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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 ADVOCATES,
22 INC.,

23 Plaintiff,

24 v.

25 OSEM USA, INC., *et al.*,

26 Defendants.

Case No.: RG21088650

[PROPOSED] CONSENT JUDGMENT AS
TO OSEM USA, INC.

1 **1. INTRODUCTION**

2 **1.1 Parties**

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

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Defendant employs ten or more individuals and is a "person in the course of doing business"
12 for 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 Defendant manufactures, imports, sells, and distributes for sale in California,
16 Bissli BBQ snacks that contain Acrylamide. EHA further alleges that Defendant has not provided
17 warnings under Proposition 65 for such products. Pursuant to Proposition 65, Acrylamide is listed as
18 a chemical known to cause cancer and reproductive harm. Osem denies that warnings are required
19 under Proposition 65 for any exposures to acrylamide in the Products, and Osem maintains that it has
20 complied with all applicable federal and state laws, including but not limited to Proposition 65.

21 **1.5 Product Description**

22 For purposes of this Consent Judgment, the "Product" or "Products" are defined as Bissli BBQ
23 Flavored Wheat Snacks that are manufactured, imported, sold, or distributed for sale in California by
24 Defendant.

25 **1.6 Notice of Violation**

26 On November 12, 2020 EHA served Defendant Osem, Ralphs Grocery Company, the
27 California Attorney General, and all other required public enforcement agencies with a 60-Day Notice
28 of Violation of California Health and Safety Code section 25249.6 *et seq.* ("Original Notice"). The

1 Original Notice alleged that Defendant violated Proposition 65 by failing to provide warnings for
2 alleged exposures to acrylamide in the Products.

3 **1.7 Complaint**

4 On February 11, 2021, EHA filed a Complaint against Defendant for the alleged violations of
5 Health and Safety Code section 25249.6 that are the subject of the Notice ("Complaint").

6 **1.8 No Admission**

7 By stipulating to the entry of this Consent Judgment and agreeing to provide the relief and
8 remedies specified herein, Osem does not admit that it has violated, or threatened to violate, Proposition
9 65 or any other law or legal duty, and Osem does not admit that the chemical acrylamide in food poses
10 any risk to human health.

11 Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,
12 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment
13 be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law.
14 This Section shall not, however, diminish or otherwise affect Defendant's obligations, responsibilities,
15 and duties under this Consent Judgment.

16 **1.9 Jurisdiction**

17 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
18 Court has jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in
19 the County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
20 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

21 **1.10 Effective Date and Compliance Date**

22 For purposes of this Consent Judgment, the term "Effective Date" means the date on which the
23 Court enters this Consent Judgment, as discussed in Section 5. The Compliance Date is the date that
24 is nine (9) months after the Effective Date.
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1 **2. INJUNCTIVE RELIEF**

2 **2.1** Any Products that are manufactured or purchased by Defendant on and after the
3 Compliance Date that it thereafter sells in California or distributes for sale in California shall either
4 (1) not exceed 350 parts per billion ("ppb") acrylamide, as set forth in Section 2.2 ("Acrylamide
5 Limit") or (2) comply with the warning requirements of Section 2.3.

6 **2.1.1.** As used in this Section 2.1, distribution for sale in California refers to directly
7 shipping a Product into California or to sell a Product to a distributor that Defendant knows will sell
8 the Product in California.

9 **2.2 Testing**

10 (a) Compliance with the 350 ppb acrylamide limit shall be determined using LC-MS/MS
11 (Liquid Chromatograph-Mass Spectrometry), GC/MS/MS (Gas Chromatography/Mass
12 Spectrometry), or any other testing method agreed upon by the Parties. Any testing for purposes of
13 Section 2.1 shall be performed by any laboratory accredited by the State of California, a federal
14 agency, or a national or international accrediting organization.

15 (b) The Acrylamide Limit is determined by randomly selecting and testing (over no less
16 than a ten-day period), and averaging the concentration result of, five samples from five lots (or from
17 as many lots as are then available for testing if there are fewer than five) of Products produced at
18 locations that supply such Products to California ("Sampling Data"). The mean and standard deviation
19 shall be calculated using the Sampling Data. Any data points that are more than three standard
20 deviations outside the mean shall be discarded once, and the mean and standard deviation recalculated
21 using the remaining data points. The arithmetic mean determined in accordance with this procedure
22 shall be used to measure compliance with the Acrylamide Limit.

23 **2.3 Warnings**

24 If Defendant provides warnings under Section 2.1, Products may be sold in California with one
25 of the following warning statements:

26 **Option 1:**

27 **WARNING:** Consuming this product can expose you to chemicals including acrylamide,
28 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.

1 **Option 2:**

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

3 The warning in Option 2 may be used only if the warning appears on the product container or
4 labeling. Terms in bracketing are optional. The word “**WARNING**” shall be displayed in all capital
5 letters and bold print. This warning statement shall be prominently displayed on the Product, on the
6 packaging of the Product, or on a placard, shelf tag, or sign, provided that the statement is displayed
7 with such conspicuousness, as compared with other words, statements, or designs as to render it likely
8 to be read and understood by an ordinary individual prior to sale. If the warning statement is displayed
9 on the Product’s label, it must be set off from other surrounding information and enclosed in a text
10 box. If the warning statement is displayed on a placard, shelf tag, or sign where the Product is offered
11 for sale, the warning placard or sign must enable an ordinary individual to easily determine which
12 Products the warning applies to, and to differentiate between the Products and other products to which
13 the warning statement does not apply. For sales by Defendant on the internet or by catalog where the
14 consumer is not physically present, the warning statement shall be displayed in such a manner that it
15 is likely to be read and understood by an ordinary individual prior to the authorization of or actual
16 payment.

17 **2.4 Grace Period for Existing Inventory of Products**

18 Notwithstanding anything else in this Consent Judgment, the Products that are manufactured
19 prior to the Compliance Date shall be subject to release of liability pursuant to this Consent Judgment,
20 without regard to when such Products were, or are in the future, distributed or sold to customers. As a
21 result, the obligation of Osem, or any Releasees (if applicable), do not apply to these Products
22 manufactured on or prior to the Compliance Date.

23 **3. MONETARY SETTLEMENT TERMS**

24 **3.1 Settlement Amount**

25 As provided in this Section 3, Defendant shall pay a total settlement amount of fifty thousand
26 dollars (\$50,000) in settlement and total satisfaction of all the claims referred to in the Notices, the
27 Complaint, and this Consent Judgment. This includes civil penalties in the amount of five thousand
28 dollars (\$5,000) pursuant to Health and Safety Code section 25249.7(b) and attorney’s fees and costs

1 in the amount of forty-five thousand dollars (\$45,000) pursuant to Code of Civil Procedure section
2 1021.5 and Health and Safety Code section 25249 et seq.

3 **3.2 Civil Penalty**

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

8 All payments owed to EHA, shall be delivered to the following payment address:

9 Samantha Dice
10 Environmental Health Advocates, Inc.
11 225 Broadway, Suite 2100
12 San Diego, CA 92101

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

15 For United States Postal Service Delivery:

16 Mike Gyurics
17 Fiscal Operations Branch Chief
18 Office of Environmental Health Hazard Assessment
19 P.O. Box 4010
20 Sacramento, CA 95812-4010

21 For Non-United States Postal Service Delivery:

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

27 Osem agrees to provide EHA's counsel with a copy of the check payable to OEHHA
28 simultaneous with its penalty payment to EHA.

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

- "Glick Law Group" (EIN: 47-1838518) at address provided in Section 3.3;
- "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.

3.3 Attorney's Fees and Costs

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

Defendant shall provide its payment to EHA's counsel in two payments, the first for \$35,000 ("First Payment") and the second for \$10,000 ("Second Payment"). Each payment shall be payable in two checks, divided equally, payable to Glick Law Group, PC and Nicholas & Tomasevic, respectively. The addresses for these two entities are:

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

Craig Nicholas
Nicholas & Tomasevic, LLP
225 Broadway, 19th Floor
San Diego, CA 92101

3.4 Timing

The First Payment above for \$35,000 (\$17,500 to each firm) shall be delivered within thirty (30) days of the Effective Date. The Second Payment above for \$10,000 (\$5,000 to each firm) shall be delivered within sixty (60) days of the Effective date. However, if the First Payment is timely made, the Second Payment shall be waived by EHA and its counsel. The civil penalty payment required under Section 3.2 shall be delivered within thirty (30) days of the Effective Date.

4. CLAIMS COVERED AND RELEASED

4.1 EHA's Public Release of Proposition 65 Claims

This Consent Judgment is a full, final, and binding resolution between, on the one hand, EHA, on behalf of itself and its attorneys, investigators, agents, heirs, and assigns (collectively referred to as

1 "EHA Releasors") and on behalf of the public in the public interest, and, on the other hand, Osem and
2 its parents, subsidiaries, affiliated entities under common ownership, its directors, officers, principals,
3 agents, employees, attorneys, insurers, accountants, predecessors, successors, and assigns ("Defendant
4 Entities"), each entity to whom Defendant directly or indirectly distributes, ships, or sells the Products
5 including but not limited to downstream distributors, wholesalers, customers, and retailers (including
6 but not limited to Ralphs Grocery Company), franchisees, franchisors, cooperative members,
7 suppliers, licensees, and licensors, and all of the foregoing entities' owners, directors, officers, agents,
8 principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors, and
9 assigns (collectively referred to as the "Releasees"), of all claims, actions, causes of action (in law or
10 in equity), suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, expenses,
11 and fees (including, but not limited to, investigation fees, expert fees, and attorney's fees), and
12 expenses (collectively, "Claims") that have been or could have been asserted under Proposition 65 for
13 any exposures to acrylamide from the Products manufactured, purchased, distributed, or sold by
14 Defendant before the Compliance Date. Compliance with the terms of this Consent Judgment
15 constitutes compliance with Proposition 65 with respect to any exposures to acrylamide from Products
16 manufactured, purchased, sold, or distributed by Defendant on and after the Compliance Date.

17 **4.2 EHA's Individual Release of Claims**

18 EHA, in its individual capacity, on behalf of itself and the EHA Releasors, also waives all
19 rights to institute or participate in, directly or indirectly, any form of legal action, and discharges and
20 releases all Claims as to all Releasees under Proposition 65 or any statutory or common law from the
21 alleged failure to provide warnings for any exposures to acrylamide, or for causing any exposures to
22 acrylamide, in the Products manufactured, purchased, distributed, or sold by Defendant. The release
23 in this Section 4.2 is effective as a full and final accord and satisfaction, as a bar to all actions, causes
24 of action, obligations, costs, expenses, attorney's fees, damages, losses, claims, liabilities, and
25 demands by EHA of any nature, character or kind, whether known or unknown, or suspected or
26 unsuspected. EHA acknowledges that it is familiar with Section 1542 of the California Civil Code,
27 which provides as follows:
28

1 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
2 THAT THE CREDITOR OR RELEASING PARTY DOES NOT
3 KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT
4 THE TIME OF EXECUTING THE RELEASE AND THAT, IF
5 KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY
6 AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR
7 OR RELEASED PARTY.

8 EHA understands and acknowledges the significance and consequence of this waiver of California
9 Civil Code section 1542.

10 **4.3 Defendant's Release of EHA**

11 Defendant, on its own behalf, and on behalf of Releasees as well as its past and current agents,
12 representatives, attorneys, successors, and assignees, hereby waives any and all claims against EHA
13 and its attorneys and other representatives, for any and all actions taken or statements made by EHA
14 and its attorneys and other representatives, whether in the course of investigating claims, otherwise
15 seeking to enforce Proposition 65 against it, in this matter or with respect to the Products.

16 **5. COURT APPROVAL**

17 This Consent Judgment is not effective until it is approved and entered by the Court and shall
18 be null and void if it is not approved and entered by the Court within six months after it has been fully
19 submitted to the Court by the Parties, or by such additional time as the Parties may agree to in writing.

20 **6. SEVERABILITY**

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

24 **7. GOVERNING LAW**

25 The terms of this Consent Judgment shall be governed by the laws of the state of California
26 and apply within the state of California.

27 **8. NOTICE**

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

1 For Defendant:

2 Sarah Esmaili
3 Arnold & Porter
4 Three Embarcadero Center, 10th Fl
San Francisco, CA 94111

For EHA:

Noam Glick
Glick Law Group, PC
225 Broadway, STE 1900
San Diego, CA 92101

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

7 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

11 **10. POST EXECUTION ACTIVITIES**

12 **10.1** EHA agrees to comply with the reporting form requirements referenced in Health and
13 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
14 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement,
15 which motion EHA shall draft and file. In furtherance of obtaining such approval, the Parties agree to
16 mutually employ their best efforts, including those of their counsel, to support the entry of this
17 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
18 purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for
19 approval, responding to any objection that any third-party may make, and appearing at the hearing
20 before the Court if so requested.

21 **10.2** Within ten (10) days of the Effective Date, EHA shall file a request for dismissal of
22 this action as to all remaining defendants.

23 **11. ENFORCEMENT**

24 Prior to bringing any motion or order to show cause to enforce the terms of this Consent
25 Judgment, a Party seeking to enforce the Consent Judgment shall provide the other Party written
26 notice of the alleged violation. The Parties shall meet and confer in an effort to try to reach
27 agreement on an appropriate cure for the alleged violation. EHA shall not bring an enforcement
28

1 action or institute a judicial proceeding if Osem demonstrates it has complied with the requirements
2 of Section 2. Osem is entitled to designate such information as confidential.

3 In the event that meet and confer efforts are unsuccessful, the Party alleging a violation may
4 initiate a judicial proceeding to enforce this Consent Judgment no earlier than 60 days after issuing
5 the written notice specified in Section 11. In the event that a Party initiates such a judicial proceeding,
6 the prevailing Party shall be entitled to recover its reasonable attorneys' fees and costs.

7 **12. MODIFICATION**

8 **12.1 Modification.** This Consent Judgment may be modified only by: (i) a written
9 agreement of the Parties and entry of a modified consent judgment thereon by the Court; (ii) a
10 successful motion or application of any Party, and the entry of a modified consent judgment thereon
11 by the Court, or (iii) as otherwise provided in Section 12 below. Any modifications made to this
12 Consent Judgment pursuant to this Paragraph 12 shall have no effect on the Osem's financial
13 obligations under this Consent Judgment.

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

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

24 **12.4 Other Court Decisions.** If there is a final judgment by a court based on a determination
25 that warnings for acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide
26 exposures are preempted or otherwise unlawful or unconstitutional, or if there is a final preliminary
27 injunction issued by a court on the basis of a determination of a likelihood of such preemption or
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1 unconstitutionality, then the Consent Judgment may be modified to conform to such ruling in order to
2 avoid unfair, inconsistent, or anti-competitive results.

3 **12.5. Federal Agency Action and Preemption.** If a court of competent jurisdiction or an
4 agency of the federal government, including, but not limited to, the U.S. Food and Drug
5 Administration, states through any guidance, regulation or legally binding act that federal law has
6 preemptive effect on any of the requirements of this Consent Judgment, then this Consent Judgment
7 may be modified in accordance with the procedure for noticed motions set forth in Section 12.1 to bring
8 it into compliance with or avoid conflict with federal law.

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

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

19 **12.8** Any modifications made to this Consent Judgment pursuant to this Paragraph 12 shall
20 have no effect on the Osem's financial obligations under this Consent Judgment.

21 **13. RETENTION OF JURISDICTION**

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

25 **12. AUTHORIZATION**

26 The undersigned are authorized to execute this Consent Judgment and acknowledge that they
27 have read, understand, and agree to all of the terms and conditions contained herein.
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1 **13. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

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

6 **14. ENTIRE AGREEMENT**

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

12 **AGREED TO:**

13
14 Date: August 5, 2021

15 By: 
16 ENVIRONMENTAL HEALTH
17 ADVOCATES, INC.

12 **AGREED TO BY (DEFENDANT)**

13
14 Date: August 5th 2021
Grez Ingber, CEO

15 By: Alberto Pessan, Legal Counsel
16 OSEM USA, INC.
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