

1 **GLICK LAW GROUP, PC**  
2 Noam Glick (SBN 251582)  
3 225 Broadway, Suite 1900  
4 San Diego, California 92101  
5 Tel: (619) 382-3400  
6 Fax: (619) 615-2193

7 **NICHOLAS & TOMASEVIC, LLP**  
8 Craig M. Nicholas (SBN 178444)  
9 Shaun Markley (SBN 291785)  
10 Jake Schulte (SBN 293777)  
11 225 Broadway, 19<sup>th</sup> Floor  
12 San Diego, California 92101  
13 Tel: (619) 325-0492  
14 Fax: (619) 325-0496

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 ADVOCATES,  
20 INC.,

21 Plaintiff,

22 v.

23 FRITO-LAY, INC.,

24 Defendant.

Case No.: [\_\_\_\_]

[PROPOSED] CONSENT JUDGMENT

1     **1.     INTRODUCTION**

2             **1.1**       The Compliance Date means six months from the Effective Date.

3             **1.2**       “Effective Date” means the date on which notice of entry of this Consent Judgment  
4 by the Court is served upon Defendant.

5             **1.3**       “Defendant” refers to Frito-Lay, Inc. and its parent company, PepsiCo, Inc.,  
6 subsidiaries, and affiliated companies under common ownership.

7             **1.4**       Plaintiff and Defendant are collectively referred to as “Parties” and individually as  
8 a “Party.”

9             **1.5**       The “Products” mean Gamesa Animalitos cookies, Gamesa Roscas cookies, and all  
10 other cookies in the Gamesa brand that are manufactured, distributed, or sold by Defendant.

11            **1.6     Allegations**

12            Plaintiff alleges that Defendant manufactures, sells, and distributes Products for sale in  
13 California that contain acrylamide. Plaintiff further alleges that Defendant has not provided warnings  
14 under Proposition 65 for alleged exposures to acrylamide in the Products. Defendant denies that  
15 warnings are required under Proposition 65 for any exposures to acrylamide in the Products, and  
16 Defendant maintains that it has complied with all applicable federal and state laws, including but not  
17 limited to Proposition 65.

18            **1.7     The Parties**

19            Defendant has ten or more employees and has manufactured, distributed, or sold the Products  
20 in the year preceding the filing of the Complaint.

21            **1.8     Notices of Violation**

22            On September 1, 2020 and October 27, 2020, Plaintiff issued 60-Day Notices of Violation of  
23 California Health and Safety Code section 25249.6 *et seq.* claiming violations of Proposition 65 by  
24 Defendant and other companies for alleged exposures to acrylamide in Gamesa Roscas and Gamesa  
25 Animalitos, respectively (“Original Notices”). The Original Notices were served on Defendant, the  
26 California Attorney General, and all other required California public prosecutors.

27            On January 13, 2021, Plaintiff issued a supplemental 60-Day Notice of Violation of California  
28 Health and Safety Code section 25249.6 *et seq.* claiming violations of Proposition 65 by Defendant

1 and other companies for alleged exposures to acrylamide in Gamesa brand cookies (“Supplemental  
2 Notice”). The Amended Notice was served on Defendant, the California Attorney General, and all  
3 other required California public prosecutors.

4 The Original Notices and Supplemental Notice are collectively referred to as the “Notices.”

### 5 **1.9 Complaint**

6 Plaintiff filed a Complaint against Defendant for the alleged violations of Health and Safety  
7 Code section 25249.6 that are the subject of the Original Notices. Upon entry of this Consent  
8 Judgment, the Complaint shall be deemed amended *nunc pro tunc* additionally to include allegations  
9 asserted in the Supplemental Notice.

### 10 **1.10 No Admission**

11 By stipulating to the entry of this Consent Judgment and agreeing to provide the relief and  
12 remedies specified herein, Defendant does not admit that it has violated, or threatened to violate,  
13 Proposition 65 or any other law or legal duty, and Defendant does not admit that the chemical  
14 acrylamide in food poses any risk to human health.

15 Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,  
16 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment  
17 be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law.  
18 This Section shall not, however, diminish or otherwise affect Defendant’s obligations, responsibilities,  
19 and duties under this Consent Judgment.

### 20 **1.11 Jurisdiction**

21 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this  
22 Court has jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in  
23 the County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this  
24 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

1     **2.     INJUNCTIVE RELIEF**

2             **2.1**     Any Products that are manufactured or purchased by Defendant on and after the  
3 Compliance Date that it thereafter sells in California or distributes for sale in California shall either  
4 (1) not exceed 280 parts per billion (“ppb”) acrylamide, as set forth in Section 2.2 (“Acrylamide  
5 Limit”) or (2) comply with the warning requirements of Section 2.4.

6                     **2.1.1.** As used in this Section 2.1, distribution for sale in California refers to directly  
7 shipping a Product into California or to sell a Product to a distributor that Defendant knows will sell  
8 the Product in California.

9             **2.2     Testing**

10            (a)     Compliance with the 280 ppb acrylamide limit shall be determined using LC-MS/MS  
11 (Liquid Chromatograph-Mass Spectrometry), GC/MS/MS (Gas Chromatography/Mass  
12 Spectrometry), or any other testing method agreed upon by the Parties. Any testing for purposes of  
13 Section 2.1 shall be performed by any laboratory accredited by the State of California, a federal  
14 agency, or a nationally recognized accrediting organization.

15            (b)     The Acrylamide Limit is determined by randomly selecting and testing, over no less  
16 than a ten-day period, one sample from up to three lots of Products produced at locations that supply  
17 such Products to California (“Sampling Data”). The mean and standard deviation shall be calculated  
18 using the Sampling Data. Any data points that are more than three standard deviations outside the  
19 mean shall be discarded once, and the mean and standard deviation recalculated using the remaining  
20 data points. The arithmetic mean determined in accordance with this procedure shall be used to  
21 measure compliance with the Acrylamide Limit.

22            **2.3     Sell-Through Period**

23            Notwithstanding anything else in this Consent Judgement, the Products that are manufactured  
24 prior to the Compliance Date shall be subject to release of liability pursuant to this Consent Judgement,  
25 without regard to when such products were, or are in the future, distributed or sold to customers. As a  
26 result, the obligations in Section 2 do not apply to these Products manufactured prior to the  
27 Compliance Date.

1           **2.4     Warnings**

2           If Defendant provides warnings under Section 2.1, Products may be sold in California with one  
3 of the following warning statements:

4           **Option 1:**

5           **WARNING:** Consuming this product can expose you to chemicals including acrylamide,  
6 which is known to the State of California to cause cancer [and birth defects or other  
7 reproductive harm]. For more information go to [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food).

8           **Option 2:**

9           **WARNING:** Cancer [and Reproductive Harm] – [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food)

10          The warning in Option 2 may be used only if the warning appears on the product container or  
11 labeling. Terms in bracketing are optional. The word “**WARNING**” shall be displayed in all capital  
12 letters and bold print. This warning statement shall be prominently displayed on the Product, on the  
13 packaging of the Product, or on a placard, shelf tag, or sign, provided that the statement is displayed  
14 with such conspicuousness, as compared with other words, statements, or designs as to render it likely  
15 to be read and understood by an ordinary individual prior to sale. If the warning statement is displayed  
16 on the Product’s label, it must be set off from other surrounding information and enclosed in a text  
17 box. If the warning statement is displayed on a placard, shelf tag, or sign where the Product is offered  
18 for sale, the warning placard or sign must enable an ordinary individual to easily determine which  
19 Products the warning applies to, and to differentiate between the Products and other products to which  
20 the warning statement does not apply. For sales by Defendant on the internet or by catalog where the  
21 consumer is not physically present, the warning statement shall be displayed in such a manner that it  
22 is likely to be read and understood by an ordinary individual prior to the authorization of or actual  
23 payment

24          **3.     MONETARY SETTLEMENT TERMS**

25           **3.1     Settlement Amount**

26          Defendant shall pay one hundred twenty thousand dollars (\$120,000) in total settlement and  
27 total satisfaction of all the claims referred to in the Notices, the Complaint, and this Consent Judgment.  
28 This includes civil penalties in the amount of twelve thousand dollars (\$12,000) pursuant to Health and

1 Safety Code section 25249.7(b) and attorney’s fees and costs in the amount of one hundred and eight  
2 thousand dollars (\$108,000) pursuant to Code of Civil Procedure section 1021.5 and Health and Safety  
3 Code section 25249 et seq.

4 **3.2 Civil Penalty**

5 The portion of the settlement attributable to civil penalties shall be allocated according to  
6 Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty  
7 paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”), and the  
8 remaining twenty-five percent (25%) of the penalty paid to Plaintiff.

9 All payments owed to Plaintiff shall be delivered to the following payment address:

10  
11 Noam Glick  
12 Glick Law Group  
13 225 Broadway, Suite 1900  
14 San Diego, CA 92101

15 All payments owed to OEHHA (EIN: 68-0284486) shall be delivered directly to OEHHA (Memo  
16 line “Prop 65 Penalties”) at the following addresses:

17 For United States Postal Delivery:

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

23 For Non-United States Postal Service Delivery:

24 Mike Gyurics  
25 Fiscal Operations Branch Chief  
26 Office of Environmental Health Hazard Assessment  
27 1001 I Street  
28 Sacramento, CA 95814

Defendant agrees to provide Plaintiff’s counsel with a copy of the check payable to OEHHA  
simultaneous with its penalty payment to Plaintiff.

1 The Parties, including Plaintiff, will exchange completed IRS 1099, W-9, or other forms as  
2 required. Relevant information for Glick Law Group, Nicholas & Tomasevic, and Plaintiff are set out  
3 below:

- 4 • “Environmental Health Advocates, Inc.” whose address and tax identification number  
5 shall be provided within five (5) days after this Consent Judgement is fully executed  
6 by the Parties;
- 7 • “Glick Law Group” (EIN: 47-1838518) at address provided in Section 3.2;
- 8 • “Nicholas & Tomasevic” (EIN: 46-3474065) at address provided in Section 3.3; and
- 9 • “Office of Environmental Health Hazard Assessment” at 1001 I Street, Sacramento,  
10 CA 95814.

### 11 **3.3 Attorney’s Fees and Costs**

12 The portion of the settlement attributable to attorneys’ fees and costs shall be paid to Plaintiff’s  
13 counsel, who are entitled to attorney’s fees and costs incurred by it in this action, including but not  
14 limited to investigating potential violations, bringing this matter to Defendant’s attention, as well as  
15 litigating and negotiating a settlement in the public interest.

16 Defendant shall provide its payment to Plaintiff’s counsel in two checks, divided equally, payable  
17 to Glick Law Group, PC (\$54,000) and Nicholas & Tomasevic, LLP (\$54,000) respectively. The addresses  
18 for these two entities are:

19 Noam Glick  
20 Glick Law Group  
21 225 Broadway, Suite 1900  
22 San Diego, CA 92101

23 Craig Nicholas  
24 Nicholas & Tomasevic, LLP  
25 225 Broadway, 19<sup>th</sup> Floor  
26 San Diego, CA 92101

### 27 **3.4 Timing**

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

1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 Plaintiff's Public Release of Proposition 65 Claims**

3 This Consent Judgment is a full, final, and binding resolution between, on the one hand,  
4 Plaintiff, on behalf of itself and its attorneys, investigators, agents, heirs, and assigns (collectively  
5 referred to as "Plaintiff Releasers") and on behalf of the public in the public interest, and, on the other  
6 hand, Defendant and its parents, subsidiaries, affiliated entities under common ownership, its directors,  
7 officers, principals, agents, employees, attorneys, insurers, accountants, predecessors, successors, and  
8 assigns ("Defendant Entities"), other companies variously named in the Notices, and each entity to  
9 whom Defendant directly or indirectly distributes, ships, or sells the Products including but not limited  
10 to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members,  
11 licensors, licensees, and their owners, directors, officers, agents, principals, employees, attorneys,  
12 insurers, accountants, representatives, predecessors, successors, and assigns (collectively referred to  
13 as the "Releasees"), of all claims, actions, causes of action (in law or in equity), suits, liabilities,  
14 demands, obligations, damages, costs, fines, penalties, losses, expenses, and fees (including, but not  
15 limited to, investigation fees, expert fees, and attorney's fees), and expenses (collectively, "Claims")  
16 that have been or could have been asserted under Proposition 65 for any exposures to acrylamide from  
17 the Products manufactured, purchased, distributed, or sold by Defendant before the Compliance Date.  
18 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with  
19 respect to any exposures to acrylamide from Products manufactured, purchased, sold, or distributed  
20 by Defendant on and after the Compliance Date.

21 **4.2 Plaintiff's Individual Release of Claims**

22 Plaintiff, in its individual capacity, on behalf of itself and the Plaintiff Releasers, also waives  
23 all rights to institute or participate in, directly or indirectly, any form of legal action, and discharges  
24 and releases all Claims as to all Releasees under Proposition 65 or any statutory or common law from  
25 the alleged failure to provide warnings for any exposures to acrylamide, or for causing any exposures  
26 to acrylamide, in the Products. The release in this Section 4.2 is effective as a full and final accord  
27 and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorney's fees,  
28 damages, losses, claims, liabilities, and demands by Plaintiff of any nature, character or kind, whether



1 known or unknown, or suspected or unsuspected. Plaintiff acknowledges that it is familiar with  
2 Section 1542 of the California Civil Code, which provides as follows:

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

7 Plaintiff understands and acknowledges the significance and consequence of this waiver of California  
8 Civil Code section 1542.

9 **4.3 Defendant's Release of Plaintiff**

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

15 **5. COURT APPROVAL**

16 This Consent Judgment is not effective until it is approved and entered by the Court and shall  
17 be null and void if it is not approved and entered by the Court within six months after it has been fully  
18 submitted to the Court by the Parties, or by such additional time as the Parties may agree to in writing.

19 **6. SEVERABILITY**

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

23 **7. GOVERNING LAW**

24 The terms of this Consent Judgment shall be governed by the laws of the state of California  
25 and apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise  
26 rendered inapplicable for reasons, including but not limited to changes in the law, then Defendant may  
27 provide written notice to Plaintiff of any asserted change, and shall have no further injunctive  
28

1 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are  
2 so affected.

3 **8. NOTICE**

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

7 For Defendant:

8 Sarah Esmaili  
9 Arnold & Porter  
10 Three Embarcadero Center, 10th Fl  
San Francisco, CA 94111

For Plaintiff:

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

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

13 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

17 **10. POST EXECUTION ACTIVITIES**

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

1     **11. ENFORCEMENT**

2             Prior to bringing any motion or order to show cause to enforce the terms of this Consent  
3 Judgment, a Party seeking to enforce the Consent Judgment shall provide the other Party written  
4 notice of the alleged violation. The Parties shall meet and confer in an effort to try to reach  
5 agreement on an appropriate cure for the alleged violation. Plaintiff shall not bring an enforcement  
6 action or institute a judicial proceeding if Defendant demonstrates it has complied with the  
7 requirements of Section 2. Defendant is entitled to designate such information as confidential.

8             In the event that meet and confer efforts are unsuccessful, the Party alleging a violation may  
9 initiate a judicial proceeding to enforce this Consent Judgment no earlier than 60 days after issuing  
10 the written notice specified in Section 11. In the event that Plaintiff proves a violation of Section 2 in  
11 a judicial proceeding to enforce the Consent Judgment, the Court may order appropriate injunctive  
12 relief, including but not limited to ordering that Defendant cease selling any affected Products in  
13 California without a clear and reasonable warning pursuant to Proposition 65. In any enforcement  
14 proceeding regarding this Consent Judgment, Defendant may assert any and all defenses that are  
15 available.

16     **12. MODIFICATION**

17             **12.1 Modification.** This Consent Judgment may be modified only by: (i) a written  
18 agreement of the Parties and entry of a modified consent judgment thereon by the Court; or (ii) a  
19 successful motion or application of any Party, and the entry of a modified consent judgment thereon  
20 by the Court.

21             **12.2 Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment shall  
22 attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the  
23 Consent Judgment.

24             **12.3 Change in Proposition 65.** If Proposition 65 or its implementing regulations  
25 (including but not limited to the published "no significant risk level" for acrylamide set forth at Cal.  
26 Code Regs., tit. 27, section 25705, subdivision (c)(2) or any "alternative risk level" adopted by  
27 regulation or court decision) are changed from their terms as they exist on the date of entry of this  
28 Consent Judgment, or if OEHHA takes some other final regulatory action that determines that

1 warnings for acrylamide are not required or modifies the standard for warnings for acrylamide, then  
2 Defendant may seek to modify this Consent Judgment. Any such modification shall have no effect on  
3 Defendant's financial obligations as provided herein.

4 **12.4 Other Court Decisions.** If a final decision of a court determines that warnings for  
5 acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide exposures are  
6 preempted or otherwise unlawful or unconstitutional, then Defendant may move to modify this Consent  
7 Judgment to conform to such ruling in order to avoid unfair, inconsistent, or anti-competitive results.  
8 Any such modification shall have no effect on Defendant's financial obligations as provided herein.

9 **12.5. Federal Agency Action and Preemption.** If a court of competent jurisdiction or an  
10 agency of the federal government, including, but not limited to, the U.S. Food and Drug  
11 Administration, states through any guidance, regulation or legally binding act that federal law has  
12 preemptive effect on any of the requirements of this Consent Judgment, then Defendant may seek to  
13 modify this Consent Judgment in accordance with the procedure for noticed motions set forth in Section  
14 12.1 to bring it into compliance with or avoid conflict with federal law. Any such modification shall  
15 have no effect on Defendant's financial obligations as provided herein.

16 **12.6 Scientific Studies.** If an agency of the federal government, including, but not limited  
17 to the U.S. Food and Drug Administration, states through any guidance, regulation, or other legally  
18 binding act, following a review of scientific studies and following public notice and comment, a cancer  
19 potency estimate for acrylamide that equates to a no significant risk level higher than 0.2 micrograms  
20 per day, then Defendant shall be entitled to seek a modification of this Consent Judgment. Any such  
21 modification shall have no effect on Defendant's financial obligations as provided herein.

22 **12.8** Before filing any motion to modify the Consent Judgment, Defendant shall provide  
23 written notice to Plaintiff to initiate the meet and confer procedure in Section 12.2. If the Parties do  
24 not agree on the proposed modification during informal meet and confer efforts, Defendant may file a  
25 motion to modify the Consent Judgment within sixty (60) days of the date of the written notice that  
26 Defendant provides to Plaintiff under this Section 12.

1 **13. RETENTION OF JURISDICTION**

2 This Court shall retain jurisdiction of this matter to implement or modify the Consent  
3 Judgment. Notwithstanding the provisions of Section 12, nothing in this Consent Judgment limits or  
4 affects the Court’s authority to modify this Consent Judgment as provided by law.

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, 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.

13 **14. ENTIRE AGREEMENT**


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

19 **AGREED TO:**

**AGREED TO:**

20 Date: 1/13/2021 \_\_\_\_\_

Date: \_\_\_\_\_

21 By:  \_\_\_\_\_

By: \_\_\_\_\_

22 KIM EMBRY [print name]  
23 ENVIRONMENTAL HEALTH  
24 ADVOCATES, INC.

FRITO-LAY, INC. [print name]

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12 in the absence of such a good faith attempt to resolve the dispute beforehand.

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15 with respect to the entire subject matter herein, and any and all prior discussions, negotiations,  
16 commitments, and understandings related hereto. No representations, oral or otherwise, express or  
17 implied, other than those contained herein have been made by any Party. No other agreements, oral  
18 or otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.

19 **AGREED TO:**

20 Date: \_\_\_\_\_

21 By: \_\_\_\_\_

22 \_\_\_\_\_ [print name]  
23 ENVIRONMENTAL HEALTH  
24 ADVOCATES, INC.

**AGREED TO:**

20 Date: January 14, 2021

21 By: Leanne J. Oliver

22 Leanne J. Oliver [print name]  
23 FRITO-LAY, INC.

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26  
27  
28