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16 Attorneys for Plaintiff  
17 Environmental Health Advocates, Inc.

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

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

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

22 Plaintiff,

23 v.

24 DESSERTS ON US, INC., a California  
25 corporation, and DOES 1 through 100,  
26 inclusive,

27 Defendants.  
28

Case No. RG20073198

**[PROPOSED] CONSENT JUDGMENT**

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

1     **1. INTRODUCTION**

2             **1.1 Parties**

3             This Consent Judgment is entered into by and between Environmental Health Advocates, Inc.,  
4     ("EHA"), on the one hand, and Desserts On Us, Inc. ("Defendant" or "Desserts On Us") on the other  
5     hand, with EHA and Desserts On Us each individually referred to as a "Party" and collectively referred  
6     to as the "Parties."

7             **1.2 Plaintiff**

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

11            **1.3 Defendant**

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

15            **1.4 General Allegations**

16            EHA alleges that Desserts On Us manufactures, imports, sells, and distributes for sale toffee  
17    wafer confections that contain acrylamide. EHA further alleges that Desserts On Us does so without  
18    providing a sufficient health hazard warning as required by Proposition 65 and related Regulations.

19            **1.5 Notices of Violation**

20            On March 13, 2020, EHA served Trader Joe's Company ("Trader Joe's"), the California  
21    Attorney General, and all other required public enforcement agencies with a 60-Day Notice of  
22    Violation of California Health and Safety Code section 25249.6 *et seq.* ("Notice"). The Notice alleged  
23    that Trader Joe's violated Proposition 65 by failing to sufficiently warn consumers in California of the  
24    health hazards associated with exposures to acrylamide contained in its "Trader Joe's Laceys Cookies  
25    Dark Chocolate Almond."

26            On May 15, 2020, EHA served Desserts On Us, Inc., Trader Joe's Company, the California  
27    Attorney General, and all other required public enforcement agencies with an amended 60-Day Notice  
28    of Violation of California Health and Safety Code section 25249.6 *et seq.* ("Second Amended Notice")

1 identifying Desserts On Us, Inc. as the manufacturer.

2 On October 9, 2020, EHA served Desserts On Us, Inc., Trader Joe's Company, the California  
3 Attorney General, and all other required public enforcement agencies with a second amended 60-Day  
4 Notice of Violation of California Health and Safety Code section 25249.6 *et seq.* ("Second Amended  
5 Notice"). The Notice alleges that Desserts On Us violated Proposition 65 by failing to sufficiently warn  
6 consumers in California of the health hazards associated with exposures to acrylamide contained in its  
7 "Almond & Chocolate Toffee Wafer Confection products."

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

#### 10 **1.6 Product Description**

11 For purposes of this Consent Judgment "Covered Products" means all Almond & Chocolate  
12 Toffee Wafer Confection products, including those with additional ingredients or flavorings,  
13 manufactured or processed by Desserts On Us and that allegedly contain acrylamide and are imported,  
14 sold, shipped, delivered or distributed for sale to consumers in California by Releasees (as defined in  
15 section 4.1), whether sold under the brand names "Trader Joe's," "Desserts On Us," or any other brand  
16 or private label at all grocery, retail, and other locations and sales channels, including the Internet,  
17 regardless of the size, shape, or name given to them, and specifically including "Target Dark Almond  
18 Toffee Wafers" and products referred to as toffee wafer confections, cookies, toffee wafer confection  
19 bites, or toffee wafer confection bars.

#### 20 **1.7 Complaint**

21 On September 10, 2020, EHA filed a Complaint against Desserts On Us for the alleged  
22 violations of Health and Safety Code section 25249.6 that are the subject of the Notice ("Complaint").

#### 23 **1.8 No Admission**

24 Desserts On Us denies the material factual and legal allegations of the Notice and Complaint,  
25 and maintains that all of the products it has manufactured, imported, sold, and/or distributed for sale in  
26 California, including the Covered Products, have been, and are, in compliance with all laws. Nothing  
27 in this Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law,  
28 issue of law, or violation of law, nor shall compliance with this Consent Judgment be construed as an

1 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall  
2 not, however, diminish or otherwise affect Desserts On Us' obligations, responsibilities, and duties  
3 under this Consent Judgment.

4 **1.9 Jurisdiction**

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

9 **1.10 Effective Date**

10 For purposes of this Consent Judgment, the terms "Effective Date" and "Compliance Date"  
11 mean the date on which the Court grants the motion for approval of this Consent Judgment, as discussed  
12 in Section 5.

13 **2. INJUNCTIVE RELIEF**

14 **2.1 Reformulation of the Products**

15 Any Covered Products that are manufactured by Desserts On Us on and after the Compliance  
16 Date that are thereafter sold in California or distributed for sale in California shall not on average  
17 exceed 390 ppb of acrylamide "Average Level", with such Average Level determined as set forth in  
18 Section 2.2 herein, unless sold with a Proposition 65 warning pursuant to Section 2.3. As used in this  
19 Section 2.1, "distributed for sale in California" means to directly ship Covered Products into California  
20 or to sell Covered Products to a distributor Desserts On Us knows to sell or distribute in California or  
21 to which Desserts On Us will sell Covered Products in California.

22 **2.2 Testing**

23 (a) The Average Level is determined by randomly selecting and testing at least one sample  
24 each from at least five different lots of a particular Covered Product. The mean and standard deviation  
25 shall be calculated using the sampling data. Any data points that are more than three standard  
26 deviations outside the mean shall be discarded, and the mean and standard deviation recalculated once  
27 using the remaining data points. The mean determined in accordance with this procedure shall be  
28 deemed the "Average Level." Testing is to be performed by a laboratory accredited by the State of

1 California, a federal agency, or a national recognized accrediting organization, using LC-MS/MS  
2 (Liquid Chromatograph-Mass Spectrometry), GC/MS (Gas Chromatography/Mass Spectrometry), or  
3 any other testing method agreed upon by the Parties.

4 (b) For three consecutive years after the Compliance Date, Desserts On Us shall arrange for  
5 testing as provided under Section 2.2 (a), above. The testing shall be at least once per year, with the  
6 first testing occurring prior to the Compliance Date. No further testing shall be required unless Desserts  
7 On Us materially modifies the ingredients or cooking process of Covered Products, at which point  
8 testing shall recommence on an annual basis for three years.

9 **2.3 Clear and Reasonable Warnings**

10 On the Compliance Date, and continuing thereafter, Desserts On Us shall not manufacture  
11 Covered Products that will be sold or offered for sale in California that exceed the previously mentioned  
12 concentration limits, unless the Covered Products bear a clear and reasonable warning as set forth in  
13 Proposition 65 and related Regulations.

14 **2.4 Sell-Through Period**

15 Notwithstanding anything else in this Consent Judgment, any Covered Products manufactured  
16 on or prior to the Compliance Date shall be subject to release of liability pursuant to this Consent  
17 Judgment, without regard to when such Covered Products were, or are in the future, distributed or sold  
18 to customers. As a result, the obligations of Desserts On Us, or any Releasees (if applicable), do not  
19 apply to these Covered Products manufactured on or prior to the Compliance Date.

20 **3. MONETARY SETTLEMENT TERMS**

21 **3.1 Settlement Amount**

22 Desserts On Us shall pay fifty thousand dollars (\$50,000.00) in settlement and total satisfaction  
23 of all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes  
24 civil penalties in the amount of five thousand dollars and zero cents (\$5,000.00) pursuant to Health and  
25 Safety Code section 25249.7(b) and attorney's fees and costs in the amount of forty-five thousand  
26 dollars and zero cents (\$45,000.00) pursuant to Code of Civil Procedure section 1021.5.



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

2           The portion of the settlement attributable to attorney's fees and costs (\$45,000.00) shall be paid  
3 to EHA's counsel, who are entitled to attorney's fees and costs incurred by it in this action, including  
4 but not limited to investigating potential violations, bringing this matter to Desserts On Us' attention,  
5 as well as litigating and negotiating a settlement in the public interest.

6           Desserts On Us shall provide its payment to EHA's counsel in two checks, divided equally,  
7 payable to Glick Law Group, PC (\$22,500.00) and Nicholas & Tomasevic, LLP (\$22,500.00)  
8 respectively. The addresses for these two entities are:

9  
10                                   Noam Glick  
11                                   Glick Law Group  
12                                   225 Broadway, 19th Floor  
13                                   San Diego, CA 92101

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

18           **3.4    Timing**

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

20           **4.    CLAIMS COVERED AND RELEASED**

21           **4.1    EHA's Public Release of Proposition 65 Claims**

22           For any claim or violation arising under Proposition 65 alleging a failure to warn about  
23 exposures to Acrylamide from the Covered Products or related products manufactured, imported,  
24 sold, or distributed by Desserts On Us prior to the Effective Date, EHA, acting for the general public,  
25 releases Desserts On Us of any and all liability. This includes Desserts On Us' owners, parents,  
26 subsidiaries, affiliated entities under common ownerships, its directors, officers, agents, employees,  
27 attorneys, and each entity to whom Desserts On Us directly or indirectly distributes or sells Products,  
28 including but not limited to downstream distributors, wholesales, customers, retailers, franchisees,  
cooperative members and licensees, and specifically including Trader Joe's (collectively, the  
"Releasees"). Releasees include defendant, its parent, and all subsidiaries and affiliates thereof and  
their respective employees, agents, and assigns that sell Desserts On Us' Covered Products.

1 Compliance with the terms of this Consent Judgement constitutes compliances with Proposition 65  
2 with respect to the alleged or actual failure to warn about exposures to acrylamide from Covered  
3 Products manufactured, imported, sold, or distributed by Desserts On Us after the Compliance Date.  
4 This Consent Judgement is a full, final and binding resolution of all claims that were or could have  
5 been asserted against Desserts On Us and/or Releasees for failure to provide warnings for alleged  
6 exposure to acrylamide contained in Covered Products.

7 **4.2 EHA's Individual Release of Claims**

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

14 **4.3 Desserts On Us' Release of EHA**

15 Desserts On Us, on its own behalf, and on behalf of Releasees as well as its past and current  
16 agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against  
17 EHA and its attorneys and other representatives, for any and all actions taken or statements made by  
18 EHA and its attorneys and other representatives, whether in the course of investigating claims,  
19 otherwise seeking to enforce Proposition 65 against it, in this matter or with respect to the Covered  
20 Products.

21 **5. COURT APPROVAL**

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

25 **6. SEVERABILITY**

26 Subsequent to the Court's approval and entry of this Consent Judgment, if any provision is held  
27 by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.  
28



1     **7. GOVERNING LAW**

2             The terms of this Consent Judgment shall be governed by the laws of the State of California as  
3 applied within the State of California. In the event that Proposition 65 is repealed, or is otherwise  
4 rendered inapplicable for reasons, including but not limited to changes in the law, then Desserts On Us  
5 may provide written notice to EHA of any asserted change, and shall have no further injunctive  
6 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are  
7 so affected.

8             In the event EHA enters into an agreement or consent judgment with any other person or entity  
9 supplying products substantially similar to the Covered Products addressing alleged violations of  
10 Proposition 65 with respect to exposure to acrylamide that provides for less stringent standards than  
11 set forth in Section 2.2 above; or if a judgment is entered in any Proposition 65 case with respect to  
12 exposure to acrylamide from products substantially similar to Covered Products that provides for less  
13 stringent requirements than set forth in Section 2.2 above; or if the California Office of Health Hazard  
14 Assessment adopts a regulation or safe use determination, or issues an interpretive guideline that  
15 exempts Covered Products from meeting the requirements of Proposition 65; or if Proposition 65 is  
16 determined to be preempted by federal law or a burden on First Amendment rights with respect to  
17 acrylamide in Covered Products or products substantially similar to Covered Products, then Desserts  
18 On Us may seek a court-approved modification of this Consent Judgment without objection of EHA,  
19 to conform to or eliminate the terms of Section 2 accordingly. Any such modification shall have no  
20 effect on the financial obligations set forth herein.

21     **8. NOTICE**

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

25     For Desserts On Us:

26     Chris Hamer  
27     Stokes, Hamer, Kirk & Eads, LLP  
28     381 Bayside Road, Ste. A  
   Arcata, CA 95521

If to EHA:

   Noam Glick  
   Glick Law Group, PC  
   225 Broadway, 19th Floor  
   San Diego, CA 92101

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

3 **9. COUNTERPARTS; DIGITAL SIGNATURES**

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

7 **10. POST EXECUTION ACTIVITIES**

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

17 **11. MODIFICATION**

18 This Consent Judgment may be modified by: (i) a written agreement of the Parties and entry of  
19 a modified consent judgment thereon by the Court; or (ii) a successful motion or application of any  
20 Party, and the entry of a modified consent judgment thereon by the Court. Desserts On Us may seek a  
21 court-approved modification of this Consent Judgment to conform to any developments in the law  
22 pertaining to regulation of acrylamide in food products.

23 **12. AUTHORIZATION**

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

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

27 If a dispute arises with respect to either Party's compliance with the terms of this Consent  
28 Judgment entered by the Court, the Parties shall meet and confer in person, or by telephone, and/or in

1 writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be filed  
2 in the absence of such a good faith attempt to resolve the dispute beforehand.

3 **14. ENTIRE AGREEMENT**

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

9 **AGREED TO:**

**AGREED TO:**

10  
11 Date: 10/09/2020

Date: 10-20-20

12  
13 By: *Ronan Blech*  
14 ENVIRONMENTAL HEALTH  
15 ADVOCATES, INC.

By: *Emmanuel E. Eyo*  
DESSERTS ON US, INC.

16 **Approved as to Form Only:**

17 Date: 10/09/2020

Date: 10/20/2020

18  
19 By: *Jake Adette*  
20 Counsel for  
21 ENVIRONMENTAL HEALTH  
22 ADVOCATES, INC.

By: *[Signature]*  
Counsel for DESSERTS ON US, INC.

23 **IT IS SO ORDERED.**

24 Date: \_\_\_\_\_

\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT