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16 Attorneys for Plaintiff
17 Environmental Health Advocates, Inc.

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

20 ENVIRONMENTAL HEALTH
21 ADVOCATES, INC.,

22 Plaintiff,

23 v.

24 FRESH GOURMET COMPANY LLC, a
25 Delaware corporation, and DOES 1 through
26 100, inclusive,

27 Defendants.
28

Case No. RG21101462

[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 (“Plaintiff” or “EHA”) and Sugar Foods Corporation, which manufactures food products under several
5 trademarks including but not limited to “Musso’s” and “Fresh Gourmet” (“Defendant,” “SFC,” “FG,”
6 and “Musso’s” are used interchangeably herein), with EHA and SFC each individually referred to as a
7 “Party” and collectively referred to as the “Parties.”

8 **1.2 Plaintiff**

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

13 **1.3 Defendants**

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

17 **1.4 General Allegations**

18 EHA alleges that FG manufactures, imports, sells, and/or distributes for sale Musso’s Toast
19 Italian Crostini that contain acrylamide. EHA further alleges that FG does so without providing a
20 sufficient health hazard warning as required by Proposition 65 and related regulations (Title 27,
21 California Code of Regulations, section 25600, *et seq.*). Pursuant to Proposition 65, acrylamide is
22 listed as a chemical known to cause cancer, birth defects and other reproductive harm.

23 **1.5 Notices of Violation**

24 On December 31, 2020, EHA served Safeway Inc., FG, the California Attorney General, and
25 all other required public enforcement agencies with a 60-Day Notice of Violation of California Health
26 and Safety Code section 25249.6 *et seq.* (“Notice”). The Notice alleged that FG had violated
27 Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated
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1 with exposures to acrylamide contained in its Musso’s Toast product.

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

4 **1.6 Covered Products**

5 The products covered by this Consent Judgment are toasted or baked bread products, including
6 but not limited to Musso’s Toast manufactured or processed by SFC including under its
7 trademark brands (including but not limited to Musso’s) that allegedly contain acrylamide and are
8 imported, sold, shipped, delivered or distributed for sale to consumers in California by Releasees (as
9 defined in Section 4.1) (“Covered Products”).

10 **1.7 State of the Pleadings**

11 Plaintiff filed a complaint against FG on June 7, 2021 for the alleged violations of Proposition
12 65 that are the subject of the Notice in the Superior Court of the State of California for the County of
13 Alameda, Case No. RG21101462 (“Complaint”).

14 FG timely filed an answer to EHA’s Complaint on or about July 30, 2021 responding to the
15 alleged violations of Health and Safety Code section 25249.6 that are subject to the Notice (“Answer”).

16 **1.8 No Admission**

17 FG denies the material factual and legal allegations of the Notice and Complaint. Nothing in
18 this Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue
19 of law, or violation of law, nor shall compliance with this Consent Judgment be construed as an
20 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
21 not, however, diminish or otherwise affect FG’s obligations, responsibilities, and duties under this
22 Consent Judgment.

23 **1.9 Jurisdiction**

24 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
25 Court has jurisdiction over SFC as to the allegations in the Complaint, that venue is proper in the
26 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
27 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.
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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 one hundred and eighty (180) days after the Effective Date
5 (“Initial Compliance Date”), plus an additional ninety (90) days if, despite reasonable best efforts, SFC
6 is unable to achieve reformulation levels set forth in Section 2.1 by the Initial Compliance Date.

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


8 **2.1** Except as otherwise provided herein, any Covered Products that are manufactured by
9 SFC on and after the Compliance Date that SFC sells in California or distributes for sale in California
10 shall not exceed 100 parts per billion (“ppb”) for acrylamide, using tests performed by a laboratory
11 accredited by the State of California, a federal agency, or a nationally recognized accrediting
12 organization, using LC-MS/MS (Liquid Chromatograph-Mass Spectrometry), unless such Covered
13 Products comply with the warning requirements of Section 2.2. As used in this Section 2, “distributed
14 for sale in California” means to directly ship Covered Products into California or to sell Covered
15 Products to a distributor SFC actually knows will sell Covered Products in California. To the extent
16 SFC is unable to achieve the aforementioned acrylamide level by the Compliance Date despite
17 reasonable, good-faith efforts to reformulate, SFC will have the option of filing a motion to modify this
18 Consent Judgment and seek a reformulation level consistent with the “lowest level currently feasible.”

19 **2.2 Warnings**


20 **2.2.1** If SFC provides warnings under Section 2.1, Covered Products may be sold in
21 California with any warning that satisfies the “safe harbor” content and methods for providing a
22 warning that have been determined “clear and reasonable” under Proposition 65 (including under Title
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1 27, California Code of Regulations, section 25600, *et seq.*) on or after the Compliance Date, including,
2 but not limited to, one of the following warning statements:

3 **Option 1:**

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

7 **Option 2:**

8  **WARNING:** Cancer and Reproductive Harm – www.P65Warnings.ca.gov.

9 The warning in Option 2 may only be used if the warning appears on the product container or
10 labeling. The word “**WARNING**” shall be displayed in all capital letters and bold print. This warning
11 statement shall be prominently displayed on the Covered Products, on the packing of the Covered
12 Products, or on a placard, shelf tag, or sign provided that the statement is displayed with such
13 conspicuousness, as compared with other words, statements, or designs as to render it likely to be read
14 and understood by an ordinary individual prior to sale. If a short form warning statement (i.e., Option
15 2) is displayed on the Covered Products’ packaging, it must be in a type size no smaller than the largest
16 type size used for other consumer information on the product. In no case shall a short form warning
17 statement appear in a type size smaller than 6-point type.

18 **2.2.2** The warning requirements set forth herein are imposed pursuant to the terms of this
19 Consent Judgment and are recognized by the Parties as not being the exclusive manner of providing a
20 warning for the Covered Products. Warnings may also be provided as specified in the Proposition 65
21 regulations for food in effect as of the Compliance Date (Title 27, California Code of Regulations,
22 section 25600, *et seq.*) or as such regulations may be amended in the future, or pursuant to a settlement
23 agreement or consent judgment involving acrylamide. In addition, SFC may follow the notification
24 procedure set out in Title 27, California Code of Regulations, section 25600.2 or a similar procedure
25 where SFC instructs its distributor or retailer customers, if any, to provide warnings for the Covered
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1 Products consistent with Section 2.2. The same warning shall be posted on any websites maintained by
2 SFC, if any, facilitating the sale of the Product into California.

3 **2.3** The Covered Products that are manufactured prior to the Effective Date shall be subject to
4 release of liability pursuant to this Consent Judgment, without regard to when such Covered Products
5 were or are in the future distributed or sold to customers.

6 **3. MONETARY SETTLEMENT TERMS**

7 **3.1 Settlement Amount**

8 SFC shall pay fifty thousand dollars (\$50,000.00) in settlement and total satisfaction of all the
9 claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes civil penalties
10 in the amount of five thousand dollars (\$5,000.00) pursuant to Health and Safety Code section
11 25249.7(b) and attorney's fees and costs in the amount of forty-five thousand dollars (\$45,000.00)
12 pursuant to Code of Civil Procedure section 1021.5. SFC's obligation to pay is contingent on the
13 court's approval of this Consent Judgment.

14 **3.2 Civil Penalty**

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

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

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21 Environmental Health Advocates
22 225 Broadway, Suite 1900
San Diego, CA 92101

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

25 For United States Postal Service Delivery:

26 Mike Gyurics
27 Fiscal Operations Branch Chief
28 Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

For Federal Express 2-Day Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

SFC agrees to provide EHA's counsel with a copy of the check payable to OEHHA, simultaneous with its settlement payments 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 the address provided in Section 3.3;
- "Nicholas & Tomasevic, LLP." (EIN: 46-3474065) at the address provided in Section 3.3.
- "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA 95814.

3.3 Attorney's Fees and Costs

The portion of the settlement attributable to attorney's 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 SFC's attention, as well as litigating and negotiating a settlement in the public interest.

SFC shall provide its payment to EHA's counsel in two installments as follows:

- The First Installment shall be in the amount of thirty-five thousand dollars (\$35,000.00), with \$17,500.00 payable to Glick Law Group, PC and \$17,500.00 payable to Nicholas & Tomasevic, LLP, within thirteen (13) days of the Effective Date ("First Installment").
- The Second Installment shall be in the amount of ten thousand dollars (\$10,000.00), with \$5,000.00 payable to Glick Law Group, PC and \$5,000.00 payable to Nicholas & Tomasevic, LLP, within forty (40) days of the Effective Date ("Second Installment"). If the First Installment is timely sent by SFC, then EHA's Counsel agrees to waive the Second Installment.

EHA shall notify SFC if and when the Court grants the motion for approval of this Consent Judgment within seventy-two (72) hours to facilitate timely payment of the First Installment.

1 The address for these two entities are:

2 Noam Glick
3 Glick Law Group
4 225 Broadway, Suite 1900
5 San Diego, CA 92101

6 Craig Nicholas
7 Nicholas & Tomasevic, LLP.
8 225 Broadway, Suite 1900
9 San Diego, CA 92101

10 **4. CLAIMS COVERED AND RELEASED**

11 **4.1 EHA's Public Release of Proposition 65 Claims**

12 Plaintiff acting on its own behalf and in the public interest releases SFC and its parents,
13 subsidiaries, affiliated entities under common ownership, its directors, officers, principals, agents,
14 employees, attorneys, insurers, accountants, predecessors, successors, and assigns ("Defendant
15 Entities"), each entity to whom the Defendant Entities directly or indirectly distribute, ship, or sell the
16 Covered Products including but not limited to downstream distributors, wholesalers, customers, and
17 retailers (including but not limited to Safeway Inc.), franchisees, franchisors, cooperative members,
18 suppliers, licensees, and licensors, and all of the foregoing entities' owners, directors, officers, agents,
19 principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors, and
20 assigns (collectively referred to as the "Releasees") from all claims for violations of Proposition 65 up
21 through the Compliance Date based on exposure to acrylamide from Covered Products. Compliance
22 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
23 exposures to acrylamide from Covered Products.

24 **4.2 EHA's Individual Release of Claims**

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

1 **4.3 SFC’s Release of EHA**

2 SFC 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 them, in this matter or with respect to the Covered Products.

7 **4.4 Mutual Release of Known and Unknown Claims**

8 The Parties certify that they have read the following provisions of California Civil Code
9 Section 1542:

10 A general release does not extend to claims that the creditor or
11 releasing party does not know or suspect to exist in his or her favor
12 at the time of executing the release, and that if known by him or her,
13 would have materially affected his or her settlement with the debtor
14 or released party.

15 The Parties expressly waive and relinquish all rights and benefits which they may have under
16 California Civil Code Section 1542 to the full extent such provisions may lawfully be waived. The
17 Parties acknowledge that this Section 4.4 applies only as between the parties and does not extend to
18 the general public.

19 **5. COURT APPROVAL**

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

23 **6. SEVERABILITY**

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

26 **7. GOVERNING LAW AND CHANGES IN LAW**

27 The terms of this Consent Judgment shall be governed by the laws of the state of California as
28 applied within the state of California. In the event that Proposition 65 is repealed, modified, or is

1 otherwise rendered inapplicable for reasons, including but not limited to changes in the law, then SFC
2 may provide written notice to EHA of any asserted change, and shall have no further injunctive
3 obligations pursuant to this Consent Judgment (including but not limited to those stated in Section 2)
4 with respect to, and to the extent that, the Covered Products are so affected.

5 In the event OEHHA adopts a regulation or safe use determination, or issues an interpretive
6 guideline that exempts Covered Products from meeting the requirements of Proposition 65 or those set
7 forth in this Consent Judgment; or if Proposition 65 is determined by a court of competent jurisdiction
8 to be preempted by federal law or a burden on First Amendment rights with respect to acrylamide in
9 Covered Products or products substantially similar to Covered Products, then SFC shall be relieved of
10 its obligation to comply with Section 2 herein.

11 **8. NOTICE**

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

16 If to SFC:

17 Sherry Jackman
18 Greenberg Glusker Fields Claman &
19 Machtinger LLP
20 2049 Century Park East Suite 2600
Los Angeles, CA 90067
sjackman@greenbergglusker.com

If to EHA:

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

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

23 **9. COUNTERPARTS; DIGITAL SIGNATURES**

24 This Consent Judgment may be executed in counterparts with signature pages transmitted by
25 email, or by facsimile, each of which shall be deemed an original, and all of which, when taken together,
26 shall constitute one and the same document.
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1 **10. POST EXECUTION ACTIVITIES**

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

11 **11. MODIFICATION**

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

15 **12. AUTHORIZATION**

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

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

19 If a dispute arises with respect to either Party’s compliance with the terms of this Consent
20 Judgment entered by the Court, the Parties shall meet and confer in person, or by telephone, and/or in
21 writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be filed
22 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:**

AGREED TO:

9
10 Date: 10/4/2021

Date: 10/1/21

11 By: 
12 ENVIRONMENTAL HEALTH
13 ADVOCATES, INC.

By: 
SUGAR FOODS CORPORATION

14
15
16 **IT IS SO ORDERED.**

17
18 Date: _____

JUDGE OF THE SUPERIOR COURT