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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.,

22 Plaintiff,

23 v.

24 GRUPO HERDEZ, S.A.B. De C.V., a Mexican
25 corporation, and DOES 1 through 100,
26 inclusive,

27 Defendants.
28

Case No. RG21092290

**AMENDED [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 tortilla chip products manufactured, distributed, sold,
6 and/or offered for sale in California by Settling Defendant or its subsidiaries and affiliates (together,
7 “Subsidiaries”), whether branded or private label, at all grocery, retail, and other locations and sales
8 channels, including on the Internet. This Consent Judgment covers the Covered Products to the extent
9 that they are incorporated as an ingredient in any food product made or sold by others.

10 **1.3** “Effective Date:” means the date on which the Court grants the motion for approval
11 of this Consent Judgment, as discussed in Section 11, below.

12 **2. INTRODUCTION**

13 **2.1** The Parties to this Consent Judgment are Environmental Health Advocates, Inc.,
14 (“EHA”) on the one hand, and Utz Quality Foods, LLC (“Settling Defendant”), licensee of the
15 Herdez brand name, on the other hand. EHA and Settling Defendant (collectively, the “Parties”)
16 enter into this Consent Judgment to settle certain claims asserted by EHA against Settling Defendant
17 and Defendants as set forth in the Complaint. Except as otherwise provided herein, this Consent
18 Judgment is intended to apply to all Covered Products manufactured, sold, distributed, and/or offered
19 for sale by Defendant Releasees (as the term is defined in Section 5.1) in California.

20 **2.2** On October 20, 2020, EHA served Settling Defendant’s licensor (Grupo Herdez, S.A.B.
21 De C.V. (“Licensor”)), Walmart Inc., and the California Attorney General, and all other required public
22 enforcement agencies with a 60-Day Notice of Violation of California Health and Safety Code
23 section 25249.6 *et seq* (the “Notice”). The Notice alleged, *inter alia*, that Licensor violated Proposition
24 65 by failing to sufficiently warn consumers in California of the health hazards associated with
25 exposures to Acrylamide contained in Herdez brand tortilla chips. No public enforcer has
26 commenced or is otherwise prosecuting an action to enforce the violations alleged in the Notice.

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1 **2.3** Settling Defendant is a corporation or other business entity that manufactures,
2 distributes, sells, or offers for sale Covered Products that are sold in the State of California or has
3 done so at times relevant to the Complaint.

4 **2.4** On February 24, 2021, EHA filed the Complaint in the above-captioned matter for the
5 alleged violations of Health and Safety Code section 25249.6 that are the subject of the Notice
6 (“Complaint”).

7 **2.5** For purposes of this Consent Judgment only, the Parties stipulate that this Court has
8 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
9 over Settling Defendant as to the acts alleged in the Complaint, that venue is proper in the County of
10 Alameda, and that this Court has jurisdiction to enter and enforce this Consent Judgment as a full and
11 final resolution of all claims which were or could have been raised in the Complaint based on the
12 facts alleged therein and in the Notice with respect to Covered Products manufactured, distributed,
13 shipped, sold and/or offered for sale by Defendant Releasees pursuant to Proposition 65 and Code of
14 Civil Procedure section 664.6.

15 **2.6** Nothing in this Consent Judgment is or shall be construed as an admission by the
16 Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall compliance with the
17 Consent Judgment constitute or be construed as an admission by the Parties of any fact, conclusion of
18 law, issue of law, or violation of law. Except as otherwise provided for herein, nothing in this Consent
19 Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense the Parties may
20 have in any other pending or future legal proceedings. This Consent Judgment is the product of
21 negotiation and compromise and is accepted by the Parties solely for purposes of settling,
22 compromising, and resolving 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 281 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) samples
11 each from at least five (5) different lots of a Covered Product (or the maximum number of lots
12 available for testing if less than five (5)) during a testing period of at least three hundred sixty-five
13 (365) days. The mean and standard deviation shall be calculated using the sampling data. Any data
14 points that are more than three standard deviations outside the mean shall be discarded, and the mean
15 and standard deviation recalculated using the remaining data points. The mean determined in
16 accordance with this procedure shall be deemed the “Average Level.”

17 **3.1.2 Unit Level**

18 The acrylamide concentration of any individual unit of Covered Products Chips shall not exceed
19 350 ppb by weight, based on a representative composite sample taken from the individual unit being
20 tested (the “Unit Level”). The Average Level and Unit Level shall collectively be referred to herein as
21 the “Reformulation Levels.” Any samples of a Covered Product tested under Sections 3.1.1 or 3.1.2
22 shall be homogenized before testing for acrylamide content.

23 **3.1.3** For avoidance of doubt, Covered Products either purchased, manufactured,
24 distributed, shipped, sold and/or offered for sale by Settling Defendant or its Subsidiaries prior to the
25 Compliance Date are not subject to the Reformulation Levels, even if such products are sold or offered
26 for sale in California after the applicable Compliance Date.

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3.1.4 Testing

Compliance with the Average Level and Unit Level shall be determined in accordance with the methodology set forth in Sections 3.1.1.1 and 3.1.2 and using LC-MS/MS (Liquid Chromatography-Mass Spectrometry), GC/MS/MS (Gas Chromatography/Mass Spectrometry), or any other testing method agreed upon by the Parties. Testing for purposes of Section 3.1 shall be performed by any laboratory accredited by the State of California, a federal agency, or a nationally recognized accrediting organization.

3.2 Clear and Reasonable Warnings.

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

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

The word “**WARNING**” shall be displayed in all capital letters and bold print. This warning statement shall be prominently displayed on the Covered Product, on the packaging of the Covered Product, or on a placard or sign provided that the statement is displayed with such conspicuousness, as compared with other words, statements or designs as to render it likely to be read and understood by an ordinary individual prior to sale. If the warning statement is displayed on the Covered Product’s label, it must be set off from other surrounding information and enclosed in a text box. If the warning statement is displayed on a placard or sign where the Covered Product is offered for sale, the warning placard or sign must enable an ordinary individual to easily determine which specific Covered Products the warning applies to, and to differentiate between that Covered Product and other products to which the warning statement does not apply. For internet, catalog or any other sale where the consumer is

1 not physically present, the warning statement shall be displayed in such a manner that it is likely to be
2 read and understood by an ordinary individual prior to the authorization of or actual payment. Nothing
3 in this Consent Judgment requires that warnings be provided for Covered Products that are not sold or
4 offered for sale in California. To comply with Section 3.2, Settling Defendant and its Subsidiaries may
5 rely on the procedure for notifying retailers set out in Title 27, California Code of Regulations, section
6 25600.2, in effect as of the applicable Compliance Date.

7 The warning requirements set forth herein are imposed pursuant to the terms of this Consent
8 Judgment and are recognized by the Parties as not being the exclusive manner of providing a warning
9 for the Covered Products. Warnings may be provided as specified in Proposition 65 regulations for
10 food in effect as of the applicable Compliance Date (Title 27, California Code of Regulations, section
11 25601, *et seq.*) or as such regulations may be amended in the future.

12 **3.3 Grace Period for Existing Inventory of Products**

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

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1 **4. MONETARY SETTLEMENT TERMS**

2 **4.1 Settlement Amount**

3 Settling Defendant shall pay Sixty Thousand Dollars (\$60,000) in settlement and total
4 satisfaction of all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This
5 includes civil penalties in the amount of Six Thousand Dollars (\$6,000) pursuant to Health and Safety
6 Code section 25249.7(b) and attorney's fees and costs in the amount of Fifty-Four Thousand Dollars
7 (\$54,000) pursuant to Code of Civil Procedure section 1021.5.

8 **4.2 Civil Penalty**

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

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

14 Samantha Dice
15 Environmental Health Advocates
16 225 Broadway, Suite 2100
 San Diego, CA 92101

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

19 For United States Postal Service Delivery:

20 Mike Gyurics
21 Fiscal Operations Branch Chief
22 Office of Environmental Health Hazard Assessment
 P.O. Box 4010
 Sacramento, CA 95812-4010

23 For Non-United States Postal Service Delivery:

24 Mike Gyurics
25 Fiscal Operations Branch Chief
26 Office of Environmental Health Hazard Assessment
 1001 I Street
 Sacramento, CA 95814

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

3 Plaintiff and its counsel will provide completed IRS 1099, W-9, or other tax forms as required.
4 Relevant information is set out below:

- 5 • "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 4.3;
- 6 • "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section 4.3; and
- 7 • "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA
8 95814.

10 **4.3 Attorney's Fees and Costs**

11 The portion of the settlement attributable to attorney's fees and costs fifty-four thousand
12 dollars (\$54,000.00) shall be paid to EHA's counsel, who are entitled to attorney's fees and costs
13 incurred by it in this action, including but not limited to investigating potential violations,
14 bringing this matter to Settling Defendant's attention, as well as litigating and negotiating a
15 settlement in the public interest.
16

17 Settling Defendant shall provide its payment to EHA's counsel in two checks, divided equally,
18 payable to Glick Law Group, PC (\$27,000) and Nicholas & Tomasevic (\$27,000) respectively. The
19 addresses for these two entities are:

20
21 Noam Glick
22 Glick Law Group
23 225 Broadway, Suite 1900
24 San Diego, CA 92101

25
26 Craig Nicholas
27 Nicholas & Tomasevic, LLP
28 225 Broadway, 19th Floor
San Diego, CA 92101

4.4 Timing

The above-mentioned checks will be issued within fourteen (14) days after the Effective Date or the date upon which Plaintiff's counsels provide Settling Defendant with their respective IRS 1099, W-9 , or other required tax forms, whichever is later.

5. CLAIMS COVERED AND RELEASED

5.1 EHA's Public Release of Proposition 65 Claims

For any claim or violation arising under Proposition 65 alleging a failure to warn about exposures to Acrylamide from Covered Products or related products manufactured, imported, sold, or distributed by Defendants and Settling Defendant or its Subsidiaries prior to the Compliance Date, EHA, acting for the general public and in the public interest, releases Settling Defendant, of any and all liability. This includes Settling Defendant's owners, parents, partners, joint ventures, Subsidiaries, Licensor, licensors, licensees, affiliated entities under common ownerships, its directors, officers, members, agents, employees, attorneys, and each entity to whom Settling Defendant and its Subsidiaries directly or indirectly distribute, sell or offer for sale Covered Products, including but not limited to downstream distributors, wholesales, customers, retailers (including but not limited to Walmart Inc.), franchisees, cooperative members and licensees, (collectively, the "Defendant Releasees"). In addition to the foregoing, Defendant Releasees include Settling Defendant, its parent, and all Subsidiaries and affiliates thereof and their respective owners, members, parents, partners, joint ventures, licensors, licensees, employees, agents, and assigns. Compliance with the terms of this Consent Judgment constitutes compliances with Proposition 65 with respect to the alleged or actual failure to warn about exposures to acrylamide from Covered Products manufactured, distributed, imported, offered for sale, sold, or distributed by Defendant Releasees after the Effective Date. This Consent Judgment is a full, final and binding resolution of the claims under Proposition 65 that were or could have been asserted against Settling Defendant, its Subsidiaries and Defendant Releasees for failure to warn about the exposure to acrylamide in Covered Products sold prior to the Compliance Date.

1 **5.2 EHA’s Individual Release of Claims**

2 EHA, in its individual capacity, also provides a release to Settling Defendant and Defendant
3 Releasees, which shall be a full and final accord and satisfaction of, as well as a bar to, all actions,
4 causes of action, obligations, costs, expenses, attorney’s fees, damages, penalties, losses, claims,
5 liabilities, and demands of every nature, character, and kind, whether known or unknown, suspected or
6 unsuspected, arising out of alleged or actual exposures to acrylamide in Covered Products
7 manufactured, imported, offered for sale, sold, or distributed by Defendant Releasees before the
8 Compliance Date.
9

10 **5.3 Settling Defendant’s Release of EHA**

11 Settling Defendant, on its own behalf, and on behalf of Defendant Releasees as well as its past
12 and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all
13 claims against EHA and its attorneys and other representatives, for any and all actions taken or
14 statements made by EHA and its attorneys and other representatives, whether in the course of
15 investigating claims, otherwise seeking to enforce Proposition 65 against it, in this matter or with
16 respect to the Covered Products manufactured, imported, sold, or distributed by Settling Defendant
17 and its Subsidiaries before the Compliance Date.
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19 **6. COURT APPROVAL**

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

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

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1 **8. 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 Settling
5 Defendant may provide written notice to EHA of any asserted change, and shall have no further
6 injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
7 Covered Products are so affected.

8 **9. NOTICE**

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

12 **If to Settling Defendant**

13
14 Richard Fama
15 Cozen O'Connor
16 3 WTC
17 175 Greenwich Street, 55th Floor
New York, NY 10007

12 **If to EHA:**

13
14 Noam Glick
15 Glick Law Group, PC
16 225 Broadway, Suite 1900
17 San Diego, CA 92101

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

20 **10. COUNTERPARTS; DIGITAL SIGNATURES**

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

24 **11. POST EXECUTION ACTIVITIES**

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

7 **12. MODIFICATION**

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9 **12.1 Modification.** This Consent Judgment may be modified by: (i) a written agreement of
10 the Parties and entry of a modified consent judgment thereon by the Court; or (ii) a successful motion
11 or application of any Party, and the entry of a modified consent judgment thereon by the Court.

12 **12.2 Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
13 attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the
14 Consent Judgment.

15 **12.3 Change in Proposition 65.** If Proposition 65 or its implementing regulations (including
16 but not limited to the published “no significant risk level” for acrylamide set forth at Cal. Code Regs.,
17 tit 27, section 25705, subdivision (c)(2) or any “alternative risk level” adopted by regulation or court
18 decision) are changed from their terms as they exist on the date of entry of this Consent Judgment, or
19 if OEHHA takes some other final regulatory action that determines that warnings for acrylamide are
20 not required or modifies the standard for warnings for acrylamide, then Settling Defendant may seek
21 to modify this Consent Judgment.

22
23 **12.4 Other Court Decisions.** If a final decision of a court determines that warnings for
24 acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide exposures are
25 preempted or otherwise unlawful or unconstitutional, then Settling Defendant or its Subsidiaries may
26 move to modify this Consent Judgment to conform to such ruling in order to avoid unfair,
27 inconsistent, or anti-competitive results.
28

1 **12.5 Federal Agency Action and Preemption.** If a court of competent jurisdiction or an
2 agency of the federal government, including, but not limited to, the U.S. Food and Drug
3 Administration, states through any guidance, regulation or legally binding act that federal law has
4 preemptive effect on any of the requirements of this Consent Judgment, then this Consent Judgment
5 may be modified in accordance with the procedure for noticed motions set forth herein to bring it into
6 compliance with or avoid conflict with federal law.

7 **12.6 Scientific Studies.** If an agency of the federal government, including, but not limited to
8 the U.S. Food and Drug Administration, states through any guidance, regulation, or other legally
9 binding act, following a review of scientific studies and following public notice and comment, a cancer
10 potency estimate for acrylamide that equates to a no significant risk level higher than 0.2 micrograms
11 per day, then Settling Defendant and its Subsidiaries shall be entitled to seek a modification of this
12 Consent Judgment.
13

14 **12.7** Before filing any motion to modify the Consent Judgment, Settling Defendant shall
15 provide written notice to EHA to initiate the meet and confer procedure in Section 12.2. If the Parties
16 do not agree on the proposed modification during informal meet and confer efforts, Settling Defendant
17 may file a motion to modify the Consent Judgment within sixty (60) days of the date of the written
18 notice that Settling Defendant provides to EHA under this Section 12.
19

20 **12.8** Any modification to this Consent Judgment pursuant to this Section 12 shall have no
21 effect on Settling Defendant's financial obligations under this Agreement.
22

23 **13. RETENTION OF JURISDICTION**

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

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1 **14. AUTHORIZATION**

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

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

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

9 **16. ENTIRE AGREEMENT**

10 This Consent Judgment contains the sole and entire agreement and understanding of the Parties
11 with respect to the entire subject matter herein, and any and all prior discussions, negotiations,
12 commitments, and understandings related hereto. No representations, oral or otherwise, express or
13 implied, other than those contained herein have been made by any Party. No other agreements, oral or
14 otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.
15

16 **AGREED TO:**

17 Date: March 17, 2021.

18 By: 
19 ENVIRONMENTAL HEALTH
20 ADVOCATES, INC.

21 **AGREED TO:**

22 Date: 

23 By: Dylan Lissette
24 Utz Quality Foods, LLC

25 **IT IS SO ORDERED.**

26 Date: _____

27 _____
28 JUDGE OF THE SUPERIOR COURT