

## **SETTLEMENT AGREEMENT**

### **1. INTRODUCTION**

#### **1.1 Parties**

This Settlement Agreement is entered into by and between Environmental Health Advocates, Inc. (“EHA”), on the one hand, and Sun Tropics, Inc. (“Sun Tropics”), on the other hand, with EHA and Sun Tropics each individually referred to as a “Party” and collectively as the “Parties.” EHA is a California corporation and purports to act in the interest of the general public. EHA seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products. Sun Tropics 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, California Health and Safety Code § 25249.6 *et seq.* (“Proposition 65”).

#### **1.2 General Allegations**

EHA alleges that Sun Tropics manufactures, imports, sells, and distributes for sale in California banana chips that expose individuals to acrylamide at levels that require a Proposition 65 warning. Furthermore, EHA alleges Sun Tropics does so without providing a sufficient health hazard warning as required by Proposition 65 and related regulations. Sun Tropics denies the allegations that the Products (as defined below) require a Proposition 65 warning, that Sun Tropics has violated Proposition 65 or any wrongdoing as related the Products and Proposition 65.

#### **1.3 Product Description**

The products covered by this Settlement Agreement are defined as, and expressly limited to, “Sun Tropics Island Saba Banana Chips Salted Caramel,” that allegedly contain acrylamide and that are manufactured, sold or distributed for sale in California by Sun Tropics and Releasees (as defined below) (“Product(s)”).

#### **1.4 Notice of Violation**

On December 31, 2020, EHA served Sun Tropics, Daiso California LLC, the California Attorney General and other requisite public enforcers with a 60-Day Notice of Violation (“Notice”),

alleging that Sun Tropics violated Proposition 65 when it failed to warn consumers in California of the health hazards associated with exposures to acrylamide from Products.

To the best of the Parties' knowledge, no public enforcer has commenced or is diligently prosecuting an action to enforce the violations alleged in the Notice.

### **1.5 No Admission**

Sun Tropics denies the material, factual, and legal allegations in the Notice and maintains that all of the products it sold and/or distributed for sale in California, including the Products, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Sun Tropics of any fact, finding, conclusion, issue of law or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Sun Tropics of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Sun Tropics. This Section shall not, however, diminish or otherwise affect Sun Tropics' obligations, responsibilities, and duties under this Settlement Agreement.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean one hundred and fifty (150) days following the execution of this Settlement Agreement by the Parties.

## **2. INJUNCTIVE RELIEF**

**2.1** Except as otherwise provided herein, any Products that are manufactured by or on behalf of Sun Tropics on and after the Effective Date that Sun Tropics sells in California or distributes for sale in California shall not exceed 281 parts per billion ("ppb") of acrylamide based on an average of up to five samples, using tests performed by a laboratory accredited by the State of California, a federal agency, or a nationally recognized accrediting organization, using LC-MS/MS (Liquid Chromatograph-Mass Spectrometry), unless such Products comply with the warning requirements of Section 2.3. As used in this Section 2, "distributed for sale in California" means to directly ship Products into California or to sell or distribute Products to a distributor or retailer that Sun Tropics knows will sell Products in California.

If, despite using commercially reasonable and good faith efforts, Sun Tropics is unable to meet this reformulation level for the Product by the Effective Date, the parties agree to meet and

confer in good faith to determine if an alternate higher reformulation level is appropriate, consistent with reformulation levels agreed to with similar products and to modify this Settlement Agreement accordingly.

2.2 Compliance with the level set forth in Section 2.1 may be demonstrated by Sun Tropics using the average results of up to five samples of the same Products.

2.3 For Products that contain acrylamide in amounts exceeding the level set forth in Section 2.1, above, and which are manufactured, supplied or distributed for sale in California on or after the Effective Date, Sun Tropics or its retailer shall provide one of the following Proposition 65 warnings, or any warning for acrylamide in foods such as the Products that is deemed compliant with Proposition 65 by the State of California:

- 1) **WARNING:** Consuming this product can expose you to chemicals including Acrylamide, 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).
- 2) **WARNING:** Cancer and Reproductive Harm – [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

The word “**WARNING**” shall be displayed in all capital letters and bold print. This warning statement shall be prominently displayed on the packaging of the Product, or on a placard, shelf tag, or sign provided that the statement is displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual prior to sale. If the warning statement is displayed on the Product’s label, it must be set off in a box from other surrounding information. The same warning shall be posted on any websites where Products are sold into California.

### **2.3 Sell-Through Period**

The injunctive requirements of Section 2 shall not apply to Product that is already in the stream of commerce as of the Effective Date, which Product is expressly subject to the releases provided in Section 4.

### **3. MONETARY SETTLEMENT TERMS**

#### **3.1 Civil Penalty Payment**

Pursuant to Health and Safety Code § 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, within one hundred and fifty (150) days of the date this Settlement Agreement is executed by the Parties, Sun Tropics agrees to pay two thousand and five hundred dollars (\$2,500.00) in civil penalties. The penalty payment will be allocated in accordance with California Health and Safety Code §§ 25249.12(c)(1) & (d), with 75% of the penalty amount paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount retained by EHA. Within fourteen (14) days of the date this Settlement Agreement is executed by the Parties, Sun Tropics shall issue two separate checks for the initial civil penalty payment to (a) “OEHHA” in the amount of one thousand eight hundred and seventy-five dollars (\$1,875) and (b) EHA in the amount of six hundred and twenty-five dollars (\$625).

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

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

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

All penalty payments owed to EHA shall be sent to:

Environmental Health Advocates  
225 Broadway, Suite 2100  
San Diego, CA 92101

### **3.2 Attorney Fees and Costs**

The Parties reached an accord on the compensation due to EHA and its counsel under the private attorney general doctrine and principles of contract law. Under these legal principles, within one hundred and fifty days (150) days of the date this Settlement Agreement is executed by the Parties, Sun Tropics agrees to pay twenty-two thousand and five hundred dollars (\$22,500) to EHA and its counsel for all fees and costs incurred in investigating, bringing this matter to the attention of Sun Tropics, and negotiating a settlement. Sun Tropics' payment shall be delivered in the form of two checks: (1) one check for eleven thousand two hundred and fifty dollars (\$11,250) payable to "Glick Law Group"; and (2) one check for eleven thousand two hundred and fifty dollars (\$11,250) payable to "Nicholas & Tomasevic LLP."

### **3.3 Payment Addresses**

All payments required under this Section shall be delivered as follows:

The Glick Law Group Payment to:

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

The Nicholas & Tomasevic, LLP Payment to:

Craig Nicholas  
Nicholas & Tomasevic, LLP  
225 Broadway, Suite 1900  
San Diego, CA 92101

### **3.4 Tax Documentation**

Sun Tropics agrees to provide a completed IRS 1099 for its payments to, and EHA agrees to provide IRS W-9 forms for each of the payees under this Settlement Agreement. The Parties acknowledge that Sun Tropics cannot and will not issue any settlement payments pursuant to Section 3.1 and 3.2 above until after Sun Tropics receives the requisite W-9 forms from EHA's counsel.

### **3.5 Attorney General Objection**

Should the California Attorney General object to this settlement, then no payment is due from Sun Tropics.

## **4. CLAIMS COVERED AND RELEASED**

### **4.1 EHA's Release of Sun Tropics**

This Settlement Agreement is a full, final, and binding resolution between EHA, on its own behalf and not on behalf of the public, and Sun Tropics and Releasees, as defined below, of any violation of Proposition 65 that was or could have been asserted by EHA, on its own behalf, on behalf of its past and current agents, representatives, attorneys, successors and assignees, against Sun Tropics and each of its respective parents, subsidiaries, affiliated entities under common ownership, directors, officers, members, employees, agents, attorneys, and their predecessors, successors and assignees, each upstream entity from whom the Product was purchased by Sun Tropics, and each entity to whom Sun Tropics directly or indirectly distributed or sold the Product, including, but not limited to, its downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members and licensees, and their successors and assigns (including Daiso California LLC) ("Releasees"), based on the failure to warn about exposures to Acrylamide in the Products manufactured, sold or distributed for sale in California by Sun Tropics before the Effective Date, as alleged in the Notice. Compliance with the terms of this Settlement Agreement constitutes compliance with Proposition 65 with respect to the alleged or actual failure to warn about exposures to acrylamide from Products manufactured, imported, sold, or distributed by Sun Tropics after the Effective Date.

In further consideration of the promises and agreements herein contained, EHA on its own behalf and not on behalf of the public, on behalf of its past and current agents, representatives, attorneys, successors and assignees hereby waives any and all rights it may have to institute or participate in, directly or indirectly, any form of legal action and releases all claims against Sun Tropics its respective parents, subsidiaries, affiliated entities under common ownership, directors, officers, members, employees, agents, attorneys, and their predecessors, successors and assignees, and Releasees including, without limitation, all actions and causes of action, suits, liabilities,

demands, obligations, damages, costs, fines, penalties, losses or expenses including, but not exclusively, investigation fees, expert fees and attorney fees arising under Proposition 65 with respect to the alleged or actual failure to warn about exposures to acrylamide in the Products manufactured, distributed, sold or offered for sale by Sun Tropics, before the Effective Date.

#### **4.2 Sun Tropics' Release of EHA**

Sun Tropics, on its own behalf and on behalf of its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against EHA and its attorneys and other representatives, for any and all actions taken or statements made by EHA and its attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it, in connection with the Products.

#### **4.3 Mutual Release of Known and Unknown Claims**

EHA, on behalf of itself and its agents, attorneys, representatives, successors, and assigns, in its respective individual capacity only and not in its representative capacity, and Sun Tropics, each provide a general release of the other including the Releasees herein which shall be effective as a full and final accord and satisfaction, as a bar to all claims of any nature, character or kind, known or unknown, suspected or unsuspected, arising out of alleged violations of Proposition 65 with respect to the Products. EHA and Sun Tropics each acknowledge that they are each familiar with Section 1542 of the California Civil Code, which provides as follows:

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

EHA and Sun Tropics on behalf of themselves, each of their past and current agents, representatives, attorneys, successors, and assignees expressly waives and relinquishes any and all rights and benefits which it may have under, or which may be conferred on it by the provisions of California Civil Code section 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters. Subject to the above, EHA and Sun Tropics may hereafter

discovery facts other than or different from those it knows to be true with respect to the claims being released. Nevertheless, EHA and Sun Tropics hereby expressly waive and fully and forever settle and release, upon this Settlement Agreement becoming final, any known or unknown, contingent or non-contingent claims related to the claims being released herein, whether or not concealed or hidden, without regard to subsequent discovery or existence of such different or additional facts.

**5. REPRESENTATIONS AND WARRANTIES**

As material and relied upon by Sun Tropics in entering into this Settlement Agreement, EHA individually and EHA's counsel represent and warrant that to the best of their information and belief, they have no knowledge of any claim held by EHA against Sun Tropics that are not released hereby. To the fullest extent permissible under applicable California law, EHA and EHA's counsel represent and warrant that they are aware of no other known clients, potential plaintiffs or entities with claims or alleged claims against Sun Tropics and do not currently intend to bring any other claims against Sun Tropics. This Settlement Agreement is intended to comply with Section 1-500(A) of the California Rules of Professional Conduct and is not intended, nor shall it be construed to, restrict EHA's counsel or any of their attorneys from practicing law.

**6. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. In the event that, after execution of the Settlement Agreement, Proposition 65 is repealed, or is otherwise rendered inapplicable for reasons, including but not limited to changes in the law, then Sun Tropics may provide written notice to EHA of any asserted change, and shall have no further injunctive obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.



7. **NOTICE**

Unless specified herein, all correspondence and notice required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (a) personal delivery; (b) first-class, registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any Party by the other at the following addresses:

For Sun Tropics:

Lauren Michals  
Nixon Peabody LLP  
One Embarcadero Center, 32<sup>nd</sup> Floor  
San Francisco, CA

For EHA:

Jake Schulte  
Nicholas & Tomasevic, LLP  
225 Broadway, Suite 1900  
San Diego, CA 92101

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

8. **COUNTERPARTS; FACSIMILE SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or portable document format (PDF) signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

9. **COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

EHA and its attorneys agree to comply with the reporting form requirements referenced in California Health and Safety Code § 25249.7(f).

10. **MODIFICATION**

This Settlement Agreement may be modified only by written agreement of the Parties or as set out below.

**10.1 Other Environmental Health Advocates Settlements.**

The Parties agree to meet and confer in good faith on a modification of this Settlement Agreement to substitute higher reformulation levels that EHA or its counsel agrees to in a future

settlement agreement or consent judgment applicable to products sufficiently similar to the Products, and EHA agrees not to oppose any such modification except for good cause shown.

## **10.2 Court Decision Regarding Similar Products.**

If a court of competent jurisdiction renders a final judgment that one or more products that are sufficiently similar to the Products do not require a warning for acrylamide under Proposition 65, then the Parties agree to meet and confer in good faith on a modification of this Settlement Agreement to conform to such ruling and EHA agrees not to oppose any such modification except for good cause shown.

## **10.3 Other Court Decisions.**

If a final decision of a court determines that warnings for acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide exposures are unconstitutional, preempted, or otherwise unlawful or unnecessary with respect to products that are similar to the Products, then the Parties agree to meet and confer in good faith to modify this Settlement Agreement to conform to such ruling in order to avoid unfair, inconsistent, or anti-competitive results and EHA agrees not to oppose any such modification except for good cause shown.

Pending final resolution of *California Chamber of Commerce v. Becerra*, United States Dist. Court Eastern District of California Case No. 2:19-cv-0219-KJM-EFB, the warnings required under Section 2.3, *supra*, are not required for the Product, although Sun Tropics will continue to use best efforts to reduce acrylamide below the reformulation level specified in that section. Should the defendant(s) in that action prevail and/ or the preliminary injunction issued on March 30, 2021, in that case be revoked or otherwise lifted, Sun Tropics will have one hundred and twenty (120) days after receiving Notice of that resolution in which to apply the warning specified in Section 2.3, should warnings be necessary, on all Product placed into the stream of commerce after that 120 day period.

#### **10.4 Change in Proposition 65.**

If Proposition 65 or its implementing regulations are changed from their terms as they exist on the date of execution of the Settlement Agreement in a manner that impacts Section 2 above, or if OEHHA or a federal regulatory agency takes some other final regulatory action for products similar to the Products in a manner that impacts reformulation standards, or that determines that warnings for acrylamide are not required or necessary or desired for such products, or that warnings for acrylamide should be provide in a different manner or different wording, then the Parties agree to meet and confer in good faith to modify this Settlement Agreement to conform to such changes and EHA agrees not to oppose any such modification except for good cause shown.

#### **10.5 Scientific Studies.**

If an agency of the federal government, including, but not limited to the U.S. Food and Drug Administration, states through any guidance, regulation, or legally binding act, following a review of scientific studies and following public notice and comment, a cancer potency estimate for acrylamide that equates to a no significant risk level higher than 0.2 micrograms per day, then Sun Tropics shall be entitled to seek a modification of this Settlement Agreement to be relieved of its obligations to meet any requirements of this Settlement Agreement that are inconsistent with such a change and the Parties agree to meet and confer in good faith to modify this Settlement Agreement to conform to such changes and EHA agrees not to oppose any such modification except for good cause shown.

#### **10.6 Federal Agency Action and Preemption.**

If a court of competent jurisdiction or an agency of the federal government, including, but not limited to the U.S. Food and Drug Administration, states through any guidance, regulation, or legally binding act that federal law has preemptive effect on any of the requirements of this Settlement Agreement, then this Settlement Agreement may be modified to bring it into compliance with or avoid conflict with federal law and the Parties agree to meet and confer in good faith to

modify this Settlement Agreement to do so and EHA agrees not to oppose any such modification except for good cause shown.

**10.7** Any Party seeking to modify this Settlement Agreement shall attempt in good faith to meet and confer with the other Party prior to filing an action and/or motion to terminate or modify this Settlement Agreement.

**10.8** Any requested modification pursuant to this Section 10 will have no effect on Sun Tropic's financial obligations set forth in this Settlement Agreement.

**11. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any provision of this Settlement Agreement is held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

**12. AUTHORIZATION**


The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood, and agree to all of the terms and conditions of this Settlement Agreement.

**AGREED TO:**

**AGREED TO:**

Date: May 18, 2021.

Date: June 7, 2021

By:   
ENVIRONMENTAL HEALTH  
ADVOCATES, INC.

By:   
SUN TROPICS, INC.