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15 Attorneys for Plaintiff
16 Environmental Health Advocates, Inc.

17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

19 ENVIRONMENTAL HEALTH
20 ADVOCATES, INC., a California corporation,

21 Plaintiff,

22 v.

23 BISCUITS & COOKIES INTERNATIONAL,
24 INC., a Texas corporation, 99 CENTS ONLY
25 STORES LLC, a California limited liability
26 company, and DOES 1 through 100,
27 inclusive,

28 Defendants.

Case No. RG21104558

[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 Biscuits and Cookies International, Inc. (“Defendant” or “BCI”) with EHA
5 and BCI 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 EHA alleges that BCI employs ten or more individuals and is a “person in the course of doing
12 business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and
13 Safety Code section 25249.6 et seq. (“Proposition 65”).

14 **1.4 General Allegations**

15 EHA alleges that BCI manufactures, imports, sells, and distributes for sale Cuétara Cookies
16 Animalitos that contain acrylamide. EHA further alleges that BCI does so without providing a
17 sufficient health hazard warning as required by Proposition 65 and related Regulations. BCI denies
18 these allegations. Pursuant to Proposition 65, acrylamide is listed as a chemical known to cause cancer,
19 birth defects and other reproductive harm.

20 **1.5 Notice of Violation**

21 On or around January 7, 2021, EHA served BCI, Cuétara S.L.U., and 99 Cents Only Stores
22 LLC, 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 BCI, Cuétara S.L.U.,
24 and 99 Cents Only Stores LLC had violated Proposition 65 by failing to sufficiently warn consumers
25 in California of the health hazards associated with exposures to acrylamide contained in animal
26 cookies, including but not limited to Cuétara Cookies Animalitos.

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

1 **1.6 Product Description**

2 The products covered by this Consent Judgment are all animal cookies or crackers, including
3 but not limited to those manufactured, processed, sold, or brokered by BCI, including those sold under
4 the “Cuétara” brand, products sold by Marquez Brothers International, Inc. including those sold under
5 the “El Mexicano” brand, including products sold by Mercado Latino including those sold under the
6 “Payaso” brand, and including products sold by Goya Foods, Inc. including those sold under the
7 “Goya” brand, including all products of these producers or brands that allegedly contain acrylamide
8 and that are imported, sold, shipped, delivered, or distributed for sale to consumers in California by
9 Releasees (as defined in section 4.1) (“Covered Products”). BCI warrants and represents that all
10 Covered Products, including those listed above, are manufactured by plants owned by the same
11 company, a representation upon which EHA relied as material to its decision to enter into this
12 Agreement.

13 **1.7 State of the Pleadings**

14 On or around July 7, 2021, EHA filed a Complaint against 99 Cents Only Stores LLC for the
15 alleged violations of Proposition 65 that are the subject of the Notice(s) (“Complaint”). On or around
16 June 14, 2022, EHA amended the Complaint to add defendant BCI.

17 **1.8 No Admission**

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

26 **1.9 Jurisdiction**

27 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
28 Court has jurisdiction over BCI as to the allegations in the Complaint, that venue is proper in the County

1 of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
2 Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

3 **1.10 Effective Date and Compliance Date**

4 For purposes of this Consent Judgment, the term “Effective Date” means the date on which the
5 Court grants the motion for approval of this Consent Judgment, as discussed in Section 5. The
6 “Compliance Date” is the date that is one hundred and eighty (180) days after the Effective Date
7 (“Initial Compliance Date”), plus an additional ninety (90) days if, despite reasonable good faith
8 efforts, BCI is unable to achieve reformulation levels as set forth in Section 2.1 by the Initial
9 Compliance Date.

10 **2. INJUNCTIVE RELIEF**

11 **2.1 Reformulation of the Covered Products**

12 Except as otherwise provided herein, any Covered Products that are manufactured by or for
13 BCI or brokered by BCI on and after the Compliance Date that BCI sells in California or distributes
14 for sale in California shall not exceed 175 parts per billion (“ppb”) for acrylamide, using tests
15 performed by a laboratory accredited by the State of California, a federal agency, or a nationally
16 recognized accrediting organization, using LC-MS/MS (Liquid Chromatograph-Mass Spectrometry),
17 unless such Covered Products comply with the warning requirements of Section 2.2. As used in this
18 Section 2, “distributed for sale in California” means to directly ship Covered Products into California
19 or to sell Covered Products to a distributor BCI actually knows will sell Covered Products in California.

20 BCI will also have the option of filing a motion to modify this Consent Judgment and seek a
21 reformulation level greater than 175 ppb by demonstrating that it has utilized quality control measures
22 that reduce the concentration of acrylamide to the “lowest level currently feasible,” as that term is used
23 by the California Office of Environmental Health Hazard Assessment (“OEHHA”). BCI is permitted
24 to establish the “lowest level currently feasible” without being bound by reformulation levels agreed
25 upon in prior court approved consent judgments. EHA shall not oppose such a motion provided BCI
26 has provided a sworn affidavit that it was unable to reach 175 ppb despite its best efforts.

1 In the event OEHHA at any time adopts a safe harbor level for acrylamide in Covered
2 Products that is higher than the reformulation level in this Consent Judgment, BCI is permitted
3 to use the established safe harbor level without further notice to EHA.

4 Subject to Section 2.3 below, if EHA alleges that any Covered Product fails to qualify
5 as a reformulated Covered Product (for which EHA alleges that no warning has been provided),
6 then EHA shall inform BCI in writing in a reasonably prompt manner of its test results,
7 including information sufficient to permit BCI to identify the Covered Product(s) at issue. BCI
8 shall, within thirty (30) days following such notice, provide EHA with testing information for
9 two (2) different batches of the Product from an independent third-party laboratory meeting the
10 requirements of Sections 2.1 demonstrating BCI's compliance with the Consent Judgment. The
11 two tests shall be averaged, with the averaged level of acrylamide controlling. In the event BCI
12 demonstrates compliance with Section 2.1, EHA will not take any further legal action.

13 **2.2 Clear and Reasonable Warnings**

14 For Covered Products that contain acrylamide in a concentration exceeding the 175 ppb level
15 set forth in section 2.1 above, and which are manufactured and packaged for distribution for authorized
16 sale or use in California on or after the Compliance Date, BCI shall provide any warning that satisfies
17 the "safe harbor" content and methods for providing a warning that have been determined "clear and
18 reasonable" under Proposition 65 (including under Title 27, California Code of Regulations, section
19 25600, et seq.) for foods, or one of the following warning statements.

20 **Option 1:**

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

24 **Option 2:**

25 **WARNING:** Cancer and Reproductive Harm --
www.P65Warnings.ca.gov/food

26 This warning statement shall be prominently displayed on the Covered Products, on the packing
27 of the Covered Products, or on a placard, shelf tag, or sign provided that the statement is displayed with
28 such conspicuousness, as compared with other words, statements, or designs as to render it likely to be

1 read and understood by an ordinary individual prior to sale. If the warning statement is displayed on
2 the Covered Products' packaging, it must be in a type size no smaller than the largest type size used
3 for other "consumer information" on the product, as defined in Title 27, California Code of
4 Regulations, section 25600.1. In no case shall a warning statement displayed on the Covered Products'
5 packaging appear in a type size smaller than 6-point type. The same warning shall be posted on the
6 product display page or at checkout of any e-commerce websites under the exclusive control of BCI
7 where Covered Products are sold into California. BCI shall instruct any third-party website to which it
8 directly sells Covered Products to include the same warning as a condition of selling the Covered
9 Products.

10 The warning requirements set forth herein are imposed pursuant to the terms of this Consent
11 Judgment and are recognized by the Parties as not being the exclusive manner of providing a warning
12 for the Covered Products. Warnings may also be provided as specified in the Proposition 65 regulations
13 for food in effect as of the Effective Date (Title 27, California Code of Regulations, section 25600, *et*
14 *seq.*) or as such regulations may be amended in the future or pursuant to any settlement agreement or
15 consent judgment involving acrylamide. In addition, BCI may follow the notification procedure set
16 out in Title 27, California Code of Regulations, section 25600.2 or a similar procedure where BCI
17 instructs its distributor or retailer customers, if any, to provide warnings for the Covered Products
18 consistent with this section.

19 **2.3 Sell-Through Period**

20 Notwithstanding anything else in this Consent Judgment, the Covered Products that are
21 manufactured on or prior to the Effective Date shall be subject to release of liability pursuant to this
22 Consent Judgment, without regard to when such Covered Products were, or are in the future, distributed
23 or sold to customers.

24 **3. MONETARY SETTLEMENT TERMS**

25 **3.1 Settlement Amount**

26 BCI shall pay fifty thousand dollars (\$50,000.00) in settlement and total satisfaction of all the
27 claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes civil penalties
28 in the amount of five thousand dollars (\$5,000.00) pursuant to Health and Safety Code section

1 25249.7(b) and attorneys' fees and costs in the amount of forty-five thousand dollars (\$45,000.00)
2 pursuant to Code of Civil Procedure section 1021.5.

3 **3.2 Civil Penalty**

4 The portion of the settlement attributable to civil penalties shall be allocated according to Health
5 and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty or three
6 thousand seven hundred fifty dollars (\$3,750.00) paid to OEHHA, and the remaining twenty-five
7 percent (25%) or one thousand two hundred fifty dollars (\$1,250.00) of the penalty paid to EHA
8 individually.

9
10 All payments owed to EHA shall be delivered to the following address:

11 Environmental Health Advocates
12 225 Broadway, Suite 2100
San Diego, CA 92101

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

15 For United States Postal Service Delivery:

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

19 For Federal Express 2-Day Delivery:

20 Mike Gyurics
21 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
22 1001 I Street
Sacramento, CA 95814

23 BCI agrees to provide EHA's counsel with a copy of the check payable to OEHHA,
24 simultaneous with its penalty payments to EHA.

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

26 Relevant information is set out below:

- 27
- "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.2(a)(i);
 - "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section 3.2(a)(i);
- 28

1 and

- 2 • “Office of Environmental Health Hazard Assessment” 1001 I Street, Sacramento, CA 95814.

3 **3.3 Attorney’s Fees and Costs**

4 The portion of the settlement attributable to attorneys’ fees and costs, forty-five thousand
5 dollars (\$45,000.00) shall be paid to Glick Law Group, P.C. and Nicholas & Tomasevic, LLP
6 (collectively, “EHA’s Counsel”, who are entitled to attorneys’ fees and costs incurred by it in this
7 action, including but not limited to investigating potential violations, bringing this matter to BCI’s
8 attention, as well as litigating and negotiating a settlement in the public interest.

9 BCI shall provide their payment to EHA’s Counsel in two installments as follows:

- 10 • The First Installment shall be in the amount of forty thousand dollars (\$40,000.00), with
11 twenty thousand dollars (\$20,000.00) payable to Glick Law Group, PC and, twenty thousand
12 dollars (\$20,000.00) payable to Nicholas & Tomasevic, LLP, within fourteen (14) days of the
13 of the Effective Date (“First Installment”).
- 14 • The Second Installment shall be in the amount of five thousand dollars (\$5,000.00), with two
15 thousand five hundred dollars (\$2,500.00) payable to Glick Law Group, PC and , two thousand
16 five hundred dollars (\$2,500.00) payable to Nicholas & Tomasevic, LLP within thirty (30)
17 days of the Effective Date (“Second Installment”). If the First Installment is timely received
18 by EHA’s Counsel, then EHA’s Counsel agrees to waive the Second Installment.

19 All installments will be sent to the following address:

20
21 Noam Glick
22 Glick Law Group
23 225 Broadway, Suite 2100
24 San Diego, CA 92101

25 Craig Nicholas
26 Nicholas & Tomasevic, LLP
27 225 Broadway, 19th Floor
28 San Diego, CA 92101

4. **CLAIMS COVERED AND RELEASED**

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

Plaintiff, acting on its own behalf and in the public interest releases BCI and its parents,

1 subsidiaries, affiliated entities under common ownership, its directors, officers, principals, agents,
2 employees, manufacturers, attorneys, insurers, accountants, predecessors, successors, and assigns
3 (“Defendant Entities”), each entity to whom Defendant Entities directly or indirectly distribute, ship,
4 sell or broker the Covered Products including but not limited to all persons manufacturing or selling
5 products with the Cuétara, El Mexicano, Mercado Latino, Payaso and Goya brand names as well as all
6 Covered Products mentioned in paragraph 1.6 above, and expressly including 99 Cent Only Stores
7 LLC, Marquez Brothers International, Inc., Carnival Supermarket, Inc. and all downstream distributors,
8 wholesalers, customers, brokers and retailers, franchisees, franchisors, cooperative members, suppliers,
9 licensees, and licensors, and all of the foregoing entities’ owners, directors, officers, agents, principals,
10 employees, attorneys, insurers, accountants, representatives, predecessors, successors, and assigns
11 (collectively referred to as the “Releasees”) from all claims for violations of Proposition 65 up through
12 the Compliance Date based on exposure to acrylamide from Covered Products as set forth in the Notice.
13 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with
14 respect to exposures to acrylamide from Covered Products as set forth in the Notice.

15 **4.2 EHA’s Individual Release of Claims**

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

22 **4.3 BCI’s Release of EHA**

23 BCI on its own behalf, and on behalf of its past and current agents, representatives, attorneys,
24 successors, and assignees, hereby waives any and all claims against EHA and its attorneys and other
25 representatives, for any and all actions taken or statements made by EHA and its attorneys and other
26 representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition
27 65 against them, in this matter or with respect to the Covered Products.

28 **4.4 Mutual Release of Known and Unknown Claims**

1 The Parties certify that they have read the following provisions of California Civil Code Section
2 1542:

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

9 The Parties expressly waive and relinquish all rights and benefits which they may have under
10 California Civil Code Section 1542 to the fullest extent such provisions may lawfully be waived. The
11 Parties acknowledge that this Section 4.4 applies only as between the Parties and does not extend to
12 the general public (but does extend to and include any claim against the Releasees).

13 **4.5 Dismissal of Parallel Action**

14 Within fourteen (14) days of receipt of payment of all amounts owed under this Consent
15 Judgment, EHA will dismiss with prejudice the lawsuit, *EHA v. Marquez Bros, Inc.*, Alameda Superior
16 Court Case No. 22CV007910, which asserts claims for the same cookie products covered by this
17 Consent Judgment.

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 **7. GOVERNING LAW**

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

1 In the event OEHHA adopts a regulation or safe use determination, or issues an interpretive
2 guideline that exempts Covered Products from meeting the requirements of Proposition 65; or if
3 acrylamide cases are permanently enjoined by a court of competent jurisdiction; or if Proposition 65 is
4 determined to be preempted by federal law or a burden on First Amendment rights with respect to
5 acrylamide in Covered Products or products substantially similar to Covered Products; or if for any
6 reason Proposition 65 no longer applies to products containing acrylamide (including, without
7 limitation, because of an amendment to the statute or any regulation, then BCI shall be relieved of its
8 obligation to comply with Section 2 herein.

9 **8. ENFORCEMENT**

10 In any action to enforce the terms of this Consent Judgment, the prevailing party shall be entitled
11 to its reasonable attorneys' fees and costs.

12 **9. NOTICE**

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

16 If to BCI:

17 H. Kim Sim
18 Conkle, Kremer & Engel, PLC
19 3130 Wilshire Boulevard, Suite 500
Santa Monica, California 90403

If to EHA:

Noam Glick
Glick Law Group
225 Broadway, Suite 2100
San Diego, CA 92101

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

22 **10. COUNTERPARTS; DIGITAL SIGNATURES**

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

26 **11. POST EXECUTION ACTIVITIES**

27 EHA agrees to comply with the reporting form requirements referenced in Health and Safety
28 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code

1 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which
2 motion EHA shall draft and file. In furtherance of obtaining such approval, the Parties agree to mutually
3 employ their best efforts, including those of their counsel, to support the entry of this agreement as
4 judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of this
5 Section, “best efforts” shall include, at a minimum, supporting the motion for approval, responding to
6 any objection that any third-party may make, providing a draft of any motion papers in advance for
7 review and comment, and appearing at the hearing before the Court if so requested.

8 **12. MODIFICATION**

9 Except as otherwise provided herein, this Consent Judgment may be modified by: (i) a written
10 agreement of the Parties and entry of a modified consent judgment thereon by the Court; or (ii) a
11 successful motion or application of any Party, and the entry of a modified consent judgment thereon
12 by the Court.

13 **13. AUTHORIZATION**

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

16 **14. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

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

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1 **15. 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: 06/22/2022

Date: 06/22/2022

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

14
15 By: 
16 BISCUITS & COOKIES
17 INTERNATIONAL, INC.

18 **IT IS SO ORDERED.**

19 Date: _____

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JUDGE OF THE SUPERIOR COURT