

**GLICK LAW GROUP, PC**

Noam Glick (SBN 251582)  
225 Broadway, Suite 1900  
San Diego, California 92101  
Tel: (619) 382-3400  
Fax: (619) 615-2193  
Email: noam@glicklawgroup.com

**NICHOLAS & TOMASEVIC, LLP**

Craig M. Nicholas (SBN 178444)  
Jake Schulte (SBN 293777)  
225 Broadway, 19<sup>th</sup> Floor  
San Diego, California 92101  
Tel: (619) 325-0492  
Fax: (619) 325-0496  
Email: [cnicholas@nicholaslaw.org](mailto:cnicholas@nicholaslaw.org)  
Email: [jschulte@nicholaslaw.org](mailto:jschulte@nicholaslaw.org)

Attorneys for Plaintiff  
Environmental Health Advocates, Inc.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA**

ENVIRONMENTAL HEALTH ADVOCATES,  
INC.,

Plaintiff,

v.

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

Defendants.

Case No.: RG21088650

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

# **1. INTRODUCTION**

## **1.1 Parties**

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

## **1.2 Plaintiff**

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

## **1.3 Defendant**

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

## **1.4 General Allegations**

EHA alleges that Defendant manufactures, imports, sells, and distributes for sale in California, Bissli BBQ snacks that contain Acrylamide. EHA further alleges that Defendant has not provided warnings under Proposition 65 for such products. Pursuant to Proposition 65, Acrylamide is listed as a chemical known to cause cancer and reproductive harm. Osem denies that warnings are required under Proposition 65 for any exposures to acrylamide in the Products, and Osem maintains that it has complied with all applicable federal and state laws, including but not limited to Proposition 65.

## **1.5 Product Description**

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

## **1.6 Notice of Violation**

On November 12, 2020 EHA served Defendant Osem, Ralphs Grocery Company, the California Attorney General, and all other required public enforcement agencies with a 60-Day Notice 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.  
25  
26  
27  
28

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](http://www.P65Warnings.ca.gov/food).

1           **Option 2:**

2           **WARNING:** Cancer [and Reproductive Harm] – [www.P65Warnings.ca.gov/food](http://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, 19<sup>th</sup> 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**

Plaintiff acting on its own behalf and in the public interest releases Osem and its parents, subsidiaries, affiliated entities under common ownership, its directors, officers, principals, agents,

1 employees, attorneys, insurers, accountants, predecessors, successors, and assigns (“Defendant  
2 Entities”), each entity to whom Defendant directly or indirectly distributes, ships, or sells the  
3 Products including but not limited to downstream distributors, wholesalers, customers, and retailers  
4 (including but not limited to Ralphs Grocery Company), franchisees, franchisors, cooperative  
5 members, suppliers, licensees, and licensors, and all of the foregoing entities’ owners, directors,  
6 officers, agents, principals, employees, attorneys, insurers, accountants, representatives, predecessors,  
7 successors, and assigns (collectively referred to as the “Releasees”) from all claims for violations of  
8 Proposition 65 up through the Compliance Date based on exposure to acrylamide from Products as  
9 set forth in the Notice. Compliance with the terms of this Consent Judgment constitutes compliance  
10 with Proposition 65 with respect to exposures to acrylamide from Products as set forth in the Notice.

#### 11 **4.2 EHA’s Individual Release of Claims**

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

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

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

28 ///



1           **4.3     Defendant's Release of EHA**

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

7           **5.     COURT APPROVAL**

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

11          **6.     SEVERABILITY**

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

15          **7.     GOVERNING LAW**

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

18          **8.     NOTICE**

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

22          For Defendant:

23          Sarah Esmaili  
24          Arnold & Porter  
25          Three Embarcadero Center, 10th Fl  
26          San Francisco, CA 94111

22          For EHA:

23          Noam Glick  
24          Glick Law Group, PC  
25          225 Broadway, STE 1900  
26          San Diego, CA 92101

26          Any Party may, from time to time, specify in writing to the other, a change of address to which  
27 all notices and other communications shall be sent.  
28

1     **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

5     **10. POST EXECUTION ACTIVITIES**

6             **10.1**    EHA agrees to comply with the reporting form requirements referenced in Health and  
7     Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety  
8     Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement,  
9     which motion EHA shall draft and file. In furtherance of obtaining such approval, the Parties agree to  
10    mutually employ their best efforts, including those of their counsel, to support the entry of this  
11    agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For  
12    purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion for  
13    approval, responding to any objection that any third-party may make, and appearing at the hearing  
14    before the Court if so requested.

15            **10.2**    Within ten (10) days of the Effective Date, EHA shall file a request for dismissal of  
16    this action as to all remaining defendants.

17    **11. ENFORCEMENT**

18            Prior to bringing any motion or order to show cause to enforce the terms of this Consent  
19    Judgment, a Party seeking to enforce the Consent Judgment shall provide the other Party written  
20    notice of the alleged violation. The Parties shall meet and confer in an effort to try to reach  
21    agreement on an appropriate cure for the alleged violation. EHA shall not bring an enforcement  
22    action or institute a judicial proceeding if Osem demonstrates it has complied with the requirements  
23    of Section 2. Osem is entitled to designate such information as confidential.

24            In the event that meet and confer efforts are unsuccessful, the Party alleging a violation may  
25    initiate a judicial proceeding to enforce this Consent Judgment no earlier than 60 days after issuing  
26    the written notice specified in Section 11. In the event that a Party initiates such a judicial proceeding,  
27    the prevailing Party shall be entitled to recover its reasonable attorneys’ fees and costs.  
28

1 **12. MODIFICATION**

2 **12.1 Modification.** This Consent Judgment may be modified only by: (i) a written  
3 agreement of the Parties and entry of a modified consent judgment thereon by the Court; (ii) a  
4 successful motion or application of any Party, and the entry of a modified consent judgment thereon  
5 by the Court, or (iii) as otherwise provided in Section 12 below. Any modifications made to this  
6 Consent Judgment pursuant to this Paragraph 12 shall have no effect on the Osem's financial  
7 obligations under this Consent Judgment.

8 **12.2 Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment shall  
9 attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the  
10 Consent Judgment.

11 **12.3 Change in Proposition 65.** If Proposition 65 or its implementing regulations  
12 (including but not limited to the published "no significant risk level" for acrylamide set forth at Cal.  
13 Code Regs., tit. 27, section 25705, subdivision (c)(2) or any "alternative risk level" adopted by  
14 regulation or court decision) are changed from their terms as they exist on the date of entry of this  
15 Consent Judgment, or if OEHHA takes some other final regulatory action that determines that  
16 warnings for acrylamide are not required or modifies the standard for warnings for acrylamide, then  
17 Osem may seek to modify this Consent Judgment.

18 **12.4 Other Court Decisions.** If there is a final judgment by a court based on a determination  
19 that warnings for acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide  
20 exposures are preempted or otherwise unlawful or unconstitutional, or if there is a final preliminary  
21 injunction issued by a court on the basis of a determination of a likelihood of such preemption or  
22 unconstitutionality, then the Consent Judgment may be modified to conform to such ruling in order to  
23 avoid unfair, inconsistent, or anti-competitive results.

24 **12.5. Federal Agency Action and Preemption.** If a court of competent jurisdiction or an  
25 agency of the federal government, including, but not limited to, the U.S. Food and Drug  
26 Administration, states through any guidance, regulation or legally binding act that federal law has  
27 preemptive effect on any of the requirements of this Consent Judgment, then this Consent Judgment  
28

1 may be modified in accordance with the procedure for noticed motions set forth in Section 12.1 to bring  
2 it into compliance with or avoid conflict with federal law.

3 **12.6 Scientific Studies.** If an agency of the federal government, including, but not limited  
4 to the U.S. Food and Drug Administration, states through any guidance, regulation, or other legally  
5 binding act, following a review of scientific studies and following public notice and comment, a cancer  
6 potency estimate for acrylamide that equates to a no significant risk level higher than 0.2 micrograms  
7 per day, then Osem shall be entitled to seek a modification of this Consent Judgment.

8 **12.7** Before filing any motion to modify the Consent Judgment, Osem shall provide written  
9 notice to EHA to initiate the meet and confer procedure in Section 12.2. If the Parties do not agree on  
10 the proposed modification during informal meet and confer efforts, Osem may file a motion to modify  
11 the Consent Judgment within sixty (60) days of the date of the written notice that Osem provides to  
12 EHA under this Section 12.

13 **12.8** Any modifications made to this Consent Judgment pursuant to this Paragraph 12 shall  
14 have no effect on the Osem's financial obligations under this Consent Judgment.

15 **13. RETENTION OF JURISDICTION**

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

19 **12. AUTHORIZATION**

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

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


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

27 **14. ENTIRE AGREEMENT**

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

6 **AGREED TO:**

7  
8 Date: August 5, 2021

9 By:   
10 ENVIRONMENTAL HEALTH  
11 ADVOCATES, INC.

**AGREED TO BY (DEFENDANT)**

12  
13 Date: August 5<sup>th</sup>, 2021  
14 Erez Ingber, CEO  
15 By: Alberto Passan, Legal Counsel  
16 OSEM USA, INC. 