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18 Environmental Health Advocates, Inc.

19 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

21 ENVIRONMENTAL HEALTH
22 ADVOCATES, INC., a California organization,

23 Plaintiff,

24 v.

25 FYFFES NORTH AMERICA INC., a Florida
26 corporation, MARSHALLS OF MA, INC., a
27 Massachusetts corporation, and DOES 1
28 through 100, inclusive,

Defendants.

Case No. RG21085428

[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") and Fyffes North America Inc. ("Defendant" or "Fyffes") with EHA and Fyffes each
5 individually referred to as a "Party" and collectively referred to as the "Parties."

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 EHA alleges that Fyffes manufactures, imports, sells and/or distribute for sale plantain products
16 that contain acrylamide. EHA further alleges that Fyffes does so without providing a sufficient health
17 hazard warning as required by Proposition 65 and related Regulations. Pursuant to Proposition 65,
18 acrylamide is listed as a chemical known to cause cancer, birth defects and other reproductive harm.

19 **1.5 Notices of Violation**

20 On October 20, 2020, EHA served Fyffes, Marshalls of MA, Inc. ("Marshalls"), 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.* ("Initial Notice"). The Initial
23 Notice alleged that Fyffes and Marshalls had violated Proposition 65 by failing to sufficiently warn
24 consumers in California of the health hazards associated with exposures to acrylamide contained in
25 Turbana Plantain Chips Sweet.

26 On March 27, 2021, EHA served Fyffes, Marshalls, the California Attorney General, and all
27 other required public enforcement agencies with a 60-Day Notice of Violation of California Health and
28 Safety Code section 25249.6 *et seq.* ("Amended Notice;" collectively, the Initial Notice and the

1 Amended Notice referred to as the "Notices"). The Amended Notice alleged that Fyffes and Marshalls
2 had violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards
3 associated with exposures to acrylamide contained in all Turbana plantain chips.

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

6 **1.6 Product Description**

7 The products covered by this Consent Judgment are all Turbana plantain chips manufactured,
8 distributed, or processed by Fyffes that allegedly contain acrylamide and are imported, sold, shipped,
9 delivered and/or distributed for sale to consumers in California by Releasees (as defined in section
10 4.1), whether sold under the Turbana label or under a private label ("Products").

11 **1.7 State of the Pleadings**

12 On January 11, 2021, EHA filed a Complaint against Fyffes and Marshalls for the alleged
13 violations of Health and Safety Code section 25249.6 that are the subject of the Notices
14 ("Complaint").

15 **1.8 No Admission**

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

24 **1.9 Jurisdiction**

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

1 **1.10 Effective Date and Compliance Date**

2 For purposes of this Consent Judgment, the term “Effective Date” means the date on which the
3 Court grants the motion for approval of this Consent Judgment, as discussed in Section 5. The
4 Compliance Date is the date that is sixty (60) days after the Effective Date.

5 **2. INJUNCTIVE RELIEF: REFORMULATION OF PRODUCTS**

6 **2.1** Except as otherwise provided herein, any Products that are manufactured by Fyffes on
7 and after the Compliance Date that Fyffes sells in California or distributes for sale in California shall
8 not exceed 330 parts per billion (“ppb”) for acrylamide resulting from the average of five (5) tests
9 applied to samples of different Turbana plantain chip flavors. Compliance with this average limit would
10 be controlled annually, using the FDA method acrylamide Rev2003 - LC-MS-MS (Liquid
11 Chromatograph-Mass Spectrometry) test method, for the period of one year. As used in this Section 2,
12 “distributed for sale in California” means to directly ship Products into California or to sell Products
13 to a distributor Fyffes know will sell Products in California.

14 **2.2 Warnings**

15 **2.2.1** If Fyffes sells Products that contain acrylamide exceeding 330 ppb, as determined by
16 the test procedure pursuant to Section 2.1, Products may be sold in California with one of the following
17 warning statements:

18 **Option 1:**

19 **WARNING:** This product can expose you to Acrylamide,
20 which is known to the State of California to cause cancer,
21 birth defects or other reproductive harm. For more
information go to www.P65Warnings.ca.gov.

22 **Option 2:**

23 **WARNING:** Cancer and Reproductive Harm –
24 www.P65Warnings.cs.gov

25 The warning in Option 2 may only be used if the warning appears on the product container or
26 labeling. The word “**WARNING**” shall be displayed in all capital letters and bold print. This warning
27 statement shall be prominently displayed on the Products, on the packing of the Products, or on a
28 placard, shelf tag, 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

1 an ordinary individual prior to sale. If the warning statement is displayed on the Products' label, it must
2 be set off from other surrounding information in a box.

3 **2.2.2** The warning requirements set forth herein are imposed pursuant to the terms of this and
4 are recognized by the Parties as not being the exclusive manner of providing a warning for the Covered
5 Products. Warnings may be provided as specified in the Proposition 65 regulations for food in effect
6 as of the Effective Date (Title 27, California Code of Regulations, section 25601, *et seq.*) or as such
7 regulations may be amended in the future, or pursuant to a settlement agreement or consent judgment
8 involving acrylamide. The same warning shall be posted on any websites where the Product is sold in
9 California.

10 **3. MONETARY SETTLEMENT TERMS**

11 **3.1 Settlement Amount**

12 Fyffes shall pay fifty thousand dollars (\$50,000.00) in settlement and total satisfaction of all
13 the claims referred to in the Notices, the Complaint, and this Consent Judgment. This includes civil
14 penalties in the amount of five thousand dollars (\$5,000.00) pursuant to Health and Safety Code section
15 25249.7(b) and attorney's fees and costs in the amount of forty-five thousand dollars (\$45,000.00)
16 pursuant to Code of Civil Procedure section 1021.5. Fyffes' obligation to pay is contingent on the
17 court's approval of this Consent Judgment.

18 **3.2 Civil Penalty**

19 The portion of the settlement attributable to civil penalties shall be allocated according to Health
20 and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty three
21 thousand seven hundred and fifty dollars (\$3,750), paid to the California Office of Environmental
22 Health Hazard Assessment ("OEHHA"), and the remaining twenty-five percent (25%) of the penalty,
23 one thousand two hundred and fifty dollars (\$1,250), paid to EHA individually. These payments will
24 be sent to the below addresses on or before thirty (30) days of the Effective Date.

25 All payments owed to EHA shall be delivered to the following address by a check made payable
26 to Environmental Health Advocates:

27 Environmental Health Advocates
28 225 Broadway, Suite 1900
San Diego, CA 92101

1 All payments owed to OEHHHA (EIN: 68-0284486) shall be delivered directly to OEHHHA by a
2 check made payable to Office of Environmental Health Hazard Assessment (Memo Line "Prop 65
3 Penalties") at the following addresses:

4 For U.S. Postal Delivery:

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

10 For Federal Express Delivery:

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

16 Fyffes agrees to provide EHA's counsel with a copy of the check payable to OEHHHA,
17 simultaneous with its penalty payment to EHA.

18 EHA and its counsel will provide completed W-9s, or other required tax documents, to Fyffe,
19 as a condition of Fyffe making any payment, including payment of the penalty to EHA. Relevant
20 information is set out below:

- 21 • "Entorno Law, LLP" (EIN: 86-1826351) at the address provided in Section 3.2(a)(i);
- 22 • "Office of Environmental Health Hazard Assessment" (EIN: 68-0284486) 1001 I Street,
23 Sacramento, CA 95814.

24 **3.3 Attorney's Fees and Costs**

25 The portion of the settlement attributable to attorney's fees and costs, forty-five thousand
26 dollars (\$45,000), shall be paid to EHA's counsel, who are entitled to attorney's fees and costs incurred
27 by it in this action, including but not limited to investigating potential violations, bringing this matter
28 to Fyffes' attention, as well as litigating and negotiating a settlement in the public interest.

Fyffes shall provide its payment to EHA's counsel in three (3) monthly payments starting within
thirty (30) days of the Effective Date and continuing thereafter for two (2) months. The first two
installments shall each be in the amount of seventeen thousand five hundred dollars (\$17,500.00),

1 payable to Entorno Law, LLP. The third installment in the amount of ten thousand dollars (\$10,000),
2 payable to Entorno Law, LLP. For example, if the Effective Date is June 1st, Fyffes' first payment
3 would be due July 1st, and their next payment would be due August 1st, etc. If the first two monthly
4 installments each of seventeen thousand five hundred dollars (\$17,500.00) are paid on time, then the
5 third monthly payment of ten thousand dollars (\$10,000.00) will be waived by EHA and EHA's
6 counsel. The address is:

7 Noam Glick
8 Entorno Law, LLP
225 Broadway, 19th Floor
9 San Diego, CA 92101

10 **3.4 Timing**

11 The first installment of the above-mentioned payments will be sent on or before thirty (30)
12 days of the Effective Date; the second installment of the payments will be sent on or before sixty (60)
13 days of the Effective Date; and the third installment, unless waived pursuant to Section 3.3, will be
14 sent within ninety (90) days of the Effective Date. If the deadline is on Sunday or holiday, it will be
15 extended until the next day that is not a holiday.

16 **4. CLAIMS COVERED AND RELEASED**

17 **4.1 EHA's Public Release of Proposition 65 Claims**

18 For any claim or violation arising under Proposition 65 alleging a failure to warn about
19 exposures to acrylamide from Products manufactured, imported, sold, or distributed by Fyffes prior to
20 the Effective Date, EHA, acting for the general public, releases Fyffes of any and all liability arising
21 under Proposition 65. This includes Fyffes' owners, parents, subsidiaries, suppliers, affiliated entities
22 under common ownership, its directors, officers, agents, employees, attorneys, and each entity to whom
23 Fyffes directly or indirectly distributes or sells Products, including but not limited to downstream
24 distributors, wholesales, customers, retailers, including but not limited to Marshalls, its parents,
25 subsidiaries, and affiliates, franchisees, cooperative members and licensees (collectively, the
26 "Releasees"). Releasees include Fyffes, Marshalls, and each of their parents, and all subsidiaries and
27
28

1 affiliates thereof and their respective employees, agents, and assigns that sell Fyffes' Products.
2 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with
3 respect to the alleged or actual failure to warn about exposures to acrylamide from Products
4 manufactured, imported, sold, and/or distributed by Fyffes after the Effective Date. This Consent
5 Judgment is a full, final and binding resolution of all claims that were or could have been asserted
6 against Fyffes and/or Releasees, whether known or unknown, for failure to provide warnings for
7 alleged exposure to acrylamide contained in Products.
8

9 **4.2 EHA's Individual Release of Claims**

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

18 **4.3 Fyffes' Release of EHA**

19 Fyffes on its own behalf, , hereby waives any and all claims against EHA and its attorneys and
20 other representatives, for any and all actions taken or statements made by EHA and its attorneys and
21 other representatives, whether in the course of investigating claims, otherwise seeking to enforce
22 Proposition 65 against them, concerning or relating to the subject matter of this action.
23

24 **4.4 Mutual Release of Known and Unknown Claims**

25 The Parties certify that they have read the following provision of California Civil Code Section
26 1542:

27 **A general release does not extend to claims that the creditor or**
28 **releasing party does not know or suspect to exist in his or her favor at**
the time of executing the release and that, if known by him or her,

1 **would have materially affected his or her settlement with the debtor or**
2 **released party.**

3 The Parties expressly waive and relinquish all rights and benefits which they may have under
4 Section 1542 of the Civil Code to the full extent such provisions may lawfully be waived. Each Party
5 hereto acknowledges that they may hereafter discover facts different from or in addition to those which
6 they now know or believe to be true with respect to the claims, demands, debts, liabilities, accounts,
7 obligations, and causes of action of every kind so released, and each agrees that the release so given
8 shall be and remain in effect as full and complete releases of notwithstanding the discovery of any such
9 new, different or additional facts.

10 **5. COURT APPROVAL**

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

14 **6. SEVERABILITY**

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

17 **7. GOVERNING LAW**

18 The terms of this Consent Judgment shall be governed by the laws of the state of California as
19 applied within the state of California. In the event that Proposition 65 is repealed, or is otherwise
20 rendered inapplicable for any reason, including but not limited to changes in Proposition 65, the
21 implementing regulations, the law, and/or any injunctive relief, and/or wherein warnings for
22 acrylamide are determined not to be required under Proposition 65 or acrylamide is subject to a safe
23 harbor level higher than 330 ppb, Fyffes may provide written notice to EHA of any asserted change,
24 and shall have no further injunctive obligations pursuant to this Consent Judgment with respect to, and
25 to the extent that, the Products are so affected.

26 **8. NOTICE**

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

If to Defendants:

Keith J. Wesley
Lori Sambol Brody
Brown George Ross O'Brien Annaguey & Ellis LLP
2121 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
kwesley@bgrfirm.com
lbrody@bgrfirm.com

If to EHA:

Noam Glick
Entorno Law, LLP
225 Broadway, 19th Floor
San Diego, CA 92101
noam@glicklawgroup.com

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

9. COUNTERPARTS; DIGITAL SIGNATURES

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

10. POST EXECUTION ACTIVITIES

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

11. MODIFICATION

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

1 **12. 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 **13. 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, through their counsel, shall meet and confer in person, or
7 by telephone, and/or in writing and endeavor to resolve the dispute in an amicable manner. No action
8 or motion may be filed in the absence of such a good faith attempt to resolve the dispute beforehand.

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1 **14. ENTIRE AGREEMENT**

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

7
8 **AGREED TO:**

9 Date: June 4, 2021

10
11 By: 

12 ENVIRONMENTAL HEALTH
13 ADVOCATES, INC.

AGREED TO:

14 Date: June 7, 2021

15 By: 

16 FYFFES NORTH AMERICA INC.

17 **IT IS SO ORDERED.**

18 Date: _____

19 _____
20 JUDGE OF THE SUPERIOR COURT
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