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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
24 Plaintiff,
25
26 v.
27
28 DELORI-NUTIFOOD PRODUCTS, INC., a
California corporation, CARDENAS
MARKETS, LLC, a Delaware Corporation,
and DOES 1 through 100, inclusive,

Defendants.

Case No.
[PROPOSED] CONSENT JUDGMENT
(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Environmental Health Advocates, Inc.,
4 (“EHA”), on the one hand, and Delori-Nutifood Products, Inc. (“Defendant” or “Delori-Nutifood”), on
5 the other hand, with EHA and Delori-Nutifood each individually referred to as a “Party” and
6 collectively referred to as the “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendants**

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

15 **1.4 General Allegations**

16 EHA alleges that Delori-Nutifood manufactures, imports, sells, and distributes for sale tostadas
17 that contain acrylamide. EHA further alleges that Delori-Nutifood does so without providing a
18 sufficient health hazard warning as required by Proposition 65 and related Regulations. Pursuant to
19 Proposition 65, acrylamide is listed as a chemical known to cause cancer, birth defects and other
20 reproductive harm.

21 **1.5 Notices of Violation**

22 On November 12, 2020, EHA served Cardenas Markets, LLC (“Cardenas”), the California
23 Attorney General, and all other required public enforcement agencies with a 60-Day Notice of
24 Violation of California Health and Safety Code section 25249.6 *et seq.* (“Notice”). On February 4,
25 2021, the Notice was amended to include Delori-Nutifood as manufacturer. The Notice alleged that
26 Cardenas and Delori-Nutifood had violated Proposition 65 by failing to sufficiently warn consumers
27 in California of the health hazards associated with exposures to acrylamide contained in its Cardenas
28 Tostada Rancherita Corn Tostadas.

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

3 **1.6 Product Description**

4 The products covered by this Consent Judgment are Cardenas Tostada Rancherita Corn
5 Tostadas manufactured or processed by Delori-Nutifood that allegedly contain acrylamide and are
6 imported, sold, shipped, delivered or distributed for sale to consumers in California by Releasees (as
7 defined in section 4.1) (“Products”).

8 **1.7 State of the Pleadings**

9 On March 10, 2021, EHA filed a Complaint against Delori-Nutifood for the alleged violations
10 of Health and Safety Code section 25249.6 that are the subject of the Notice (“Complaint”).

11 **1.8 No Admission**

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

20 **1.9 Jurisdiction**

21 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
22 Court has jurisdiction over Delori-Nutifood as to the allegations in the Complaint, that venue is proper
23 in the County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
24 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

25 **1.10 Effective Date and Compliance Date**

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

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

2 **2.1** Except as otherwise provided herein, any Products that are manufactured by Delori-
3 Nutifood on and after the Compliance Date that Delori-Nutifood sells in California or distributes for
4 sale in California shall not exceed 225 parts per billion (“ppb”) for acrylamide, using tests performed
5 by a laboratory accredited by the State of California, a federal agency, or a nationally recognized
6 accrediting organization, using LC-MS/MS (Liquid Chromatograph-Mass Spectrometry), unless such
7 Products comply with the warning requirements of Section 2.2. As used in this Section 2, “distributed
8 for sale in California” means to directly ship Products into California or to sell Products to a distributor
9 Delori-Nutifood know will sell Products in California.

10 **2.2 Warnings**

11 **2.2.1** If Delori-Nutifood provides warnings under Section 2.1, Products may be sold in
12 California with one of the following warning statements:

13 **Option 1:**

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

17 **Option 2:**

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

19 The warning in Option 2 may only be used if the warning appears on the product container or
20 labeling. The word “**WARNING**” shall be displayed in all capital letters and bold print. This warning
21 statement shall be prominently displayed on the Products, on the packing of the Products, or on a
22 placard, shelf tag, or sign provided that the statement is displayed with such conspicuousness, as
23 compared with other words, statements, or designs as to render it likely to be read and understood by
24 an ordinary individual prior to sale. If the warning statement is displayed on the Products’ label, it must
25 be set off from other surrounding information.

26 **2.2.2** The warning requirements set forth herein are imposed pursuant to the terms of this and
27 are recognized by the Parties as not being the exclusive manner of providing a warning for the Products.
28 Warnings may be provided as specified in the Proposition 65 regulations for food in effect as of the

1 Effective Date (Title 27, California Code of Regulations, section 25601, *et seq.*) or as such regulations
2 may be amended in the future, or pursuant to a settlement agreement or consent judgment involving
3 acrylamide. In addition, Delori-Nutifood may follow the notification procedure set out in Title 27,
4 California Code of Regulations, section 25600.2 or a similar procedure where Delori-Nutifood instructs
5 its distributor or retailer customers to provide warnings for the Products consistent with Section 2.2. The
6 same warning shall be posted on any websites where the Product is sold in California.

7 **3. MONETARY SETTLEMENT TERMS**

8 **3.1 Settlement Amount**

9 Delori-Nutifood shall pay sixty thousand dollars (\$60,000.00) in settlement and total
10 satisfaction of all the claims referred to in the Notice, the Complaint, and this Consent Judgment
11 (“Settlement Amount”). The Settlement Amount includes civil penalties in the amount of seven
12 thousand dollars (\$7,000.00) pursuant to Health and Safety Code section 25249.7(b) and attorney’s
13 fees and costs in the amount of fifty-three thousand dollars (\$53,000.00) pursuant to Code of Civil
14 Procedure section 1021.5. Delori-Nutifood shall pay the Settlement Amount in twelve (12) equal
15 installments of five thousand dollars (\$5,000) each, with the first payment due on or before April 15,
16 2021 and the remaining installments to be paid on or before the fifteenth (15th) day of each month
17 thereafter until the entire Settlement Amount is paid in full. Such settlement payments shall be
18 disbursed as determined by EHA’s attorney.

19 **3.2 Civil Penalty**

20 The portion of the Settlement Amount attributable to civil penalties shall be allocated according
21 to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the
22 penalty paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”), and
23 the remaining twenty-five percent (25%) of the penalty paid to EHA individually.

24 All Settlement Amount payments shall be made to EHA’s attorney, payable to:

25 Entorno Law, LLP Client Trust Account
26 225 Broadway, 19th Floor
27 San Diego, CA 92101
28 (EIN: 86-1826351)

1 All payments owed to EHA and/or OEHHA (EIN: 68-0284486) shall be disbursed to OEHHA
2 (Memo Line "Prop 65 Penalties") and EHA (Memo Line "Prop 65 Penalties") by EHA's attorney.
3 Plaintiff and its counsel will provide completed IRS 1099, W-9, or other tax forms as required to Delori-
4 Nutifood.

5 **3.3 Attorney's Fees and Costs**

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

10 **3.4 Timing**

11 The Settlement Amount payments will be issued as set forth in Section 3.1.

12 **4. CLAIMS COVERED AND RELEASED**

13 **4.1 EHA's Public Release of Proposition 65 Claims**

14 For any claim or violation arising under Proposition 65 alleging a failure to warn about
15 exposures to acrylamide from the Products or related products manufactured, imported, sold, or
16 distributed by Delori-Nutifood prior to the Effective Date, EHA, acting for the general public, releases
17 Delori-Nutifood of any and all liability related thereto. This includes Delori-Nutifood's owners,
18 parents, subsidiaries, affiliated entities under common ownerships, its directors, officers, agents,
19 employees, attorneys, and each entity to whom Delori-Nutifood directly or indirectly distributes or
20 sells the Products, including but not limited to downstream distributors, wholesales, customers, retailers
21 (including Cardenas Markets, LLC, its affiliates and subsidiaries), franchisees, cooperative members
22 and licensees, (collectively, the "Releasees"). Releasees include Defendant, its parent, and all
23 subsidiaries and affiliates thereof and its respective employees, agents, and assigns that sell Delori-
24 Nutifood's Products. Compliance with the terms of this Consent Judgment constitutes compliances
25 with Proposition 65 with respect to the alleged or actual failure to warn about exposures to acrylamide
26 from Products manufactured, imported, sold, or distributed by Delori-Nutifood after the Effective Date.
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1 This Consent Judgment is a full, final and binding resolution of all claims that were or could have been
2 asserted against Delori-Nutifood and/or Releasees for failure to provide warnings for alleged exposure
3 to acrylamide contained in Products.

4 **4.2 EHA's Individual Release of Claims**

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

12 With respect to Sections 4.1 and 4.2 Plaintiff intends that this Consent Judgment is a general
13 release which shall be effective as a bar to any and all claims by Plaintiff against Delori-Nutifood
14 and/or Releasees regarding the allegations in the Complaint. Plaintiff recognizes that it may have some
15 claim, demand, or cause of action against the other, of which Plaintiff is completely unaware and
16 unsuspecting, in which Plaintiff is giving up by execution of this Consent Judgment. Plaintiff intend
17 in executing this Consent Judgment that it will deprive it of such claim, demand or cause of action and
18 prevent it from asserting it against Delori-Nutifood and/or Releasees. In furtherance of this intention,
19 Plaintiff, knowingly and voluntarily, expressly waives any rights or benefits conferred by the
20 provisions of Civil Code section 1542, which provides as follows:
21

22 **"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE**
23 **CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO**
24 **EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE**
25 **RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE**
26 **MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE**
27 **DEBTOR OR RELEASED PARTY."**
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1 **4.3 Delori-Nutifood’s Release of EHA**

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

7
8 **5. COURT APPROVAL**

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

12 **6. SEVERABILITY**

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

17 The terms of this Consent Judgment shall be governed by the laws of the state of California as
18 applied within the state of California. In the event that Proposition 65 is repealed, or is otherwise
19 rendered inapplicable for reasons, including but not limited to changes in the law, then Delori-Nutifood
20 may provide written notice to EHA of any asserted change, and shall have no further injunctive
21 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
22 so affected.

23 **8. NOTICE**

24 Unless otherwise specified herein, all correspondence and notice required by this Consent
25 Judgment shall be in writing and sent by: (1) personal delivery; (2) first-class, registered, or certified
26 mail, return receipt requested; or (3) a recognized overnight courier to the following addresses:
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1 If to Delori-Nutifood:

2 Christopher Gonzalez
3 Leech Tishman Fuscaldo and Lampl
4 200 S. Los Robles Ave., Suite 300
Pasadena, CA 91101

If to EHA:

Noam Glick
Entorno Law, LLP
225 Broadway, 19th Floor
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 notices and other communications shall be sent.

7 **9. COUNTERPARTS; DIGITAL SIGNATURES**

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

11 **10. POST EXECUTION ACTIVITIES**

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

21 **11. MODIFICATION**

22 This Consent Judgment may be modified by: (1) a written agreement of the Parties and entry
23 of a modified consent judgment thereon by the Court; or (2) a successful motion or application of any
24 Party, and the entry of a modified consent judgment thereon by the Court.

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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13. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES

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

[Remainder of page intentionally left blank.]

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.

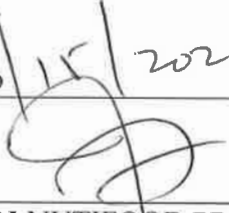
7 **AGREED TO:**

AGREED TO:

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9 Date: 03/12/2021

Date: 3/15/2021

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11 By: 
12 ENVIRONMENTAL HEALTH
ADVOCATES, INC.

By: 
DELORI-NUTIFOOD PRODUCTS, INC.
Jaime Brown, President

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14 **IT IS SO ORDERED.**

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16 Date: _____

JUDGE OF THE SUPERIOR COURT

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