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16 Attorneys for Plaintiff
17 Environmental Health Advocates, Inc.

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

19 **IN AND FOR THE COUNTY OF ALAMEDA**

20 ENVIRONMENTAL HEALTH
21 ADVOCATES, INC., a California corporation,

22 Plaintiff,

23 v.

24 THE SIMPLY GOOD FOODS COMPANY, a
25 Colorado corporation, DOES 1 through 100,
26 inclusive,

27 Defendants.
28

Case No.: HG20080490

[PROPOSED] CONSENT JUDGMENT

(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 the one hand, and The Simply Good Foods Company (“Defendant” or “SGF”) on the
5 other hand, with EHA and SGF each individually referred to as a “Party” and collectively referred to
6 as the “Parties.”

7 **1.2 Plaintiff**

8 EHA is an organization residing in California, acting in the interest of the general public. It
9 seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing
10 or eliminating hazardous substances contained in consumer products.

11 **1.3 Defendant**

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

15 **1.4 General Allegations**

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

22 **1.5 Notice of Violation**

23 On August 13, 2020, EHA served The Simply Good Foods Company, Target Corporation,
24 California, Inc., the California Attorney General, and all other required public enforcement agencies
25 with a 60-Day Notice of Violation of California Health and Safety Code section 25249.6 *et seq.*
26 (“Notice”). The Notice alleged that SGF violated Proposition 65 by failing to sufficiently warn
27 consumers in California of the health hazards associated with exposures to Acrylamide contained in its
28

1 “Atkins Protein Wafer Crisps”.

2 No public enforcer has commenced or is otherwise prosecuting an action to enforce the
3 violations alleged in the Notice.

4 **1.6 Product Description**

5 The products covered by this Consent Judgement are “Atkins Protein Wafer Crisps”
6 manufactured or distributed by SGF that are imported, sold, shipped, delivered or distributed for sale
7 to consumers in California by Releasees (as defined in section 4.1) (“Products”), whether sold under
8 the SGF brand, any other brand, or some other private label at all grocery, retail, and other locations
9 and sales channels, including on the Internet. This Consent Judgement covers the Products to the extent
10 that they are incorporated as an ingredient in any food product made or sold by others.

11 **1.7 Complaint**

12 On November 19, 2020, EHA filed a Complaint against SGF for the alleged violations of
13 Health and Safety Code section 25249.6 that are the subject of the Notice (“Complaint”).

14 **1.8 No Admission**

15 SGF denies the material factual and legal allegations of the Notice and Complaint, and
16 maintains that all of the products it has manufactured, imported, sold, or distributed for sale in
17 California, including Products, have been, and are, in compliance with all laws, including Proposition
18 65. SGF specifically denies that the chemical acrylamide in food poses any risk to human health.
19 Nothing in this Consent Judgment shall be construed as an admission of any fact, finding, conclusion
20 of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment be construed
21 as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section
22 shall not, however, diminish or otherwise affect SGF’s obligations, responsibilities, and duties under
23 this Consent Judgment.

24 **1.9 Jurisdiction**

25 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
26 Court has jurisdiction over SGF as to the allegations in the Complaint, that venue is proper in the
27 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
28 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
3 notice of entry of this Consent Judgment is served on Defendant. Due to the fact that the Products are
4 subject to other regulatory requirements and any reformulation must ensure compliance with these
5 other applicable regulatory requirements, the Compliance Date is the date that is six (6) months after
6 the Effective Date.

7 **2. INJUNCTIVE RELIEF**

8 **2.1 Reformulation of the Product**

9 Any Products that are manufactured by or for SGF on and after the Compliance Date that are
10 thereafter sold in California or distributed for sale in California by SGF shall not exceed 280 ppb
11 acrylamide on average, as set forth in this Section 2. As used in this Section 2.1, “distributed for sale
12 in California” means to directly ship a Product into California or to sell a Product to a distributor that
13 SGF knows will sell the Product in California.

14 **2.2 Testing**

15 (a) Compliance with the average level shall be determined using LC-MS/MS (Liquid
16 Chromatograph-Mass Spectrometry), GC/MS/MS (Gas Chromatography/Mass Spectrometry), or any
17 other testing method agreed upon by the Parties. Any testing for purposes of Section 2.1 shall be
18 performed by any laboratory accredited by the State of California, a federal agency, or a nationally
19 recognized accrediting organization.

20 (b) The Average Level is determined by randomly selecting and testing, over no less than
21 a ten-day period, one sample from at least five lots (or from as many lots as are available, if fewer than
22 five) and a maximum of ten lots of Products produced at locations that supply such Products to
23 California (“Sampling Data”). The mean and standard deviation shall be calculated using the Sampling
24 Data. Any data points that are more than three standard deviations outside the mean shall be discarded
25 once, and the mean and standard deviation recalculated using the remaining data points. The arithmetic
26 mean determined in accordance with this procedure shall be deemed the “Average Level.”

27 (c) For at least three consecutive years after the Compliance Date, SGF shall arrange for
28 testing under Section 2.2. The testing shall be at least once per year, with the first testing occurring prior

1 to the Compliance Date. No further testing shall be required unless SGF materially modifies the
2 ingredients or cooking process of a Product, at which point testing shall recommence on an annual
3 basis for at least three years.

4 **2.3 Grace Period for Existing Inventory of Products**

5 Notwithstanding anything else in this Consent Judgment, the Products that are manufactured
6 on or prior to the Compliance Date shall be subject to release of liability pursuant to this Consent
7 Judgment, without regard to when such Products were, or are in the future, distributed or sold to
8 customers. As a result, the obligation of SGF, or any Releasees (if applicable), do not apply to these
9 Products manufactured on or prior to the Compliance Date.

10 **3. MONETARY SETTLEMENT TERMS**

11 **3.1 Settlement Amount**

12 SGF shall pay sixty thousand dollars (\$60,000.00) in settlement and total satisfaction of all the
13 claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes civil penalties
14 in the amount of six thousand dollars (\$6,000.00) pursuant to Health and Safety Code section
15 25249.7(b) and attorney's fees and costs in the amount of fifty-four thousand dollars (\$54,000.00)
16 pursuant to Code of Civil Procedure section 1021.5.

17 **3.2 Civil Penalty**

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

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

23 Samantha Dice
24 Environmental Health Advocates
25 225 Broadway, Suite 1900
26 San Diego, CA 92101

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

For United States Postal Service Delivery:

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

6 For Non-United States Postal Service Delivery:

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

12 SGF agrees to provide EHA's counsel with a copy of the check payable to OEHHA
13 simultaneously with its penalty payments to EHA.

14 Plaintiff and its counsel will provide completed IRS 1099, W-9, or other tax forms as required.
15 Relevant information is set out below:

- 16 • "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.3;
- 17 • "Nicholas & Tomasevic, LLP." (EIN: 46-3474065) at the address provided in Section
18 3.3.and
- 19 • "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA
20 95814.

21 **3.3 Attorney's Fees and Costs**

22 The portion of the settlement attributable to attorney's fees and costs (\$54,000.00) shall be paid
23 to EHA's counsel, who are entitled to attorney's fees and costs incurred by it in this action, including
24 but not limited to investigating potential violations, bringing this matter to SGF's attention, as well as
25 negotiating a settlement in the public interest.

26 SGF shall provide its payment to EHA's counsel in two checks, divided equally, payable to
27 Glick Law Group, PC (\$27,000.00) and to Nicholas & Tomasevic, LLP, (\$27,000.00) respectively.
28 The addresses for these two entities are:

Noam Glick
Glick Law Group
225 Broadway, Suite 1900
San Diego, CA 92101

Craig Nicholas

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

For any claim or violation arising under Proposition 65 alleging a failure to warn about exposures to Acrylamide from Products manufactured, imported, sold, or distributed by SGF prior to the Compliance Date, EHA, acting for the general public, releases SGF of any and all liability, including SGF's owners, parents, subsidiaries, affiliated entities under common ownerships, its directors, officers, agents, employees, and attorneys. EHA, acting for the general public, also releases each entity to which SGF directly or indirectly distributes or sells Products, including but not limited to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members and licensees, (collectively, the "Releasees"). Releasees include Defendant, its parent, and all subsidiaries and affiliates thereof and their respective employees, agents, and assigns that sell the Products. Compliance with the terms of this Consent Judgement constitutes compliance with Proposition 65 with respect to the alleged or actual failure to warn about exposures to acrylamide from Products manufactured, imported, sold, or distributed by SGF after the Compliance Date. This Consent Judgement is a full, final and binding resolution on behalf of the general public of all claims that were or could have been asserted against SGF or Releasees for failure to provide warnings for alleged exposure to acrylamide contained in Products.

4.2 EHA's Individual Release of Claims

EHA, in its individual capacity, also waives all rights to institute or participate in, directly or indirectly, any form of legal action, and discharges and releases all claims against all Releasees, including SGF, under Proposition 65 or any statutory or common law from the alleged failure to provide warnings for any exposures to acrylamide, or for causing any exposures to acrylamide, in the Products manufactured, purchased, distributed, or sold by Defendant. This release in this Section 4.2 is effective as a full and final accord and satisfaction of, as well as a bar to, all actions, causes of action, obligations,

costs, expenses, attorney's fees, damages, losses, claims, liabilities, and demands of every nature, character, and kind, whether known or unknown, suspected or unsuspected. EHA acknowledges that it is familiar with Section 1542 of the California Civil Code, which provides 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.

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

4.3 SGF's Release of EHA

SGF, 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 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 Products.

5. COURT APPROVAL

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

6. SEVERABILITY

Subsequent to the Court's approval and entry of this Consent Judgment, if any provision 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 Consent Judgment shall be governed by the laws of the state of California as applied within the state of California. In the event that Proposition 65 is repealed, or is otherwise rendered inapplicable for reasons, including but not limited to changes in the law, then SGF may provide written notice to EHA of any asserted change, and shall have no further injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.

1 **8. NOTICE**

2 Unless otherwise specified herein, all correspondence and notice required by this Consent
3 Judgment shall be in writing and sent by: (1) personal delivery; (ii) first-class, registered, or certified
4 mail, return receipt requested; or (iii) a recognized overnight courier to the following addresses:

5 If to The SGF Foods Company:

6 Gary M. Roberts
7 Dentons US LLP
8 601 South Figueroa Street, STE 2500
9 Los Angeles, CA 90017

5 If to EHA:

6 Noam Glick
7 Glick Law Group, PC
8 225 Broadway, 19th Floor
9 San Diego, CA 92101

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

11 **9. COUNTERPARTS; DIGITAL SIGNATURES**

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

15 **10. POST EXECUTION ACTIVITIES**

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

25 **11. MODIFICATION**

26 11.1 **Modification.** This Consent Judgment may be modified by: (i) a written agreement of
27 the Parties and entry of a modified consent judgment thereon by the Court; or (ii) a successful motion
28 or application of any Party, and the entry of a modified consent judgment thereon by the Court.

1 11.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgement shall
2 attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the
3 Consent Judgement.

4 11.3 **Change in Proposition 65.** If Proposition 65 or its implementing regulations (including
5 but not limited to the published “no significant risk level” for acrylamide set forth at Cal. Code Regs.,
6 tit 27, section 25705, subdivision (c)(2) or any “alternative risk level” adopted by regulation or court
7 decision) are changed from their terms as they exist on the date of entry of this Consent Judgement, or
8 if OEHHA takes some other final regulatory action that determines that warnings for acrylamide are
9 not required or modifies the standard for warnings for acrylamide, then SGF may seek to modify this
10 Consent Judgement.

11 11.4 **Other Court Decisions.** If a final decision of a court determines that warnings for
12 acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide exposures are
13 preempted or otherwise unlawful or unconstitutional, then SGF may move to modify this Consent
14 Judgement to conform to such ruling in order to avoid unfair, inconsistent, or anti-competitive results.

15 11.5 **Federal Agency Action and Preemption.** If a court of competent jurisdiction or an
16 agency of the federal government, including, but not limited to, the U.S. Food and Drug
17 Administration, states through any guidance, regulation or legally binding act that federal law has
18 preemptive effect on any of the requirements of this Consent Judgement, then this Consent Judgement
19 may be modified in accordance with the procedure for noticed motions set forth in Section 11.1 to bring
20 it into compliance with or avoid conflict with federal law.

21 11.6 **Scientific Studies.** If an agency of the federal government, including, but not limited to
22 the U.S. Food and Drug Administration, states through any guidance, regulation, or other legally
23 binding act, following a review of scientific studies and following public notice and comment, a cancer
24 potency estimate for acrylamide that equates to a no significant risk level higher than 0.2 micrograms
25 per day, then SGF shall be entitled to seek a modification of this Consent Judgement.

26 11.7 Before filing any motion to modify the Consent Judgement, SGF shall provide written
27 notice to EHA to initiate the meet and confer procedure in Section 11.2. If the Parties do not agree on
28 the proposed modification during informal meet and confer efforts, SGF may file a motion to modify

1 the Consent Judgment within sixty (60) days of the date of the written notice that SGF provides to EHA
2 under this Section 11.

3 **12. RETENTION OF JURISDICTION**

4 This Court shall retain jurisdiction of this matter to implement or modify the Consent Judgment.
5 Notwithstanding the provisions of Section 11, nothing in this Consent Judgment limits or affects the
6 Court's authority to modify this Consent Judgment as provided by law.

7 **13. 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 **14. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

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

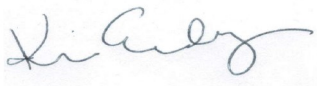
17 In the event that meet and confer efforts are unsuccessful, the Party alleging a violation may
18 initiate a judicial proceeding to enforce this Consent Judgment no earlier than 60 days after issuing the
19 written notice specified in this Section 14. In the event that a Party initiates such a judicial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

21 **15. ENTIRE AGREEMENT**

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

2 Date: 12/15/2020

3 By: 
4 ENVIRONMENTAL HEALTH
5 ADVOCATES, INC.

AGREED TO:

Date: 12/17/20

By: 
THE SIMPLY GOOD FOODS COMPANY

6
7
8 **IT IS SO ORDERED.**

9
10 Date: _____

11 _____
12 JUDGE OF THE SUPERIOR COURT

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