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17 Attorneys for Plaintiff
18 Environmental Health Advocates, Inc.

19 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
20 **IN AND FOR THE COUNTY OF ALAMEDA**

21 ENVIRONMENTAL HEALTH
22 ADVOCATES, INC., a California organization,
23
24 Plaintiff,
25
26 v.
27
28 MCKEE FOODS CORPORATION, a
Tennessee corporation, and DOES 1 through
100, inclusive,
Defendants.

Case No. RG21085473

[PROPOSED] CONSENT JUDGMENT
(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 664.6)

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1. INTRODUCTION

1.1 Parties

This Consent Judgment is entered into by and between Environmental Health Advocates, Inc., (“Plaintiff” or “EHA”), on the one hand, and McKee Foods Corporation (“Defendant” or “McKee”), on the other hand, with EHA and McKee each individually referred to as a “Party” and collectively referred to as the “Parties.”

1.2 Plaintiff

EHA is a corporation organized in the state of California, acting in the interest of the general public. It seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products.

1.3 Defendant

McKee 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, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

1.4 General Allegations

EHA alleges that McKee manufactures, imports, sells, and distributes for sale wafers that contain acrylamide. EHA further alleges that McKee does so without providing a sufficient health hazard warning as required by Proposition 65 and related Regulations. Pursuant to Proposition 65, acrylamide is listed as a chemical known to cause cancer, birth defects and other reproductive harm.

1.5 Notice of Violation

On September 1, 2020, EHA served McKee, Grocery Outlet Inc., the California Attorney General, and all other required public enforcement agencies with a 60-Day Notice of Violation of Proposition 65 (“Notice”). The Notice alleged that McKee violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated with exposures to acrylamide contained in its Nutty Buddy Wafers with Peanut Butter (“Products”).

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

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1.6 “Covered Products” Description

The products covered by this Consent Judgment are Nutty Buddy Wafers with Peanut Butter manufactured or processed by McKee that allegedly contain acrylamide and are imported, sold, shipped, delivered or distributed for sale to consumers in California by Releasees (as defined in section 4.1) (“Covered Products”), whether sold under the brand name Little Debbie, Fieldstone, or McKee or any other brand or private label at all grocery, retail, and other locations and sales channels, including but not limited to Grocery Outlet and the Internet, regardless of size, shape, or name given to them.

1.7 Complaint

On January 11, 2021, EHA filed a Complaint against McKee for the alleged violations of Proposition 65 that are the subject of the Notice (“Complaint”).

1.8 No Admission

McKee denies the material factual and legal allegations of the Notice and Complaint and maintains that all the products it has manufactured, imported, sold, and/or distributed for sale in California, including the Covered Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or otherwise affect McKee’s obligations, responsibilities, and duties under this Consent Judgment.

1.9 Jurisdiction

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

1.10 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” means the date on which the Court grants the motion for approval of this Consent Judgment, as discussed in Section 5.

1 **2. INJUNCTIVE RELIEF: REFORMULATION OF PRODUCTS OR WARNINGS**

2 **2.1 Reformulation of Products**

3 Any Covered Products that McKee manufactures, sells, imports, or distributes in California on
4 and after the Effective Date shall not exceed 140 parts per billion (“ppb”) for acrylamide “Average
5 Level”, with such Average Level determined as set forth in Section 2.2 herein, unless such Covered
6 Products comply with the warning requirements of Section 2.3. As used in this Section 2.1, “distributed
7 for sale in California” means to directly ship Covered Products into California or to sell Covered
8 Products to a distributor McKee knows to sell or distribute in California or to which McKee will sell
9 Covered Products in California.

10 **2.2 Testing**

11 (a) The Average Level is determined by randomly selecting and testing at least one sample
12 from at least five different lots of a particular Covered Product. The mean and standard deviation shall
13 be calculated using the sampling data. Any data points that are more than three standard deviations
14 outside the mean shall be discarded, and the mean and standard deviation recalculated once using the
15 remaining data points. The mean determined in accordance with this procedure shall be deemed the
16 “Average Level.” Any testing for purposes of this Consent Judgment shall be performed by Eurofins,
17 Silliker, KPrime, or any laboratory accredited by the State of California, a federal agency, or nationally
18 recognized accreditation organization, using LC-MS/MS (Liquid Chromatograph-Mass Spectrometry),
19 CG/MS (Gas Chromatography/Mass Spectrometry), or any other testing method agreed upon by the
20 Parties.

21 (b) For three consecutive years after the Effective Date, McKee shall arrange for testing as
22 provided under Section 2.2(a), above. The testing shall be at least once per year, with the first testing
23 occurring prior to the first anniversary of the Effective Date. No further testing shall be required unless
24 McKee materially modifies the ingredients or cooking process of the Covered Products, at which point
25 testing shall recommence on an annual basis for three years.

26 **2.3 Clear and Reasonable Warnings**

27 For Covered Products that contain acrylamide in a concentration exceeding the ppb level set
28 forth in Section 2.1 above with respect to the Average Level as determined under Section 2.2, and

1 which are manufactured and packaged for distribution for authorized sale or use in California on or
2 after the Effective Date, McKee shall provide one of the following Proposition 65 warnings:

3 **Option 1:**

4 **WARNING:** This product can expose you to chemicals
5 including Acrylamide, which is known to the State of
6 California to cause cancer, birth defects or other
7 reproductive harm. For more information go to
8 www.P65Warnings.ca.gov.

9 **Option 2:**

10 **WARNING:** Cancer and Reproductive Harm –
11 www.P65Warnings.cs.gov

12 The word “**WARNING**” shall be displayed in all capital letters and bold print. This warning
13 statement shall be prominently displayed on the packaging of the Covered Products, or on a placard,
14 shelf tag, or sign provided that the statement is displayed with such conspicuousness, as compared with
15 other words, statements, or designs as to render it likely to be read and understood by an ordinary
16 individual prior to sale. If the warning statement is displayed on the Covered Products’ label, it must
17 be set off from other surrounding information. The same warning shall be posted on any websites
18 under the exclusive control by McKee where Covered Products are sold into California.

19 **2.3 Sell-Through Period**

20 Notwithstanding anything else in this Consent Judgment, Covered Products that are
21 manufactured on or prior to the Effective Date shall be subject to release of liability pursuant to this
22 Consent Judgment, without regard to when such Covered Products were, or are in the future, distributed
23 or sold to customers. As a result, the obligation of McKee or any Releasees (if applicable) do not apply
24 to Covered Products manufactured on or prior to the Effective Date.

25 **3. MONETARY SETTLEMENT TERMS**

26 **3.1 Settlement Amount**

27 McKee shall pay one hundred fifty thousand dollars (\$150,000.00) in settlement and total
28 satisfaction of all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This
includes civil penalties in the amount of fifteen thousand dollars (\$15,000.00) pursuant to Health and

1 Safety Code section 25249.7(b) and attorneys' fees and costs in the amount of one hundred thirty-five
2 thousand dollars (\$135,000.00) pursuant to Code of Civil Procedure section 1021.5.

3 **3.2 Civil Penalty**

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

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

9 Environmental Health Advocates
10 225 Broadway, Suite 1900
San Diego, CA 92101

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

13 For United States Postal Service Delivery:

14 Mike Gyurics
15 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
16 P.O. Box 4010
Sacramento, CA 95812-4010

17 For Non-United States Postal Service Delivery:

18 Mike Gyurics
19 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
20 1001 I Street
Sacramento, CA 95814

21 McKee agrees to provide EHA's counsel with a copy of the check payable to OEHHA,
22 simultaneous with its penalty payments to EHA.

23 Plaintiff and its counsel will provide completed IRS 1099, W-9, or other tax forms as required.

24 Relevant information is set out below:

- 25
- 26 • "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.3;
 - 27 • "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section 3.3; and

28

- 1 • “Office of Environmental Health Hazard Assessment” 1001 I Street, Sacramento, CA
2 95814.

3 **3.3 Attorneys’ Fees and Costs**

4 The portion of the settlement attributable to attorney’s fees and costs shall be paid to EHA’s
5 counsel, who are entitled to attorneys’ fees and costs incurred by it in this action, including but not
6 limited to investigating potential violations, bringing this matter to McKee’s attention, as well as
7 litigating and negotiating a settlement in the public interest.

8 McKee shall provide their payment to EHA’s counsel in two checks, divided equally, payable
9 to Glick Law Group, PC (\$67,500.00) and Nicholas & Tomasevic, LLP (\$67,500.00) respectively. The
10 addresses for these two entities are:

11
12 Noam Glick
13 Glick Law Group
14 225 Broadway, 19th Floor
15 San Diego, CA 92101

16
17 Craig Nicholas
18 Nicholas & Tomasevic, LLP
19 225 Broadway, 19th Floor
20 San Diego, CA 92101

21 **3.4 Timing**

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

23 **4. CLAIMS COVERED AND RELEASED**

24 **4.1 EHA’s Public Release of Proposition 65 Claims**

25 For any claim or violation arising under Proposition 65 alleging a failure to warn about
26 exposures to acrylamide from Covered Products manufactured, imported, sold, or distributed by
27 McKee prior to the Effective Date, EHA, acting for the general public, releases McKee from any and
28 all liability. This includes McKee’s owners, parents, subsidiaries, affiliated entities under common
ownerships, its directors, officers, agents, employees, attorneys, and each entity to whom McKee
directly or indirectly distributes or sells Covered Products, including but not limited to downstream
distributors, wholesalers, customers, retailers, franchisees, cooperative members and licensees,

1 (collectively, the “Releasees”). Releasees include all such persons and entities and their parents, and
2 all subsidiaries and affiliates thereof and their respective employees, agents, and assigns that sell
3 Covered Products. Compliance with the terms of this Consent Judgment constitutes compliance with
4 Proposition 65 with respect to the alleged or actual failure to warn about exposures to acrylamide from
5 Covered Products manufactured, imported, sold, or distributed by McKee on or after the Effective
6 Date. This Consent Judgment is a full, final and binding resolution of all claims that were or could have
7 been asserted against McKee and/or Releasees for failure to provide warnings for alleged exposure to
8 acrylamide contained in Covered Products.
9

10 **4.2 EHA’s Individual Release of Claims**

11 EHA, in its individual capacity, also hereby provides a release to McKee and all Releasees,
12 which shall be a full and final accord and satisfaction of, as well as a bar to, all actions, causes of action,
13 obligations, costs, expenses, attorney’s fees, damages, losses, claims, liabilities, and demands of every
14 nature, character, and kind, whether known or unknown, suspected or unsuspected, arising out of
15 alleged or actual exposures to acrylamide in Covered Products manufactured, imported, sold, or
16 distributed by McKee before the Effective Date.
17

18 **4.3 McKee’s Release of EHA**

19 McKee on its own behalf, and on behalf of Releasees as well as its past and current agents,
20 representatives, attorneys, successors, and assignees, hereby waives any and all claims against EHA
21 and its attorneys and other representatives, for any and all actions taken or statements made by EHA
22 and its attorneys and other representatives, whether in the course of investigating claims, otherwise
23 seeking to enforce Proposition 65 against them, in this matter or with respect to Covered Products.
24

25 **5. COURT APPROVAL**

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

1 **6. SEVERABILITY**

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

4 **7. GOVERNING LAW**

5 The terms of this Consent Judgment shall be governed by the laws of the state of California as
6 applied within the state of California. If Proposition 65 is repealed, amended, modified, or is otherwise
7 rendered inapplicable for any reason, including but not limited to changes in the law regarding
8 concentration levels for acrylamide, then McKee may provide written notice to EHA of any asserted
9 change, and shall have no further injunctive obligations pursuant to this Consent Judgment with respect
10 to, and to the extent that, the Covered Products are so affected.

11 **8. NOTICE**

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

15 If to McKee:

16 Martin Hahn
17 Hogan Lovells US LLP
18 Columbia Square
19 555 Thirteenth St, NW
20 Washington DC, 20004

15 If to EHA:

16 Jake Schulte
17 Nicholas & Tomasevic LLP
18 225 Broadway, 19th Floor
19 San Diego, CA 92101

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

22 **9. COUNTERPARTS; DIGITAL SIGNATURES**

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

26 **10. POST EXECUTION ACTIVITIES**

27 EHA agrees to comply with the reporting form requirements referenced in Health and Safety
28 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code

1 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which
2 motion EHA shall draft and file. In furtherance of obtaining such approval, the Parties agree to mutually
3 employ their best efforts, including those of their counsel, to support the entry of this agreement as
4 judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of this
5 Section, "best efforts" shall include, at a minimum, supporting the motion for approval, responding to
6 any objection that any third-party may make, and appearing at the hearing before the Court if so
7 requested.

8 **11. MODIFICATION**

9 This Consent Judgment may be modified by: (i) a written agreement of the Parties and entry of
10 a modified consent judgment thereon by the Court; or (ii) a successful motion or application of any
11 Party, and the entry of a modified consent judgment thereon by the Court.

12 **12. AUTHORIZATION**

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

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

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

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14. ENTIRE AGREEMENT

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

AGREED TO:

AGREED TO:

Date: 02/01/2021

Date: 2/16/21

By: 
ENVIRONMENTAL HEALTH
ADVOCATES, INC.

By: 
MCKEE FOODS CORPORATION

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT