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10 Environmental Health Advocates, Inc.

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

13 ENVIRONMENTAL HEALTH
14 ADVOCATES, INC.,

15 Plaintiff,

16 v.

17 UTZ QUALITY FOODS, LLC, a
Pennsylvania corporation, COSTCO
18 WHOLESALE CORPORATION, a
Washington corporation, and DOES 1 through
19 100, inclusive.

20 Defendants.
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Case No. HG21086246

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 664.6)

1 **1. DEFINITIONS**

2 **1.1** “Compliance Date:” Because the Covered Products are subject to regulatory
3 requirements and any reformulation must ensure compliance with these other applicable regulatory
4 requirements, the Compliance Date means the date that is six (6) months after the Effective Date.

5 **1.2** “Covered Products:” means all Pub Mix, Snack Mix, Poker Mix and Party Mix
6 products manufactured, distributed, sold, and/or offered for sale in California by Settling Defendant
7 or its subsidiaries and affiliates (together, “Subsidiaries”), whether branded or private label, at all
8 grocery, retail, and other locations and sales channels, including on the Internet, including but not
9 limited to “Utz Pub Crunchy Snack Mix, 44 oz (UPC 041780052728)”. For purposes of this Consent
10 Judgment, the terms “Pub Mixes,” “Snack Mixes,” “Poker Mixes,” “Party Mixes” and “Covered
11 Products” are meant to include snack foods comprised of multiple snack items, irrespective of
12 whether the term “Pub Mix,” “Snack Mix,” “Poker Mix,” or “Party Mix” appears in the product’s
13 name or labeling. This Consent Judgment covers the Covered Products to the extent that they are
14 incorporated as an ingredient in any food product made or sold by others.

15 **1.3** “Effective Date:” means the date on which the Court grants the motion for approval
16 of this Consent Judgment, as discussed in Section 11, below.

17 **2. INTRODUCTION**

18 **2.1** The Parties to this Consent Judgment are Environmental Health Advocates, Inc.,
19 (“EHA”) on the one hand, and Utz Quality Foods, LLC (“Settling Defendant”) on the other hand.
20 EHA and Settling Defendant (collectively, the “Parties”) enter into this Consent Judgment to settle
21 certain claims asserted by EHA against Settling Defendant and Defendants as set forth in the
22 Complaint. Except as otherwise provided herein, this Consent Judgment is intended to apply to all
23 Covered Products manufactured, sold, distributed, and/or offered for sale by Defendant Releasees (as
24 the term is defined in Section 5.1) in California.

25 **2.2** In or about November 2020, EHA Defendant and the California Attorney General, and
26 all other required public enforcement agencies with a 60-Day Notice of Violation of California Health
27 and Safety Code section 25249.6 *et seq* (the “Notice”). The Notice alleged, *inter alia*, that Defendants
28 violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards

1 associated with exposures to Acrylamide contained in Utz Pub Crunchy Snack Mix, 44 oz (UPC
2 041780052728). No public enforcer has commenced or is otherwise prosecuting an action to enforce
3 the violations alleged in the Notice.

4 **2.3** Settling Defendant is a corporation or other business entity that manufactures,
5 distributes, sells, or offers for sale Covered Products that are sold in the State of California or has
6 done so at times relevant to the Complaint.

7 **2.4** On January 20, 2021, EHA filed the Complaint in the above-captioned matter for the
8 alleged violations of Health and Safety Code section 25249.6 that are the subject of the Notice
9 (“Complaint”).

10 **2.5** For purposes of this Consent Judgment only, the Parties stipulate that this Court has
11 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
12 over Settling Defendant as to the acts alleged in the Complaint, that venue is proper in the County of
13 Alameda, and that this Court has jurisdiction to enter and enforce this Consent Judgment as a full and
14 final resolution of all claims which were or could have been raised in the Complaint based on the
15 facts alleged therein and in the Notice with respect to Covered Products manufactured, distributed,
16 shipped, sold and/or offered for sale by Defendant Releasees pursuant to Proposition 65 and Code of
17 Civil Procedure section 664.6.

18 **2.6** Nothing in this Consent Judgment is or shall be construed as an admission by the Parties
19 of any fact, conclusion of law, issue of law, or violation of law, nor shall compliance with the Consent
20 Judgment constitute or be construed as an admission by the Parties of any fact, conclusion of law, issue
21 of law, or violation of law. Except as otherwise provided for herein, nothing in this Consent Judgment
22 shall prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
23 other pending or future legal proceedings. This Consent Judgment is the product of negotiation and
24 compromise and is accepted by the Parties solely for purposes of settling, compromising, and resolving
25 issues disputed in this action in an efficient and economic manner.

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1 **3. INJUNCTIVE RELIEF**

2 **3.1 Reformulation of Covered Products**

3 **3.1.1 Average Level**

4 Any Covered Products that are manufactured on and after the Compliance Date that are
5 thereafter sold or distributed for sale in California shall not exceed 225 ppb acrylamide by weight (the
6 “Average Level”). As used in this Section 3, “distributed for sale in California” means to directly ship
7 a Covered Product into California or to sell a Covered Product to a distributor that Settling Defendant
8 or its Subsidiaries knows will sell the Covered Product in California.

9 **3.1.1.1 Average Level Determination**

10 The Average Level is determined by randomly selecting and testing at least five (5)
11 samples each from at least five (5) different lots of a Covered Product (or the maximum number of
12 lots available for testing if less than five (5)) during a testing period of at least three hundred sixty-
13 five (365) days. The mean and standard deviation shall be calculated using the sampling data. Any
14 data points that are more than three standard deviations outside the mean shall be discarded, and the
15 mean and standard deviation recalculated using the remaining data points. The mean determined in
16 accordance with this procedure shall be deemed the “Average Level.” Any samples of a Covered
17 Product tested under Sections 3.1.1 and 3.1.1.1 shall be homogenized before testing for acrylamide
18 content.

19 **3.1.2** For avoidance of doubt, Covered Products either purchased, manufactured,
20 distributed, shipped, sold and/or offered for sale by Settling Defendant or its Subsidiaries prior to the
21 Compliance Date are not subject to the Reformulation Levels, even if such products are sold or offered
22 for sale in California after the applicable Compliance Date.

23 **3.1.3 Testing**

24 Compliance with the Average Level shall be determined in accordance with the methodology set
25 forth in Sections 3.1.1.1 and using LC-MS/MS (Liquid Chromatograph-Mass Spectrometry),
26 GC/MS/MS (Gas Chromatography/Mass Spectrometry), or any other testing method agreed upon
27 by the Parties. Testing for purposes of Section 3.1 shall be performed by any laboratory accredited by
28 the State of California, a federal agency, or a nationally recognized accrediting organization.

1 **3.2 Clear and Reasonable Warnings.** A Covered Product purchased, manufactured,
2 distributed, shipped, sold or offered for sale by Defendant Releasees may, as an alternative to meeting
3 the Reformulation Levels, be sold or offered for sale in California with a Clear and Reasonable Warning
4 that complies with the provisions of this Section 3.2. A Clear and Reasonable Warning may only be
5 provided for Covered Products that Settling Defendant or its Subsidiaries reasonably believe do not
6 meet the Reformulation Levels. A Clear and Reasonable Warning under this Consent Judgment shall
7 state:

8 **WARNING:** Consuming this product can expose you to chemicals including acrylamide,
9 which are known to the State of California to cause cancer. Acrylamide is a chemical that can
10 form in some foods during high-temperature cooking processes, such as frying, roasting, and
11 baking. For more information go to www.P65Warnings.ca.gov/food.

12 The word “**WARNING**” shall be displayed in all capital letters and bold print. This warning statement
13 shall be prominently displayed on the Covered Product, on the packaging of the Covered Product, or
14 on a placard or sign provided that the statement is displayed with such conspicuousness, as compared
15 with 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 Product’s label, it must
17 be set off from other surrounding information and enclosed in a text box. If the warning statement is
18 displayed on a placard or sign where the Covered Product is offered for sale, the warning placard or
19 sign must enable an ordinary individual to easily determine which specific Covered Products the
20 warning applies to, and to differentiate between that Covered Product and other products to which the
21 warning statement does not apply. For internet, catalog or any other sale where the consumer is not
22 physically present, the warning statement shall be displayed in such a manner that it is likely to be read
23 and understood by an ordinary individual prior to the authorization of or actual payment. Nothing in
24 this Consent Judgment requires that warnings be provided for Covered Products that are not sold or
25 offered for sale in California. To comply with Section 3.2, Settling Defendant and its Subsidiaries may
26 rely on the procedure for notifying retailers set out in Title 27, California Code of Regulations, section
27 25600.2, in effect as of the applicable Compliance Date.

1 The warning requirements set forth herein are imposed pursuant to the terms of this Consent
2 Judgment, and are recognized by the Parties as not being the exclusive manner of providing a warning
3 for the Covered Products. Warnings may be provided as specified in Proposition 65 regulations for
4 food in effect as of the applicable Compliance Date (Title 27, California Code of Regulations, section
5 25601, *et seq.*) or as such regulations may be amended in the future.

6 **3.3 Grace Period for Existing Inventory of Products**

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

12 **4. MONETARY SETTLEMENT TERMS**

13 **4.1 Settlement Amount**

14 Settling Defendant shall pay Fifty-Five Thousand Dollars (\$55,000) in settlement and total
15 satisfaction of all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This
16 includes civil penalties in the amount of Five Thousand Dollars (\$5,000) pursuant to Health and Safety
17 Code section 25249.7(b) and attorney's fees and costs in the amount of Fifty Thousand Dollars
18 (\$50,000) pursuant to Code of Civil Procedure section 1021.5.

19 **4.2 Civil Penalty**

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

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

25 Samantha Dice
26 Environmental Health Advocates
27 225 Broadway, Suite 2100
28 San Diego, CA 92101

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

3 For United States Postal Service Delivery:

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

9 For Non-United States Postal Service Delivery:

10 Mike Gyurics
11 Fiscal Operations Branch Chief
12 Office of Environmental Health Hazard Assessment
13 1001 I Street
14 Sacramento, CA 95814

15 Settling Defendant agrees to provide EHA's counsel with a copy of the check payable to
16 OEHHA, simultaneous with its penalty payments to EHA.

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

18 Relevant information is set out below:

- 19 • "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 4.3;
- 20 • "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section 4.3; and
- 21 • "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA
22 95814.

23 *[Rest of page intentionally left blank]*

1 distributors, wholesales, customers, retailers (including but not limited to Costco Wholesale
2 Corporation), franchisees, cooperative members, licensors, licensees and all those who serve the
3 Covered Products to the public, (collectively, the “Defendant Releasees”). In addition to the foregoing,
4 Defendant Releasees include Settling Defendant, its parent, and all Subsidiaries and affiliates thereof
5 and their respective owners, members, parents, partners, joint ventures, licensors, licensees, employees,
6 agents, and assigns. Compliance with the terms of this Consent Judgment constitutes compliances with
7 Proposition 65 with respect to the alleged or actual failure to warn about exposures to acrylamide from
8 Covered Products manufactured, distributed, imported, offered for sale, sold, or distributed by
9 Defendant Releasees after the Effective Date. This Consent Judgment is a full, final and binding
10 resolution of all claims that were or could have been asserted against Settling Defendant, its
11 Subsidiaries and Defendant Releasees for failure to provide warnings for alleged exposure to
12 acrylamide contained in Covered Products.

13 **5.2 EHA’s Individual Release of Claims**

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

21 **5.3 Settling Defendant’s Release of EHA**

22 Settling Defendant, on its own behalf, and on behalf of Defendant Releasees as well as its past
23 and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all
24 claims against EHA and its attorneys and other representatives, for any and all actions taken or
25 statements made by EHA and its attorneys and other representatives, whether in the course of
26 investigating claims, otherwise seeking to enforce Proposition 65 against it, in this matter or with
27 respect to the Covered Products manufactured, imported, sold, or distributed by Settling Defendant
28 and its Subsidiaries before the Compliance Date.

1 **6. COURT APPROVAL**

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

5 **7. SEVERABILITY**

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

8 **8. GOVERNING LAW**

9 The terms of this Consent Judgment shall be governed by the laws of the state of California as
10 applied within the state of California. In the event that Proposition 65 is repealed, or is otherwise
11 rendered inapplicable for reasons, including but not limited to changes in the law, then Settling
12 Defendant may provide written notice to EHA of any asserted change, and shall have no further
13 injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
14 Covered Products are so affected.

15 **9. NOTICE**

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

19 If to Settling Defendant

20 Richard Fama
21 Cozen O'Connor
22 3 WTC
175 Greenwich Street, 55th Floor
New York, NY 10007

19 If to EHA:

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

23 and

24 David Shimkin
25 Cozen O'Connor
601 S. Figueroa Street, Suite 3700
26 Los Angeles, CA 90017

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

1 **10. COUNTERPARTS; DIGITAL SIGNATURES**

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

5 **11. POST EXECUTION ACTIVITIES**

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

15 **12. MODIFICATION**

16 **12.1 Modification.** This Consent Judgment may be modified by: (i) a written agreement of
17 the Parties and entry of a modified consent judgment thereon by the Court; or (ii) a successful motion
18 or application of any Party, and the entry of a modified consent judgment thereon by the Court.

19 **12.2 Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
20 attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the
21 Consent Judgment.

22 **12.3 Change in Proposition 65.** If Proposition 65 or its implementing regulations (including
23 but not limited to the published “no significant risk level” for acrylamide set forth at Cal. Code Regs.,
24 tit 27, section 25705, subdivision (c)(2) or any “alternative risk level” adopted by regulation or court
25 decision) are changed from their terms as they exist on the date of entry of this Consent Judgment, or
26 if OEHHA takes some other final regulatory action that determines that warnings for acrylamide are
27 not required or modifies the standard for warnings for acrylamide, then Settling Defendant may seek
28 to modify this Consent Judgment.

1 **12.4 Other Court Decisions.** If a final decision of a court determines that warnings for
2 acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide exposures are
3 preempted or otherwise unlawful or unconstitutional, then Settling Defendant or its Subsidiaries may
4 move to modify this Consent Judgment to conform to such ruling in order to avoid unfair, inconsistent,
5 or anti-competitive results.

6 **12.5 Federal Agency Action and Preemption.** If a court of competent jurisdiction or an
7 agency of the federal government, including, but not limited to, the U.S. Food and Drug
8 Administration, states through any guidance, regulation or legally binding act that federal law has
9 preemptive effect on any of the requirements of this Consent Judgment, then Settling Defendant or its
10 Subsidiaries may provide written notice to EHA of any such asserted preemptive effect, and shall have
11 no further injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent
12 that, the Covered Products are so affected.

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

19 **12.7** Before filing any motion to modify the Consent Judgment, Settling Defendant shall
20 provide written notice to EHA to initiate the meet and confer procedure in Section 12.2. If the Parties
21 do not agree on the proposed modification during informal meet and confer efforts, Settling Defendant
22 may file a motion to modify the Consent Judgment within sixty (60) days of the date of the written
23 notice that Settling Defendant provides to EHA under this Section 12.

24 **12.8** Any modification to this Consent Judgment pursuant to this Section 12 shall have no
25 effect on Settling Defendant's financial obligations under this Agreement.

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1 **13. RETENTION OF JURISDICTION**

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

5 **14. AUTHORIZATION**

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

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

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

13 **16. DISMISSAL OF CLAIMS**

14 Within ten (10) calendar days of receiving the payments required by Section 4, EHA shall file
15 a dismissal with prejudice of all claims in this action against Costco Wholesale Corporation, which
16 shall waive all costs in this action.

17 **17. ENTIRE AGREEMENT**

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

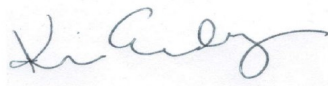
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AGREED TO:

AGREED TO:

Date: March 24, 2021.

Date: 3/25/21

By: 
ENVIRONMENTAL HEALTH
ADVOCATES, INC.

By: 
UTZ QUALITY FOODS, LLC

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

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