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11

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

14 ENVIRONMENTAL HEALTH
ADVOCATES, INC.,

15 Plaintiff,

16 v.

17 DARE FOODS LIMITED, a Canadian
18 corporation, WHOLE FOODS MARKET
CALIFORNIA, INC., a California corporation,
19 and DOES 1 through 100, inclusive,

20 Defendants.
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Case No. RG21092929

[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” or “Plaintiff”) and Dare Foods Limited (“Defendant” or “Dare Foods”) with EHA and Dare
5 Foods each 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 Dare Foods 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 Dare Foods manufactures, imports, sells, and distributes for sale Lesley Stowe
16 Raincoast Crisps Gingerbread and Spiced Pear Crackers that contain acrylamide. EHA further alleges
17 that Dare Foods does so without providing a sufficient health hazard warning as required by Proposition
18 65 and related Regulations. Pursuant to Proposition 65, acrylamide is listed as a chemical known to
19 cause cancer, birth defects and other reproductive harm.

20 **1.5 Notice of Violation**

21 On or around December 31, 2020, EHA served Dare Foods, Whole Foods Market California,
22 Inc., the California Attorney General, and all other required public enforcement agencies with a 60-
23 Day Notice of Violation of Proposition 65 (“Notice”). The Notice alleged that Dare Foods had violated
24 Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated
25 with exposures to acrylamide contained in Lesley Stowe Raincoast Crisps Gingerbread and Spiced
26 Pear Crackers.

27 No public enforcer has commenced or is otherwise prosecuting an action to enforce the
28 violation alleged in the Notice.

1 provided that the Compliance Date may be extended up to an additional four (4) months by Dare
2 Foods notifying EHA at least thirty (30) days before the Compliance Date that good cause exists for
3 such extension. If EHA believes in good faith that such extension is without basis, EHA shall notify
4 Dare Foods of such determination and the parties shall meet and confer to resolve the dispute.

5 **2. INJUNCTIVE RELIEF**

6 **2.1 Reformulation of Covered Products**

7 Except as otherwise provided herein, any Covered Products that are manufactured by Dare
8 Foods on and after the Compliance Date that Dare Foods sells in California or distributes for sale in
9 California shall not exceed 350 parts per billion (“ppb”) for acrylamide on average of 3 units, and not
10 exceed 490 ppb for any one unit, using tests performed by a laboratory accredited by the State of
11 California, a federal agency, or a nationally recognized accrediting organization, using LC-MS/MS
12 (Liquid Chromatograph-Mass Spectrometry), unless such Covered Products comply with the warning
13 requirements of Section 2.2. As used in this Section 2, “distributed for sale in California” means to
14 directly ship Covered Products into California or to sell Covered Products to a distributor Dare Foods
15 knows will sell Covered Products in California.

16 **2.2 Clear and Reasonable Warnings**

17 For Covered Products that contain acrylamide in a concentration exceeding the 350 ppb level
18 set forth in section 2.1 above, and which are manufactured and packaged for distribution for authorized
19 sale or use in California on or after the Effective Date, Dare Foods shall provide one of the following
20 warning statements.

21 **Option 1:**

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

25 **Option 2:**

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

27 This warning statement shall be prominently displayed on the Covered Products, on the packing
28 of the Covered Products, or on a placard, shelf tag, or sign provided that the statement is displayed with

1 such conspicuousness, as compared with other words, statements, or designs as to render it
2 likely to be read and understood by an ordinary individual prior to sale. If the warning statement
3 is displayed on the Covered Products' label, it must be set off from other surrounding
4 information. The same warning shall be posted on any websites under the exclusive control of
5 Dare Foods where Covered Products are sold into California.

6 **2.3 Sell-Through Period**

7 Notwithstanding anything else in this Consent Judgment, the Covered Products that are
8 manufactured on or prior to the Compliance Date shall be subject to release of liability pursuant
9 to this Consent Judgment, without regard to when such Covered Products were, or are in the
10 future, distributed or sold to customers. As a result, the obligation of Dare Foods, or any
11 Releasees (if applicable), do not apply to these Covered Products manufactured on or prior to
12 the Compliance Date.

13 **3. MONETARY SETTLEMENT TERMS**

14 **3.1 Settlement Amount**

15 Dare Foods shall pay fifty thousand dollars (\$50,000.00) in settlement and total
16 satisfaction of all the claims referred to in the Notice, the Complaint, and this Consent
17 Judgment. This includes civil penalties in the amount of five thousand dollars (\$5,000.00)
18 pursuant to Health and Safety Code section 25249.7(b) and attorneys' fees and costs in the
19 amount of forty-five thousand dollars (\$45,000.00) pursuant to Code of Civil Procedure section
20 1021.5.

21 **3.2 Civil Penalty**

22 The portion of the settlement attributable to civil penalties shall be allocated according to Health
23 and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty. Three
24 thousand seven hundred and fifty dollars (\$3,750.00), paid to the California Office of Environmental
25 Health Hazard Assessment ("OEHHA"), and the remaining twenty-five percent (25%) of the penalty,
26 one thousand two hundred and fifty dollars (\$1,250.00), paid to EHA individually. These payments
27 will be sent to the below addresses within ten (10) days of the Effective Date.

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

1 Environmental Health Advocates
2 225 Broadway, Suite 1900
3 San Diego, CA 92101

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

5 For United States Postal Service Delivery:

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

11 For Federal Express 2-Day Delivery:

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

17 Dare Foods agrees to provide EHA's counsel with a copy of the check payable to OEHHA,
18 simultaneous with its penalty payments to EHA.

19 Plaintiff and its counsel will provide completed IRS 1099, W-9, or other tax forms as required.

20 Relevant information is set out below:

- 21 • "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.2(a)(i);
- 22 • "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section
23 3.2(a)(i); and
- 24 • "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA
25 95814.

26 **3.3 Attorneys' Fees and Costs**

27 The portion of the settlement attributable to attorneys' fees and costs, forty-five thousand
28 dollars (\$45,000.00), shall be paid to EHA's counsel, who are entitled to attorneys' fees and costs
incurred by it in this action, including but not limited to investigating potential violations, bringing this
matter to Dare Foods's attention, as well as litigating and negotiating a settlement in the public interest.

Dare Foods shall provide their payment to EHA's counsel in two installments. The first
installment shall be in the amount of seventeen thousand five hundred dollars (\$17,500.00), payable to

1 Glick Law Group, PC and seventeen thousand five hundred dollars (\$17,500.00), payable to
2 Nicholas & Tomasevic, LLP, respectively. The second installment shall be in the amount of
3 five thousand dollars (\$5,000.00), payable to Glick Law Group, PC, and five thousand dollars
4 (\$5,000.00), payable to Nicholas & Tomasevic, LLP, respectively. If the first installment of
5 thirty-five thousand dollars (\$35,000.00) is paid on time, then the second installment of ten
6 thousand dollars (\$10,000.00) shall be deemed waived by EHA and EHA's counsel. The
7 addresses for these two entities are:

8 Noam Glick
9 Glick Law Group
10 225 Broadway, 19th Floor
11 San Diego, CA 92101

12 Craig Nicholas
13 Nicholas & Tomasevic, LLP
14 225 Broadway, 19th Floor
15 San Diego, CA 92101

16 **3.4 Timing**

17 The civil penalty payment and first installment of the above-mentioned attorney's fee
18 payments shall be sent within sixty (60) days of the Effective Date, but in no event shall the payment
19 be sent after February 1, if the judgment has been entered before that date. If the deadline is on
20 Sunday or holiday, it will be extended until the next day that is not a holiday. Unless waived in
21 accordance with Section 3.3, the second installment shall be sent within thirty (30) days of the first
22 installment payment.

23 **4. CLAIMS COVERED AND RELEASED**

24 **4.1 EHA's Public Release of Proposition 65 Claims**

25 For any claim or violation arising under Proposition 65 alleging a failure to warn about
26 exposures to acrylamide from Covered Products manufactured, imported, sold, or distributed
27 by Dare Foods prior to the Compliance Date, EHA, acting for the general public, releases Dare
28 Foods of any and all liability arising under Proposition 65. This includes Dare Foods's owners,
parents, subsidiaries, affiliated entities under common ownerships, its directors, officers,
agents, employees, attorneys, and each entity to whom Dare Foods directly or indirectly
distributes or sells Covered Products, including but not limited to downstream distributors,

1 wholesales, customers, retailers, franchisees, cooperative members and licensees, (collectively, the
2 “Releasees”). Releasees include defendants, their parents, and all subsidiaries and affiliates thereof and
3 their respective employees, agents, and assigns that sell Dare Foods’s Covered Products. Compliance
4 with the terms of this Consent Judgment constitutes compliances with Proposition 65 with respect to
5 the alleged or actual failure to warn about exposures to acrylamide from Covered Products
6 manufactured, imported, sold, or distributed by Dare Foods after the Compliance Date. This Consent
7 Judgment is a full, final, and binding resolution of all claims under Proposition 65 that were or could
8 have been asserted against Dare Foods and/or Releasees for failure to provide warnings required under
9 Proposition 65 for alleged exposure to acrylamide contained in Covered Products.

10 **4.2 EHA’s Individual Release of Claims**

11 EHA, in its individual capacity, also provides a release to Dare Foods and/or Releasees, which
12 shall be a full and final accord and satisfaction of, as well as a bar to, all actions, causes of action,
13 obligations, costs, expenses, attorneys’ fees, damages, losses, claims, liabilities, and demands of every
14 nature, character, and kind, whether known or unknown, suspected or unsuspected, arising out of
15 alleged or actual exposures to acrylamide in Covered Products manufactured, imported, sold, or
16 distributed by Dare Foods before the Compliance Date.

17 **4.3 Dare Foods’s Release of EHA**

18 Dare Foods on its own behalf, and on behalf of Releasees as well as its past and current agents,
19 representatives, attorneys, successors, and assignees, hereby waives any and all claims against EHA
20 and its attorneys and other representatives, for any and all actions taken or statements made by EHA
21 and its attorneys and other representatives, whether in the course of investigating claims, otherwise
22 seeking to enforce Proposition 65 against them, in this matter or with respect to the Covered Products.

23 **5. COURT APPROVAL**

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

27 **6. SEVERABILITY**

28 Subsequent to the Court’s approval and entry of this Consent Judgment, if any provision is held

1 by a court to be unenforceable, the validity of the remaining provisions shall not be adversely
2 affected.

3 **7. GOVERNING LAW**

4 The terms of this Consent Judgment shall be governed by the laws of the state of
5 California as applied within the state of California. In the event that Proposition 65 is repealed,
6 or is otherwise rendered inapplicable for reasons, including but not limited to changes in the
7 law, then Dare Foods may provide written notice to EHA of any asserted change, and shall have
8 no further injunctive obligations pursuant to this Consent Judgment with respect to, and to the
9 extent that, the Covered Products are so affected.

10 In the event the California Office of Health Hazard Assessment adopts a regulation or
11 safe use determination, or issues an interpretive guideline that exempts Covered Products from
12 meeting the requirements of Proposition 65; or if the Ninth Circuit Court of Appeals upholds
13 the District Court decision to grant a preliminary injunction in *California Chamber of*
14 *Commerce v. Becerra*, No. 2:19-cv-01019-KJM-JDP (E.D. Cal.); or if Proposition 65 is
15 determined to be preempted by federal law or a burden on First Amendment rights with respect
16 to acrylamide in Covered Products or Covered Products substantially similar to Covered
17 Products, then Dare Foods shall be relieved of its obligation to comply with Section 2 herein.

18 **8. NOTICE**

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

23 If to Dare Foods:

24 William Tarantino
25 Morrison & Foerster LLP
26 425 Market Street
27 San Francisco, CA 94105

If to EHA:

Noam Glick
Glick Law Group, PC
225 Broadway, 19th Floor
San Diego, CA 92101

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

3 **9. COUNTERPARTS; DIGITAL SIGNATURES**

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

7 **10. POST EXECUTION ACTIVITIES**

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

17 **11. MODIFICATION**

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

21 **12. AUTHORIZATION**

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

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

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

1 **14. ENTIRE AGREEMENT**

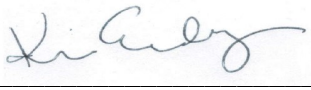
2 This Consent Judgment contains the sole and entire agreement and understanding of the
3 Parties with respect to the entire subject matter herein, and any and all prior discussions,
4 negotiations, commitments, and understandings related hereto. No representations, oral or
5 otherwise, express or implied,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

8 **AGREED TO:**

AGREED TO:

9
10 Date: September 10, 2021

Date: September 9, 2021

11
12 By: 

By: 

13 ENVIRONMENTAL HEALTH
14 ADVOCATES, INC.

DARE FOODS LIMITED

15 **IT IS SO ORDERED.**

16
17
18 Date: _____

JUDGE OF THE SUPERIOR COURT