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10 ENVIRONMENTAL HEALTH ADVOCATES, INC.

11  
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

14 ENVIRONMENTAL HEALTH ADVOCATES,  
15 INC.,

16 Plaintiff,

17 v.

18 Have'a Natural Foods, Inc,

19 Defendant.  
20  
21  
22  
23  
24  
25  
26  
27  
28

Case No.: RG 21086901

[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       (“Plaintiff”) and Have’a Natural Foods, Inc. (“Defendant”). Plaintiff and Defendant are referred to  
5       individually as a “Party” and collectively as the “Parties.”

6               **1.2 Notices**

7                       **1.2.1**     On October 5, 2020, Plaintiff issued a 60-day notice letter (“Notice”) under  
8       Cal. Health & Safety Code § 25249.7 (“Proposition 65”) to Defendant in which it asserted a claim  
9       under Proposition 65 for alleged exposures to acrylamide in Have’a Corn Chips (the “Covered  
10      Product(s)").

11                      **1.2.2 Complaint**

12              Plaintiff filed a Complaint in this action against Defendant for the alleged violations of Health  
13      and Safety Code section 25249.6 asserted in the Notice.

14               **1.3 No Admission**

15              The Parties enter into this Consent Judgment in order to achieve a settlement of the  
16      Proposition 65 claims arising from or relating to the allegations asserted in the Notices for the  
17      purpose of avoiding prolonged litigation. Nothing in this Consent Judgment shall be construed as an  
18      admission of Plaintiff or Defendant of any fact, issue of law, or violation of law, nor shall compliance  
19      with this Consent Judgment constitute or be construed as an admission by Defendant of any fact,  
20      issue of law or violation of law. Nothing in this Consent Judgment or any document referred to  
21      herein, shall be construed as giving rise to any presumption or inference of admission or concession  
22      by Defendant as to any fault, wrongdoing or liability whatsoever. Nothing in this Consent Judgment  
23      nor compliance with this Consent Judgment shall constitute or be construed as an admission by any  
24      of the Parties or by any of their respective officers, directors, shareholders, employees, agents, parent  
25      companies, subsidiaries, divisions, franchisees, licensees, customers, suppliers, distributors,  
26      wholesalers, or retailers of any fact, issue of law, or violation of law. This Consent Judgment is the  
27      product of negotiation and compromise and is accepted by the Parties solely for purposes of settling,  
28      compromising, and resolving issues disputed with respect to the claims in the Notices and shall not be

used for any purpose except to enforce the terms of this Consent Judgment. The Parties agree that this Section shall not diminish or otherwise affect the obligations, responsibilities, and duties of the Parties under this Consent Judgment.

#### **1.4 Effective Date; Compliance Date**

The Effective Date of this Consent Judgment is the date of entry of the Consent Judgment by the Court. The Compliance Date is the date that is six (6) months after the Effective Date.

## **2. DEFENDANT’S DUTIES**

**2.1** Except as otherwise provided herein, any Covered Products that are manufactured by Defendant on and after the Compliance Date that Defendant thereafter sells in California or distributes for sale in California shall comply with the warning requirements of Section 2.2. As used in this Section 2, “distribute for sale in California” means to directly ship a Covered Product into California for sale in California or to sell a Covered Product to a distributor that Defendant knows will sell the Covered Product in California.

### **2.2 Warnings**

**2.2.1** The warning statement required under Section 2.1 shall be one of the following, at Defendant’s option:

#### **Option 1:**

**WARNING:** Consuming this product can expose you to chemicals including acrylamide, which is 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](http://www.P65Warnings.ca.gov/food).

#### **Option 2:**

**WARNING:** Cancer [and Reproductive Harm] – [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food)

The warning in Option 2 may be used only if the warning appears on the product container or labeling. The word “**WARNING**” shall be displayed in all capital letters and bold print. The terms in brackets are optional. The warning statement shall be prominently displayed on the Covered Product, on the packaging of the Covered Product, or on a placard, shelf tag, or sign provided that the statement is displayed with such conspicuousness, as compared with other words, statements or

1 designs as to render it likely to be read and understood by an ordinary individual prior to sale. If the  
2 warning statement is displayed on the Covered Product's label, it must be set off from other  
3 surrounding information.

4           **2.2.2** The warning requirements set forth herein are imposed pursuant to the terms of  
5 this, and are recognized by the Parties as not being the exclusive manner of providing a warning for  
6 the Covered Products. Warnings may be provided as specified in the Proposition 65 regulations for  
7 food in effect as of the Effective Date (Title 27, California Code of Regulations, section 25601, *et*  
8 *seq.*) or as such regulations may be amended in the future, or pursuant to a settlement agreement or  
9 consent judgment involving acrylamide. In addition, Defendant may follow the notification  
10 procedure set out in Title 27, California Code of Regulations, section 25600.2 or a similar procedure  
11 where Defendant instructs its distributor or retailer customers to provide warnings for the Covered  
12 Products consistent with Section 2.2

13           **2.3** Covered Products that were put into the stream of commerce by Defendant before the  
14 Compliance Date are not subject to the obligations of Section 2 but are nonetheless subject to the  
15 release provisions of Section 6.

### 16       **3. SETTLEMENT PAYMENT**

17           **3.1** In full satisfaction of all potential civil penalties, additional settlement payments,  
18 attorney's fees and costs (including, but not limited to, fees and costs incurred by attorneys, experts,  
19 and investigators), Defendant shall pay a total settlement amount of fifty thousand dollars and zero  
20 cents (\$50,000.00). This includes civil penalties in the amount of five thousand dollars (\$5,000).  
21 pursuant to Health and Safety Code section 25249.7(b) and attorney's fees and costs in the amount of  
22 forty-five thousand dollars (\$45,000). pursuant to Code of Civil Procedure section 1021.5 and Health  
23 and Safety Code section 25249 et seq.

24           **3.2** The portion of the settlement attributable to civil penalties shall be allocated according  
25 to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the  
26 penalty paid to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and  
27 the remaining twenty-five percent (25%) of the penalty paid to Plaintiff.

28 All payments owed to Plaintiff shall be delivered to the following payment address:

Noam Glick  
Glick Law Group  
225 Broadway, Suite 2100  
San Diego, CA 92101

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

For United States Postal 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

Defendant agrees to provide Plaintiff's counsel with a copy of the check payable to OEHHHA simultaneous with its penalty payment to Plaintiff.

The Parties, including Plaintiff, will exchange completed IRS 1099, W-9, or other forms as required. Relevant information for Glick Law Group, Nicholas & Tomasevic, and Plaintiff are set out below:

- Environmental Health Advocates, Inc., whose address and tax identification number shall be provided within five (5) days after this Consent Judgement is fully executed by the Parties;
- "Glick Law Group" (EIN: 47-1838518) at address provided in Section 3.2;
- "Nicholas & Tomasevic" (EIN: 46-3474065) at address provided in Section 3.3; and
- "Office of Environmental Health Hazard Assessment" at 1001 I Street, Sacramento, CA 95814.

1                   **3.3     Attorney’s Fees and Costs**

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

6                   Defendant shall provide its payment to Plaintiff’s counsel in two checks, divided equally,  
7                   payable to Glick Law Group, PC (\$22,500) and Nicholas & Tomasevic, LLP (\$22,500) respectively.  
8                   The addresses for these two entities are:

9                               Noam Glick  
10                              Glick Law Group  
11                              225 Broadway, 19<sup>th</sup> Floor  
12                              San Diego, CA 92101

13                             Craig Nicholas  
14                             Nicholas & Tomasevic, LLP  
15                             225 Broadway, 19<sup>th</sup> Floor  
16                             San Diego, CA 92101

17                   **3.4     Timing**

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

19                   **4.     ENFORCEMENT**

20                   **4.1**     Before seeking any judicial enforcement, the Parties shall attempt in good faith to meet  
21                   and confer to resolve any dispute arising under this Consent Judgment.

22                   **4.2**     Plaintiff may not bring any 60-day notice or enforcement action concerning acrylamide  
23                   in the Covered Products if the packaging of the Covered Product is marked or labeled with the  
24                   statement “Not for sale in California” or equivalent language. If Settling Defendant marks or labels a  
25                   Covered Product with such a statement, Defendant shall include a letter to each of its retailer or  
26                   distributor customers receiving that Covered Product notifying the customer that the Covered Product  
27                   may not be sold in California.  
28

1       **5. APPLICATION**

2           This Consent Judgment may apply to, be binding upon, and benefit the Parties and their  
3 predecessors, successors, and assigns. This Consent Judgment shall have no application to any  
4 Covered Product which is distributed or sold outside the State of California.

5       **6. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

6           **6.1 Plaintiff's Public Release of Claims**

7           This Consent Judgment is a full, final, and binding resolution between, on the one hand,  
8 Plaintiff, on behalf of itself and its attorneys, investigators, agents, heirs, and assigns (collectively  
9 referred to as "Plaintiff Releasers") and on behalf of the public in the public interest, and, on the  
10 other hand, Defendant and its parents, subsidiaries, affiliated entities under common ownership, its  
11 directors, officers, principals, agents, employees, attorneys, insurers, accountants, predecessors,  
12 successors, and assigns ("Defendant Entities"), and each entity to whom Defendant directly or  
13 indirectly distributes, ships, or sells the Covered Products including but not limited to downstream  
14 distributors, wholesalers, customers, retailers (including but not limited to Lunardi's Super Market  
15 Inc.), franchisees, cooperative members, and licensees, and their owners, directors, officers, agents,  
16 principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors, and  
17 assigns (collectively referred to as the "Releasees"), of all claims, actions, causes of action (in law or  
18 in equity), suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, expenses,  
19 and fees (including, but not limited to, investigation fees, expert fees, and attorney's fees), and  
20 expenses (collectively, "Claims") that have been or could have been asserted under Proposition 65 for  
21 any exposures to acrylamide from the Covered Products manufactured, distributed, or sold by  
22 Defendant prior to the Compliance Date. Compliance with the terms of this Consent Judgment  
23 constitutes compliance with Proposition 65 with respect to any exposures to acrylamide from  
24 Covered Products manufactured, sold, or distributed by Defendant on and after the Compliance Date.

25           **6.2 Plaintiff's Release of Claims**

26           Plaintiff, in its individual capacity, on behalf of itself and the Plaintiff Releasers, also waives  
27 all rights to institute or participate in, directly or indirectly, any form of legal action, and discharges  
28 and releases all claims, actions, causes of action (in law or in equity), suits, liabilities, demands,

1 obligations, damages, costs, fines, penalties, losses, expenses, and fees (including, but not limited to,  
2 investigation fees, expert fees, and attorney's fees), and expenses (collectively, "Claims") as to all  
3 Releasees under Proposition 65 or any statutory or common law from the alleged failure to provide  
4 warnings for any exposures to acrylamide, or for causing any exposures to acrylamide, in the  
5 Covered Products manufactured, sold, or distributed by Defendant, provided that such products meet  
6 the standard in Section 2.1 of this Consent Judgment.

7 It is possible that other Claims not known to the Parties, arising out of the facts alleged in the  
8 Notice, and relating to the Covered Products, will develop or be discovered. Plaintiff, in its  
9 individual capacity, and on behalf of herself the Plaintiff Releasors, acknowledges that this Consent  
10 Judgment is expressly intended to cover and include all such Claims. Plaintiff, on behalf of itself the  
11 Plaintiff Releasors, acknowledges that the claims released in Sections 6.1 and 6.2 above may include  
12 unknown claims, and nevertheless waives California Civil Code section 1542 as to any such  
13 unknown claims. California Civil Code section 1542 reads as follows:

14 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE  
15 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT  
16 TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE  
17 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE  
18 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE  
19 DEBTOR OR RELEASED PARTY.

20 Plaintiff acknowledges and understands the significance and consequences of this specific  
21 waiver of California Civil Code section 1542. The release in this Section 6.2 is effective as a full and  
22 final accord and satisfaction, as a bar to all Claims of any nature, character or kind, whether known or  
23 unknown, or suspected or unsuspected. Plaintiff acknowledges that it is familiar with Section 1542  
24 of the California Civil Code, which provides as follows:

25 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS  
26 THAT THE CREDITOR OR RELEASING PARTY DOES NOT  
27 KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT  
28 THE TIME OF EXECUTING THE RELEASE AND THAT, IF  
29 KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY  
30 AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR  
31 OR RELEASED PARTY.



1 Plaintiff understands and acknowledges the significance and consequence of this waiver of California  
2 Civil Code section 1542

3       **6.3** Defendant, on its own behalf, and on behalf of the Defendant Entities, hereby waives  
4 any and all claims against Plaintiff and the Plaintiff Releasors, for any and all actions taken or  
5 statements made by Plaintiff and its attorneys and other representatives, whether in the course of  
6 investigating claims, otherwise seeking to enforce Proposition 65 against it, in this matter or with  
7 respect to the Covered Products.

8       **6.4** Nothing in Section 6 affects or limits the right of any Party to enforce the terms of this  
9 Consent Judgment.

## 10       **7. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

11       In the event that any of the provisions of this Consent Judgment are held by a court to be  
12 unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.

## 13       **8. GOVERNING LAW**

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

## 16       **9. MODIFICATION**

17       **9.1** Except as provided in Section 9, this Consent Judgment may be modified only by: (i) a  
18 written agreement of the Parties and entry of a modified consent judgment thereon by the Court; or (ii)  
19 a successful motion or application of any Party, and the entry of a modified consent judgment thereon  
20 by the Court. Any modifications made to this Consent Judgment pursuant to this Section 9 shall have  
21 no effect on the Defendant's financial obligations under this Consent Judgment. Prior to filing a  
22 motion to modify the Consent Judgment, any Party seeking to modify this Consent Judgment shall  
23 attempt in good faith to meet and confer with the other Party.

24       **9.2** If a final decision of a court determines that warnings for acrylamide exposures or that  
25 enforcement of Proposition 65 claims for acrylamide exposures are preempted or otherwise unlawful  
26 or unconstitutional in a manner that applies to the Covered Products or products similar to the Covered  
27 Products, then Defendant shall be entitled to request a Court order modifying this Consent Judgment.  
28 Plaintiff agrees not to oppose such modification except for good cause shown.

1           **9.3**     If Proposition 65 or its implementing regulations (including but not limited to the “safe  
2 harbor no significant risk level” for acrylamide set forth at Cal. Code Regs., tit. 27, section 25705,  
3 subdivision (c)(2) or any “alternative risk level” adopted by regulation or court decision) are changed  
4 from their existing terms, or if OEHHA takes some other final regulatory action for products similar to  
5 the Covered Product, then Defendant may request a Court order modifying the Consent Judgment  
6 accordingly. Plaintiff agrees not to oppose such modification except for good cause shown.

7           **9.4**     If there is any other change in law, regulation or guidance for which Defendant believes  
8 a modification to this Consent Judgment is appropriate, including but not limited to a determination  
9 that warnings for acrylamide in foods or in products similar to the Covered Products are not required  
10 under Proposition 65 or a change in the safe harbor warning regulations, Defendant may request a  
11 Court order modifying this Consent Judgment accordingly. Plaintiff agrees not to oppose such  
12 modification except for good cause shown.

13           **9.5**     If there is a court-approved consent judgment that sets an acrylamide standard for  
14 similar products, Defendant may comply with that standard as an alternative to providing warnings  
15 under Section 2.

16           **9.6**     If a dispute should arise concerning the terms of Section 9, then the Parties shall meet  
17 and confer in good faith to attempt to resolve the dispute, but if it cannot be resolved in that manner,  
18 either Party may present the dispute to the court for resolution. Any modification of this Consent  
19 Judgment shall have no bearing on any financial obligations contained herein.

## 20       **10.   PROVISION OF NOTICE**

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

### 23           **For Plaintiff:**

24           Noam Glick  
25           Glick Law Group, PC  
26           225 Broadway, 21st Floor  
27           San Diego, CA 92101

### 28           **For Defendant:**

            Sarah Esmaili  
            ARNOLD & PORTER KAYE SCHOLER LLP

Three Embarcadero Center, 10th Floor  
San Francisco, CA 94111  
Telephone: (415) 471-3283  
Facsimile: (415) 471-3400  
Email: sarah.esmaili@arnoldporter.com

## **11. EXECUTION AND COUNTERPARTS**

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

## **12. DRAFTING**

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

## **13. COURT APPROVAL; DISMISSAL**

**13.1** If this Consent Judgment is not entered by the Court, it shall be of no force or effect.

**13.2** Within ten (10) days of the Effective Date, Plaintiff shall file a request for dismissal of this action as to all remaining defendants.

## **14. RETENTION OF JURISDICTION**

This Court shall retain jurisdiction of this matter to implement or modify the Consent Judgment. Notwithstanding the provisions of Section 9, nothing in this Consent Judgment limits or affects the Court's authority to modify this Consent Judgment as provided by law

## **15. AUTHORIZATION**

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

1 **STIPULATED AND AGREED TO:**

2 Date: 2/25/2021

Date: 2/24/2021

3 By: 

By: 

4 Kim Embry

STEPHANIE J. DUNN

5 ENVIRONMENTAL HEALTH  
6 ADVOCATES, INC.

[print name]

HAVE'A NATURAL FOODS, INC.

7 **IT IS SO ORDERED, ADJUDGED, AND DECREED:**

8 Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court