interpretation
and construction of this Consent Judgment, no inference, assumption, or presumption shall be
drawn, and no provision of this Consent Judgment shall be construed against any Party, based on
the fact that one of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all

1 or any portion of the Consent Judgment. It is conclusively presumed that all of the Parties
2 participated equally in the preparation and drafting of this Consent Judgment.

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

4 13.1. If a dispute arises with respect to either Party's compliance with the terms of this
5 Consent Judgment, the Parties shall meet and confer in person, by telephone, and/or in writing
6 and endeavor to resolve the dispute in an amicable manner. No action or motion may be filed in
7 the absence of such a good faith attempt to resolve the dispute beforehand.

8 **14. ENTIRE AGREEMENT, AUTHORIZATION**

9 14.1. This Consent Judgment contains the sole and entire agreement and understanding
10 of the Parties with respect to the entire subject matter herein, and any and all prior discussions,
11 negotiations, commitments, and understandings related hereto. No representations, oral or
12 otherwise, express or implied, other than those contained herein have been made by any Party.
13 No other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to
14 exist or to bind any Party.

15 14.2. Each signatory to this Consent Judgment certifies that he or she is fully authorized
16 by the Party he or she represents to stipulate to this Consent Judgment.

17 **15. COURT APPROVAL**

18 15.1. Key Sciences shall file a motion seeking approval of this Consent Judgment
19 pursuant to California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment,
20 Key Sciences and Defendant waive their respective rights to a hearing or trial on the allegations
21 of the Complaint.

22 15.2. The Parties shall make all reasonable efforts possible to have the Consent
23 Judgment approved by the Court. For purposes of this Section, "reasonable efforts" shall include,
24 at minimum, cooperating with the drafting and filing of the necessary moving papers, and
25 supporting the motion for judicial approval.

26 15.3. If this Consent Judgment is not approved in full by the Court, (a) this Consent
27 Judgment and any and all prior agreements between the Parties merged herein shall terminate

1 and become null and void, and the actions shall revert to the status that existed prior to the
2 execution date of this Consent Judgment; (b) no term of this Consent Judgment or any draft
3 thereof, or of the negotiation, documentation, or other part or aspect of the Parties' settlement
4 discussions, shall have any effect, nor shall any such matter be admissible in evidence for any
5 purpose in this Action, or in any other proceeding; and (c) the Parties agree to meet and confer to
6 determine whether to modify the terms of the Consent Judgment and to resubmit it for approval.

7 **16. DISMISSAL**

8 16.1. Within ten days of the Effective Date, Key Sciences shall dismiss without
9 prejudice the claims in the Complaint as to the Doe Defendants.

10 **17. SERVICE ON THE ATTORNEY GENERAL**

11 17.1. Key Sciences shall serve a copy of this Consent Judgment, signed by the parties,
12 on the California Attorney General so that the Attorney General may review this Consent
13 Judgment prior to its approval by the Court. No sooner than forty-five (45) days after the
14 Attorney General has received the aforementioned copy of this Consent Judgment, and in the
15 absence of any written objection by the Attorney General to the terms of this Consent Judgment,
16 may the Court approve this Consent Judgment.

17 **18. ATTORNEY FEES**

18 18.1. Except as specifically provided in section 4.2.2 and 5.5, each party shall bear its
19 own costs and attorney fees in connection with this action.

20 **19. RETENTION OF JURISDICTION**

21 19.1. This Court shall retain jurisdiction of this matter to implement, enforce, or modify
22 the Consent Judgment under Code of Civil Procedure § 664.6.

23 **IT IS SO STIPULATED:**
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Dated: July 2, 2021

NATURE'S PATH FOODS USA INC.

Neil Mandleman

Signature

Neil Mandleman
Printed Name

Chief Financial Officer
Title

Dated: July 1, 2021

KEY SCIENCES, LLC



Signature

Lao Tizer
Printed Name

Owner
Title

APPROVED AS TO FORM:

19.1.1.

Dated: July 1, 2021


**DAVITT, LALLEY, DEY & MCHALE,
PC**

By: 

Peter T. Sato
Attorneys for Key Sciences, LLC

Dated: July 2, 2021

MORRISON & FOERSTER LLP

By: 

William F. Tarantino
Attorneys for Nature's Path Foods USA
Inc.

ORDER AND JUDGMENT

1 Based upon the Parties' Stipulation, and good cause appearing, this Consent Judgment is
2 approved and Judgment is hereby entered according to its terms.
3

4 **IT IS SO ORDERED, ADJUDGED, AND DECREED.**

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6 Dated: _____ Judge of the Superior Court
7