

1 **GLICK LAW GROUP, P.C.**

2 Noam Glick (SBN 251582)
225 Broadway, Suite 1900
San Diego, California 92101
3 Tel: (619) 382-3400
Fax: (619) 393-0154
4 Email: noam@glicklawgroup.com

5 **NICHOLAS & TOMASEVIC, LLP.**

6 Craig M. Nicholas (SBN 178444)
7 Jake Schulte (SBN 293777)
225 Broadway, Suite 1900
San Diego, California 92101
8 Tel: (619) 325-0492
9 Fax: (619) 325-0496
Email: cnicholas@nicholaslaw.org
Email: jschulte@nicholaslaw.org

10 Attorneys for Plaintiff
Environmental Health Advocates, Inc.

11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

14 ENVIRONMENTAL HEALTH
15 ADVOCATES, INC., a California organization,

16 Plaintiff,

17 v.

18 GEMINI FOOD CORPORATION., a
California corporation, and DOES 1 through
19 100, inclusive,

20 Defendant.

Case No. RG21086502

[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”) and Gemini Food Corporation (“Defendant” or “Gemini”) with EHA and Gemini each
5 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 Gemini employs ten or more individuals and is a “person in the course of doing business” for
12 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 Gemini manufactures, imports, sells, and/or distributes for sale wafers that
16 contain acrylamide. EHA further alleges that Gemini does so without providing a sufficient health
17 hazard warning as required by Proposition 65 and related Regulations. Pursuant to Proposition 65,
18 acrylamide is listed as a chemical known to cause cancer, birth defects and other reproductive harm.

19 **1.5 Notices of Violation**

20 On September 23, 2020, EHA served Gemini Food Corporation, Hunya Foods Co., Lion
21 Supermarket Stores, Inc., and the California Attorney General, and all other required public
22 enforcement agencies with a 60-Day Notice of Violation of California Health and Safety Code
23 section 25249.6 *et seq.* (“Notice”). The Notice alleged that Gemini had violated Proposition 65 by
24 failing to sufficiently warn consumers in California of the health hazards associated with exposures to
25 acrylamide contained in its Chocolate & Peanut Butter Wafer Pies (“Products”).

26 On January 7, 2021, EHA served Gemini Food Corporation, Hunya Foods Co., Ltd., Lion
27 Market Story, LLC, and the California Attorney General, and all other required public enforcement
28 agencies with an Amended 60-Day Notice of Violation of California Health and Safety Code section

1 25249.6 *et seq.* (“Amended Notice”). The Amended Notice corrected the retailer to Lion Market Story,
2 LLC.

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

5 **1.6 Product Description**

6 The products covered by this Consent Judgment are Chocolate & Peanut Butter Wafer Pies
7 manufactured or distributed by Gemini that allegedly contain acrylamide and are imported, sold,
8 shipped, delivered or distributed for sale to consumers in California by Releasees (as defined in
9 section 4.1) (“Products”).

10 **1.7 State of the Pleadings**

11 On *January 22, 2021*, EHA filed a Complaint against Gemini for the alleged violations of
12 Health and Safety Code section 25249.6 that are the subject of the Notice (“Complaint”).

13 On _____, Gemini filed an Answer to EHA’s Complaint responding to the alleged
14 violations of Health and Safety Code section 25249.6 that are the subject of the Notice (“Answer”).

15 **1.8 No Admission**

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

24 **1.9 Jurisdiction**

25 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
26 Court has jurisdiction over Gemini as to the allegations in the Complaint, that venue is proper in the
27 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
28 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

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 sixty (60) days after the Effective Date.

5 **2. INJUNCTIVE RELIEF: REFORMULATION OF PRODUCTS OR WARNING**

6 **2.1** Except as otherwise provided herein, any Products that are manufactured by Gemini on
7 and after the Compliance Date that Gemini sells in California or distributes for sale in California shall
8 not exceed 115 parts per billion (“ppb”) for acrylamide, using tests performed by a laboratory
9 accredited by the State of California, a federal agency, or a nationally recognized accrediting
10 organization, using LC-MS/MS (Liquid Chromatograph-Mass Spectrometry), unless such Products
11 comply with the warning requirements of Section 2.2. As used in this Section 2, “distributed for sale
12 in California” means to directly ship Products into California or to sell Products to a distributor Gemini
13 know will sell Products in California.

14 **2.2 Warnings**

15 **2.2.1** If Gemini provides warnings under Section 2.1, Products may be sold in California with
16 one of the following warning statements:

17 **Option 1:**

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

21 **Option 2:**

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

23 The warning in Option 2 may only be used if the warning appears on the product container or
24 labeling. The word “**WARNING**” shall be displayed in all capital letters and bold print. This warning
25 statement shall be prominently displayed on the Products, on the packing of the Products, or on a
26 placard, shelf tag, or sign provided that the statement is displayed with such conspicuousness, as
27 compared with other words, statements, or designs as to render it likely to be read and understood by
28

1 an ordinary individual prior to sale. If the warning statement is displayed on the Products' label, it must
2 be set off from other surrounding information.

3 **2.2.2** The warning requirements set forth herein are imposed pursuant to the terms of this and
4 are recognized by the Parties as not being the exclusive manner of providing a warning for the Covered
5 Products. Warnings may be provided as specified in the Proposition 65 regulations for food in effect
6 as of the Effective Date (Title 27, California Code of Regulations, section 25601, *et seq.*) or as such
7 regulations may be amended in the future, or pursuant to a settlement agreement or consent judgment
8 involving acrylamide. In addition, Gemini may follow the notification procedure set out in Title 27,
9 California Code of Regulations, section 25600.2 or a similar procedure where Gemini instructs its
10 distributor or retailer customers to provide warnings for the Covered Products consistent with Section
11 2.2. The same warning shall be posted on any websites where the Product is sold in California.

12 **2.3 Products Already In The Stream of Commerce**

13 The injunctive relief (reformulation or warning) set forth in section 2 shall not be required as to
14 any Products that are already in the stream of commerce as of the Effective Date, *i.e.*, products that
15 already left the possession of Gemini, and all such Products are hereby deemed to be exempt from
16 Proposition 65 with respect to acrylamide and addressed in this Consent Judgment.

17 **3. MONETARY SETTLEMENT TERMS**

18 **3.1 Settlement Amount**

19 Gemini shall pay fifty thousand dollars (\$50,000.00) in settlement and total satisfaction of all
20 the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes civil
21 penalties in the amount of five thousand dollars (\$5,000.00) pursuant to Health and Safety Code section
22 25249.7(b) and attorney's fees and costs in the amount of forty-five thousand dollars (\$45,000.00)
23 pursuant to Code of Civil Procedure section 1021.5.

24 **3.2 Civil Penalty**

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

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

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

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

6 For United States Postal Service Delivery:

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

12 For Non-United States Postal Service Delivery:

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

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

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

21 Relevant information is set out below:

- 22 • "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.2(a)(i);
- 23 • "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section 3.2(a)(i);
- 24 and
- 25 • "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA
26 95814.

27 **3.3 Attorney's Fees and Costs**

28 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 Gemini's attention, as well as
litigating and negotiating a settlement in the public interest.

1 Gemini shall provide their payment to EHA’s counsel in two checks, divided equally, payable
2 to Glick Law Group, PC (\$22,500.00) and Nicholas & Tomasevic, LLP (\$22,500.00) respectively. The
3 addresses for these two entities are:

4 Noam Glick
5 Glick Law Group
6 225 Broadway, 19th Floor
7 San Diego, CA 92101

8 Craig Nicholas
9 Nicholas & Tomasevic, LLP
10 225 Broadway, 19th Floor
11 San Diego, CA 92101

12 **3.4 Timing**

13 The above-mentioned checks will be issued within fourteen (14) of the Effective Date.

14 **4. CLAIMS COVERED AND RELEASED**

15 **4.1 EHA’s Public Release of Proposition 65 Claims**

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

1 against Gemini and/or Releasees for failure to provide warnings for alleged exposure to acrylamide
2 contained in Products.

3 **4.2 EHA’s Individual Release of Claims**

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

11 **4.3 Gemini’s Release of EHA**

12 Gemini on its own behalf, and on behalf of Releasees as well as its past and current agents,
13 representatives, attorneys, successors, and assignees, hereby waives any and all claims against EHA
14 and its attorneys and other representatives, for any and all actions taken or statements made by EHA
15 and its attorneys and other representatives, whether in the course of investigating claims, otherwise
16 seeking to enforce Proposition 65 against them, in this matter or with respect to the Products.
17

18 **5. COURT APPROVAL**

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

22 **6. SEVERABILITY**

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

26 **7. GOVERNING 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, or is otherwise

1 rendered inapplicable for reasons, including but not limited to changes in the law, then Gemini may
2 provide written notice to EHA of any asserted change, and shall have no further injunctive obligations
3 pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.
4 However, any change in law shall have no effect on Gemini's financial obligations as contained herein.

5 **8. NOTICE**

6 Unless otherwise specified herein, all correspondence and notice required by this Consent
7 Judgment shall be in writing and sent by: (1) personal delivery; (ii) first-class, registered, or certified
8 mail, return receipt requested; or (iii) a recognized overnight courier to the following addresses:

9 If to Gemini:

10 Michael Gleason
11 Hahn Loeser & Parks LLP
12 One America Plaza
600 W Broadway Suite 1500
San Diego, CA 92101

If to EHA:

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

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

15 **9. COUNTERPARTS; DIGITAL SIGNATURES**

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

19 **10. POST EXECUTION ACTIVITIES**

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

1 **11. MODIFICATION**

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

5 **12. AUTHORIZATION**

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

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

9 If a dispute arises with respect to either Party's compliance with the terms of this Consent
10 Judgment entered by the Court, the Parties shall meet and confer in person, or by telephone, and/or in
11 writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be filed
12 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 **AGREED TO:**

AGREED TO:

8
9 Date: 01/27/2021

Date: February 2, 2021

10
11 By: 
12 ENVIRONMENTAL HEALTH
13 ADVOCATES, INC.

11 By: 
12 GEMINI FOOD CORPORATION

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

17 Date: _____

18 _____
19 JUDGE OF THE SUPERIOR COURT