

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties

This Settlement Agreement is entered into by and between Environmental Health Advocates, Inc. (“Plaintiff” or “EHA”), and Mitsuwa Corporation (“Mitsuwa” or “Defendant”). EHA and Mitsuwa are each sometimes individually referred to as a “Party,” and collectively as the “Parties.” EHA alleges that it is a California corporation acting in the interest of the public who seeks to improve human health by reducing or eliminating listed chemicals in consumer products. EHA alleges that Mitsuwa employs ten or more individuals and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code § 25249.6 *et seq.* (“Proposition 65”).

1.2 General Allegations

EHA alleges that Mitsuwa imported, distributed, sold, and/or offered for sale in California certain corn and rice crackers that contain acrylamide without first providing a Proposition 65 warning. Acrylamide is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer and birth defects or other reproductive harm.

1.3 Product Description

The products covered by this Settlement Agreement are defined as savory crackers including but not limited to House Foods Japanese Cone Shaped Crackers and Sanko Seika Zeitaku Kakimochi Senbei (Rice Cracker with Almond Black Beans), that contain acrylamide and that are imported, distributed, sold, or offered for sale in California by Mitsuwa (collectively the “Products”).

1.4 Notices of Violation

On March 13, 2020, EHA served Mitsuwa, House Foods America Corporation, the California Attorney General, and other requisite public enforcers with a 60-Day Notice of Violation, alleging that Mitsuwa violated Proposition 65 when it failed to warn its customers and consumers in California that House Foods Japanese Cone Shaped Crackers may expose consumers to acrylamide. EHA served an amended notice on May 12, 2020 naming House Foods Japan as the manufacturer of the product (collectively the “House Foods Notice”).

On August 13, 2020, EHA served Mitsuwa, Sanko Seika Co., Ltd., the California Attorney General, and other requisite public enforcers with a 60-Day Notice of Violation, alleging that Mitsuwa violated Proposition 65 when it failed to warn its customers and consumers in California that Sanko Seika Zeitaku Kakimochi Senbei (Rice Cracker with Almond Black Beans) may expose consumers to acrylamide (the “Sanko Seika Notice”).

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 House Foods Notice or the Sanko Seika Notice (collectively the “Notices”).

1.5 No Admission

Mitsuwa enters into this Settlement Agreement as a full and final settlement of all claims that were raised or that could have been raised in the Notices, and to avoid prolonged and costly litigation. Mitsuwa denies the material factual and legal allegations contained in the Notices, maintains that it is not a person subject to Proposition 65, and that all products that it has sold and/or distributed in California, including the Products, have been and are in compliance with all laws, and are completely safe for their intended use. Nothing in this Settlement Agreement shall be construed as an admission by Mitsuwa of any fact, finding, issue of law, or violation of law, including but not limited to any fact or conclusion of law suggesting or demonstrating that Mitsuwa has violated Proposition 65. Nothing in this Settlement Agreement shall prejudice, waive or impair any right, remedy, argument or defense Mitsuwa may have in this or any other future legal proceeding. This Settlement Agreement is the product of negotiation and compromise and is accepted by Mitsuwa solely for purposes of settling, compromising, and resolving issues disputed in the Notices. However, this Section 1.5 shall not diminish or otherwise affect the Parties’ obligations, responsibilities and duties under this Settlement Agreement.

1.6 Effective Date

For purposes of this Settlement Agreement, the term “Effective Date” shall mean sixty (60) days following the full execution of this Settlement Agreement by the Parties.

2. INJUNCTIVE RELIEF

2.1 Reformulation of Products

As of the Effective Date, and continuing thereafter, Products that Mitsuwa directly manufactures, imports, distributes, sells, or offers for sale in California shall either be: (a) Reformulated Products pursuant to § 2.2 below; or (b) labeled with a clear and reasonable Proposition 65 warning pursuant to §§ 2.3 and 2.4 below. For purposes of this Settlement Agreement, a “Reformulated Product” is a Product that is in compliance with the standard set forth in § 2.2, below. The warning requirement set forth in §§ 2.3 and 2.4 shall not apply to any Reformulated Product.

2.2 Reformulation Standard

“Reformulated Products” shall mean Products that contain an Average Concentration Level less than or equal to 281 parts per billion (ppb) of Acrylamide when analyzed pursuant to methodologies utilized by federal or state government agencies for the purpose of determining the acrylamide content in food products. The Average Concentration Level will be determined after analyzing three to five randomly selected Products from separate lots (if available) that are sold or offered for sale in California. Mitsuwa shall be entitled to rely on its own testing or testing performed by its suppliers of the Products to determine whether the Products are Reformulated Products. Nothing in this Settlement Agreement obligates Mitsuwa to perform its own testing or obtain supplier testing for the Products if it chooses to provide Proposition 65 warnings as set forth in Section 2.3 and 2.4 below

2.3 Clear and Reasonable Warnings

As of the Effective Date, and continuing thereafter, a clear and reasonable Proposition 65 warning as set forth in this §§ 2.3 and 2.4 must be provided for all Products that Mitsuwa imports, distributes, sells, and/or offers for sale in California that are not Reformulated Products pursuant to Section 2.2.

2.4 Warning Requirements

For Products that are not Reformulated Products pursuant to Section 2.2, Mitsuwa or its suppliers can provide a Proposition 65 warning on the Products’ packaging or product label for Products sold in California as set forth below. Alternatively, Mitsuwa can place a Proposition 65

warning as set forth below on a posted store sign, shelf tag, or shelf sign, in reasonable proximity to each point of display where Products are sold within Mitsuwa's California stores 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.

For purposes of this Settlement Agreement, a Proposition 65 warning affixed to a Product's package or label shall be deemed clear and reasonable if it contains the following statement:

[California Prop 65] **WARNING:** Consuming this product can expose you to chemicals including Acrylamide, which are 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.

For purposes of this Settlement Agreement, a Proposition 65 warning affixed to a posted store sign, shelf tag, or shelf sign, in reasonably close proximity to each point of display where Products covered by the House Foods Notice are sold at a California Mitsuwa store shall contain the following statement:

[California Prop 65] **WARNING:** Consuming House Foods Japanese Cone Crackers UPC Code 4902402873977[, as well as any other crackers, chips, or cookies of any kind offered for sale on these shelves] can expose you to chemicals including acrylamide which are 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.

For purposes of this Settlement Agreement, a Proposition 65 warning affixed to a posted store sign, shelf tag, or shelf sign, in reasonably close proximity to each point of display where Products covered by the Sanko Seika Notice are sold at a California Mitsuwa store shall contain the following statement :

[California Prop 65] **WARNING:** Consuming Sanko Seiko Zeitaku Kakimochi Senbei Rice Crackers With Almond Bean Curd UPC Code 4901626015040[, as well as any other crackers, chips, or cookies of any kind offered for sale on these shelves] can expose you to chemicals including acrylamide which are 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.

Language in brackets above optional.

If Mitsuwa sells Products via an internet website to customers located in California, the warning requirements of this section shall be satisfied if the foregoing product package or label warning or a clearly marked hyperlink to that warning using the word(s) “[California Prop 65] **WARNING**” (language in brackets optional) appears either: (a) on the same web page on which a Product is displayed and/or described; (b) on the same page as the price for the Product; or (c) on one or more web pages displayed to a purchaser prior to purchase during the checkout process. Alternatively, a symbol consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent to or immediately following the display, description, price, or checkout listing of the Product, if the warning statement appears elsewhere on the same web page in a manner that clearly associates it with the product(s) to which the warning applies.

2.5 Sell-Through Period

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

2.6 Compliance with Warning Regulations

The Parties agree that Mitsuwa shall be deemed to be in compliance with this Settlement Agreement by either adhering to §§ 2.3 and 2.4 of this Settlement Agreement or by complying with warning requirements adopted by the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”) after the Effective Date.

2.7 Public Benefit

It is Mitsuwa’s understanding that the commitments it has agreed to herein and actions to be taken by Mitsuwa under this Settlement Agreement 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 Mitsuwa that to the extent any other private party serves a notice and/or initiates an action alleging a violation of Proposition 65 with respect to Mitsuwa’s alleged failure to provide a warning concerning actual or alleged exposures to acrylamide prior to use of the Products it has imported, distributed, sold, or offered for sale in California, or will import, 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 Mitsuwa is in material compliance with this Settlement Agreement.

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 for monetary relief of any kind related to the Notices, alleged in the Notices, or referred to in this Settlement Agreement (except for Plaintiff’s attorney’s fees and expenses set forth in Section 3.2 below), Mitsuwa agrees to pay five hundred dollars (\$500) 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 fully executed by the Parties, Mitsuwa shall issue two separate checks for the initial civil penalty payment to: (a) “OEHHA” in the amount of three hundred seventy-five dollars (\$375); and (b) Environmental Health Advocates, in the amount of one hundred twenty-five dollars (\$125).

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

Samantha Dice
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, Mitsuwa shall reimburse EHA's counsel the total amount of \$18,000 for any and all of EHA's attorney's fees and expenses, including but not limited to all investigative, expert, and testing expenses incurred as a result of investigating and bringing this matter to Mitsuwa's attention, and negotiating this settlement in the public interest. Within ten (10) days of the date this Settlement Agreement is fully executed by the Parties, Mitsuwa agrees to pay eighteen thousand dollars (\$18,000) in the form of two checks: (1) one check for nine thousand dollars (\$9,000) payable to "Glick Law Group"; and (2) one check for nine thousand dollars (\$9,000) payable to "Nicholas & Tomasevic LLP."

3.3 Payment Addresses

All payments required under Section 3.2 shall be delivered as follows:

The Glick Law Group Payment to:

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

The Nicholas & Tomasevic, LLP Payment to:

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

3.4 Tax Documentation

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

4. CLAIMS COVERED AND RELEASED

4.1 EHA's Release of Mitsuwa

This Settlement Agreement is a full, final, and binding resolution between EHA, on its own behalf, and Mitsuwa, of any actual or alleged 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 assignees, against Mitsuwa and each of its respective parents, subsidiaries, affiliated entities under common ownership, directors, officers, members, employees and attorneys of each of them, and each upstream entity from whom the Products were purchased by Mitsuwa (including but not limited to House Foods and Sanko Seika), and each entity to whom Mitsuwa directly or indirectly distributed or sold the Products, including, but not limited to, its downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees ("Releasees"), based on the actual or alleged failure to warn about exposures to acrylamide in the Products imported, sold or distributed for sale in California by Mitsuwa before the Effective Date, as alleged in the Notices.

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 Mitsuwa and the Releasees, including without limitation, all actions and causes of action, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses and expenses, including but not limited to investigation fees, expert fees and attorney fees arising under Proposition 65 with respect to the Products imported, distributed, sold or offered for sale by Mitsuwa before the Effective Date.

4.2 Mitsuwa's Release of EHA

Mitsuwa, on its own behalf and on behalf of its past and current agents, representatives, attorneys, successors and/or 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 or otherwise seeking to enforce Proposition 65 against it in connection with the Products.

4.3 Mutual Release of Known and Unknown Claims

It is possible that other claims not known to the Parties including but not limited to those arising out of the facts alleged in the Notices or relating to other products manufactured, imported, distributed and/or sold by or for Mitsuwa and its affiliates through the Effective Date will develop or be discovered. EHA on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees only, on one hand, and Mitsuwa and its affiliates on the other hand, acknowledge that this Settlement Agreement is expressly intended to cover and include all such claims against the Releasees for products manufactured imported, distributed and/or sold by or for Mitsuwa and its affiliates up through the Effective Date, including all rights of action therefor. The Parties acknowledge that the claims released in §§ 4.1 and 4.2, above, may include unknown claims, and nevertheless waive California Civil Code § 1542 as to any such unknown claims. California Civil Code § 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.

Mitsuwa and EHA expressly waive and relinquish any and all rights and benefits that they may have under, or that may be conferred upon them by the provisions of Civil Code section 1542, as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent they may lawfully waive such rights or benefits pertaining to the released matters.

4.4 Deemed Compliance with Proposition 65

The Parties agree that compliance by Mitsuwa with this Settlement Agreement constitutes compliance with Proposition 65 with respect to actual or alleged exposure to acrylamide from use or consumption of the Products.

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. In the event that Proposition 65 is repealed, amended, or is otherwise rendered inapplicable or limited by reason of law generally, and/or by final court decision, or as to acrylamide and/or the Products, Mitsuwa shall provide written notice to EHA of any asserted change in the law, and shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

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 Mitsuwa:

General Counsel
Mitsuwa Corporation
1815 West 213th Street, Suite 235
Torrance, CA 90501

With Copy to:

James Robert Maxwell, Esq.

Rogers Joseph O'Donnell, PC
311 California Street, 10th Floor
San Francisco, CA 94104

For EHA:

Jake Schulte, Esq.
Nicholas & Tomasevic, LLP
225 Broadway, Suite 1900
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. ENFORCEMENT

Before any Party may take action to enforce the terms of this Settlement Agreement for alleged breach, that Party must give the other Party written notice and a good faith opportunity to respond and cure the alleged violation. The Parties must thereafter meet and confer for a period of no less than 30 days to try to resolve any alleged violation. EHA shall not bring an enforcement action or institute a judicial proceeding or seek any other relief of any kind if Mitsuwa demonstrates that it has complied with the requirements of Section 2. Mitsuwa shall be able to rebut any alleged violation by performing and/or producing testing consistent with Section 2.2 showing that the Average Level of acrylamide in the Products does not exceed 350 ppb, or by producing evidence that warnings were provided. Mitsuwa is entitled to designate any such information provided hereunder as confidential under an appropriate confidentiality agreement. In the event that meet-and-confer efforts are unsuccessful, the Party alleging a violation may initiate a judicial proceeding to enforce this Settlement Agreement no earlier than 30 days after issuing the written notice specified herein. In the event that a Party initiates such a judicial proceeding, the prevailing Party shall be entitled to recover its reasonable attorneys' fees and costs.

9. JOINT PREPARATION

The Parties have jointly participated in the preparation of this Settlement Agreement and this Settlement Agreement is the result of the joint efforts of the Parties. Accordingly, any uncertainty or ambiguity existing in this Settlement Agreement shall not be interpreted against any Party as a result

of the manner of the preparation of this Settlement Agreement. Each Party to this Settlement Agreement agrees that any statute or rule of construction providing that ambiguities are to be resolved against the drafting Party should not be employed in the interpretation of this Settlement Agreement and, in this regard, the Parties hereby waive California Civil Code § 1654.

10. ENTIRE AGREEMENT

This Settlement Agreement contains the sole and entire agreement of the Parties and any and all prior negotiations and understandings related hereto shall be deemed to have been merged within it. No representations or terms of agreement other than those contained herein exist or have been made by any Party with respect to the other Party or the subject matter hereof.

10. 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.

11. 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).

12. MODIFICATION

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

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13. AUTHORIZATION


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

AGREED TO:

AGREED TO:

Date: April 23, 2021.

Date: 4/21/21

By: 
ENVIRONMENTAL HEALTH
ADVOCATES, INC.

By: 
MITSUWA CORPORATION