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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.,

21 Plaintiff,

22 v.

23 CAPPELLO'S LLC, a Delaware limited  
24 liability company, CAPPELLO'S PRODUCTS  
25 OF CALIFORNIA LLC, a California limited  
26 liability company, WHOLE FOODS  
27 MARKET CALIFORNIA, INC., a California  
28 corporation, and DOES 1 through 100,  
inclusive,

Defendants.

Case No. RG21104519

**[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”), on the one hand, and Cappello’s LLC (“Defendant” or “Cappello’s”), on the  
5 other hand, with EHA and Cappello’s each individually referred to as a “Party” and collectively  
6 referred to as the “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

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

15 **1.4 General Allegations**

16 EHA alleges that Cappello’s manufactures, imports, sells, and distributes for sale Cappello’s  
17 Grain Free Naked Pizza Crust that contain acrylamide. EHA further alleges that Cappello’s does so  
18 without providing a sufficient health hazard warning as required by Proposition 65 and related  
19 regulations pursuant to Proposition 65, acrylamide is listed as a chemical known to cause cancer, birth  
20 defects and other reproductive harm. Cappello’s denies that warnings are required under Proposition  
21 65 for any exposures to acrylamide in Covered Products, and Cappello’s maintains that it has  
22 complied with all applicable federal and state law, including but not limited to Proposition 65.

23 **1.5 Notice of Violation**

24 On or around February 11, 2021, EHA served Cappello’s, Cappello’s Products of California  
25 LLC, Whole Foods Market California, Inc., the California Attorney General, and all other required  
26 public enforcement agencies with a 60-Day Notice of Violation of Proposition 65 (“Notice”). The  
27 Notice alleged that Cappello’s had violated Proposition 65 by failing to sufficiently warn consumers

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1 in California of the health hazards associated with exposures to acrylamide contained in Cappello's  
2 Grain Free Naked Pizza Crust.

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 Cappello's Grain Free Naked Pizza Crust  
7 manufactured or processed by Cappello's 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) ("Covered Products").

10 **1.7 State of the Pleadings**

11 On or around July 7, 2021, EHA filed a Complaint against Cappello's and Whole Foods  
12 Market California, Inc. for the alleged violations of Proposition 65 that are the subject of the Notice  
13 ("Complaint").

14 **1.8 No Admission**

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

23 **1.9 Jurisdiction**

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

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1 **1.10 Effective Date**

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.

4 **2. INJUNCTIVE RELIEF**

5 **2.1 Reformulation of Covered Products**

6 Except as otherwise provided herein, any Covered Products that are manufactured by  
7 Cappello’s on and after the Effective Date that Cappello’s sells in California or distributes for sale in  
8 California shall not exceed an average concentration level for acrylamide of 100 parts per billion  
9 (“ppb”), based on three samples. “Average concentration” refers to the average of concentrations  
10 measured in multiple items or individual packaging units of the specific food product in the form the  
11 product is sold to California consumers, prior to any cooking or other heat processing performed by  
12 the consumer. Compliance with this provision shall be determined using tests performed by a  
13 laboratory accredited by the State of California, a federal agency, or a nationally recognized accrediting  
14 organization, using LC-MS/MS (Liquid Chromatograph-Mass Spectrometry). The three tests may be  
15 taken at the same time or at various times during the same calendar year.

16 If the average concentration of acrylamide exceeds 100 ppb, the Covered Products must comply  
17 with the warning requirements of Section 2.2.

18 As used in this Section 2, “distributed for sale in California” means to directly ship Covered  
19 Products into California or to sell Covered Products to a distributor Cappello’s know will sell Covered  
20 Products in California.

21 **2.2 Clear and Reasonable Warnings**

22 If the average concentration of acrylamide in the Covered Products exceeds the 100-ppb level  
23 set forth in section 2.1 above, for those Covered Products which are manufactured and packaged for  
24 distribution for authorized sale or use in California on or after the Effective Date, Cappello’s shall  
25 provide one of the following warning statements.

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1           **Option 1:**

2                   **WARNING:** This product can expose you to chemicals including  
3                   Acrylamide, which is known to the State of California to cause cancer  
4                   and birth defects or other reproductive harm. For more information go  
5                   to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

6           **Option 2:**

7                   **WARNING:** Cancer and Reproductive Harm –  
8                   [www.P65Warnings.cs.gov](http://www.P65Warnings.cs.gov)

9           This warning statement shall be prominently displayed on the Covered Products, on the  
10           packing of the Covered Products, or on a placard, shelf tag, or sign provided that the statement is  
11           displayed with such conspicuousness, as compared with other words, statements, or designs as to  
12           render it likely to be read and understood by an ordinary individual prior to sale. If the warning  
13           statement is displayed on the Covered Products’ packaging, it must be in a type size no smaller  
14           than the largest type size used for other consumer information on the product. In no case shall a  
15           warning statement displayed on the Covered Products’ packaging appear in a type size smaller  
16           than 6-point type. The same warning shall be posted on any websites under the exclusive control  
17           of Cappello’s where Covered Products are sold into California.

18           **2.3     Sell-Through Period**

19           Notwithstanding anything else in this Consent Judgment, the Covered Products that are  
20           manufactured on or prior to the Effective Date shall be subject to release of liability pursuant to  
21           this Consent Judgment, without regard to when such Covered Products were, or are in the future,  
22           distributed or sold to customers. As a result, the obligation of Cappello’s, or any Releasees (if  
23           applicable), do not apply to these Covered Products manufactured on or prior to the Effective Date.

24           **3.     MONETARY SETTLEMENT TERMS**

25           **3.1     Settlement Amount**

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

1 section 25249.7(b) and attorneys' fees and costs in the amount of forty-five thousand dollars  
2 (\$45,000.00) 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  
5 Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the  
6 penalty, three thousand seven hundred and fifty dollars (\$3,750.00), paid to the California Office of  
7 Environmental Health Hazard Assessment ("OEHHA"), and the remaining twenty-five percent (25%)  
8 of the penalty, one thousand two hundred and fifty dollars (\$1,250.00), paid to EHA individually.  
9 These payments will be sent to the below addresses within fourteen (14) days of the Effective Date.

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

11 Environmental Health Advocates  
12 225 Broadway, Suite 1900  
13 San Diego, CA 92101

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

16 For United States Postal Service Delivery:

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

22 For Federal Express 2-Day Delivery:

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

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

Plaintiff and its counsel will provide completed IRS 1099, W-9, or other tax forms as required.  
Relevant information is set out below:

- 1 • “Glick Law Group” (EIN: 47-1838518) at the address provided in Section 3.2(a)(i);
- 2 • “Nicholas & Tomasevic” (EIN: 46-3474065) at the address provided in Section
- 3 3.2(a)(i); and
- 4 • “Office of Environmental Health Hazard Assessment” 1001 I Street, Sacramento, CA
- 5 95814.

### 6 **3.3 Attorneys’ Fees and Costs**

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

12 Attorneys’ fees and costs shall be paid in two payments as follows:

- 13 • The first payment of twenty thousand dollars (\$20,000.00) shall be paid within 14 days
- 14 of the Effective Date.
- 15 • The second payment of twenty-five thousand dollars (\$25,000.00) shall be paid within
- 16 sixty (60) days of the Effective Date.

17 Each payment shall be divided equally between EHA’s counsel in two checks – i.e.  
18 two checks for ten thousand dollars (\$10,000.00) and two checks for twelve thousand five  
19 hundred dollars (\$12,500.00) payable to Glick Law Group, PC, and payable to Nicholas &  
20 Tomasevic, LLP, respectively. The addresses for these two entities are:

21 Noam Glick  
22 Glick Law Group  
23 225 Broadway, 19<sup>th</sup> Floor  
24 San Diego, CA 92101

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

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1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 EHA’s Public Release of Proposition 65 Claims**

3 Plaintiff acting on its own behalf and in the public interest releases Cappello’s and its parents,  
4 subsidiaries, affiliated entities under common ownership, its directors, officers, principals, agents,  
5 employees, attorneys, insurers, accountants, predecessors, successors, and assigns (“Defendant  
6 Entities”), each entity to whom Defendant directly or indirectly distributes, ships, or sells the Covered  
7 Products including but not limited to downstream distributors, wholesalers, customers, and retailers  
8 (including but not limited to Whole Foods Market California, Inc.), franchisees, franchisors,  
9 cooperative members, suppliers, licensees, and licensors, and all of the foregoing entities’ owners,  
10 directors, officers, agents, principals, employees, attorneys, insurers, accountants, representatives,  
11 predecessors, successors, and assigns (collectively referred to as the “Releasees”) from all claims for  
12 violations of Proposition 65 up through the Effective Date based on exposure to acrylamide from  
13 Covered Products as set forth in the Notice. Compliance with the terms of this Consent Judgment  
14 constitutes compliance with Proposition 65 with respect to exposures to acrylamide from Covered  
15 Products as set forth in the Notice.

16 **4.2 EHA’s Individual Release of Claims**

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

23 **4.3 Cappello’s Release of EHA**

24 Cappello’s on its own behalf, and on behalf of Defendant Entities as well as its past and current  
25 agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against  
26 EHA and its attorneys and other representatives, for any and all actions taken or statements made by  
27 EHA and its attorneys and other representatives, whether in the course of investigating claims,

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1 otherwise seeking to enforce Proposition 65 against them, in this matter or with respect to the Covered  
2 Products.

3 **4.4. Dismissal of Whole Foods Market California, Inc.**

4 Within fourteen (14) days of the Effective Date, EHA shall file a dismissal with  
5 prejudice of its Complaint against Whole Foods Market California, Inc.

6 **5. COURT APPROVAL**

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

10 **6. SEVERABILITY**

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

14 **7. GOVERNING LAW**

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

21 In the event the California Office of Health Hazard Assessment adopts a regulation or safe use  
22 determination, or issues an interpretive guideline that exempts Covered Products from meeting the  
23 requirements of Proposition 65; or if acrylamide cases are permanently enjoined by a court of  
24 competent jurisdiction; or if Proposition 65 is determined to be preempted by federal law or a burden  
25 on First Amendment rights with respect to acrylamide in Covered Products or Covered Products  
26 substantially similar to Covered Products, then Cappello's shall be relieved of its obligation to comply  
27 with Section 2 herein.  
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1 **8. ENFORCEMENT**

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

4 **9. NOTICE**

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

8 If to Cappello's:

9 Michael B. Sachs  
10 Clark Hill LLP  
11 505 Montgomery Street, 13th Floor  
San Francisco, CA 94111

If to EHA:

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

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

14 **10. COUNTERPARTS; DIGITAL SIGNATURES**

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

18 **11. POST EXECUTION ACTIVITIES**

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

1 **12. 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 **13. 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 **14. 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 **15. ENTIRE AGREEMENT**

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

7  
8 **AGREED TO:**

**AGREED TO:**

9 Date: 12/23/2021

Date: 1-5-22

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

By:   
14 CAPPELLO'S LLC

15 **IT IS SO ORDERED.**

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

\_\_\_\_\_

JUDGE OF THE SUPERIOR COURT