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11 Environmental Health Advocates, Inc.

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

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

14 ENVIRONMENTAL HEALTH  
15 ADVOCATES, INC.,

16 Plaintiff,

17 v.

18 MELINDA'S FOODS, LLC, a Texas limited  
19 liability company, MARSHALL'S OF MA,  
20 INC., a Massachusetts corporation, and DOES  
21 1 through 100, inclusive,

22 Defendants.

Case No. HG21104823

**[PROPOSED] REVISED 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 Melinda’s Foods, LLC (“Defendant” or “Melinda’s”) with EHA and  
5 Melinda’s 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  
9 by reducing or eliminating hazardous substances contained in consumer products.

10              **1.3 Defendant**

11              Melinda’s employs ten or more individuals and is a “person in the course of doing business”  
12 for 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 Melinda’s imports, sells, and distributes for sale Melinda’s Thin & Crispy  
16 Banana Chips Sour Cream & Onion that contain acrylamide. EHA further alleges that Melinda’s does  
17 so without providing a sufficient health hazard warning as required by Proposition 65 and related  
18 Regulations. Pursuant to Proposition 65, acrylamide is listed as a chemical known to cause cancer,  
19 birth defects and other reproductive harm.

20              **1.5 Notices of Violation**

21              On or around February 11, 2021, EHA served Melinda’s, Marshall’s of MA, Inc., the  
22 California Attorney General, and all other required public enforcement agencies with a 60-Day Notice  
23 of Violation of Proposition 65 (“Notice”). The Notice alleged that Melinda’s had violated Proposition  
24 65 by failing to sufficiently warn consumers in California of the health hazards associated with  
25 exposures to acrylamide contained in Melinda’s Thin & Crispy Banana Chips Sour Cream & Onion.

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

28       ///

1           **1.6     Product Description**

2           The products covered by this Consent Judgment are Melinda’s Thin & Crispy Banana Chips  
3 Sour Cream & Onion imported by Melinda’s that allegedly contain acrylamide and are imported,  
4 sold, shipped, delivered, or distributed for sale to consumers in California by Melinda’s or Releasees  
5 (as defined in section 4.1) (“Covered Products”).

6           **1.7     State of the Pleadings**

7           On or around July 9, 2021, EHA filed a Complaint against Melinda’s for the alleged violations  
8 of Proposition 65 that are the subject of the Notice (“Complaint”).

9           **1.8     No Admission**

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

18          **1.9     Jurisdiction**

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

23          **1.10    Effective Date**

24          For purposes of this Consent Judgment, the term “Effective Date” means the date on which  
25 the Court grants the motion for approval of this Consent Judgment, as discussed in Section 5.

26          **2.     INJUNCTIVE RELIEF**

27          **2.1     Removal of Covered Products from California Market**

28          Notwithstanding any Covered Products manufactured on or prior to the Effective Date as

1 provided for in Section 2.2, Melinda's shall no longer distribute or sell the Covered Products in  
2 California unless they contain the warning set out in Section 2.1.2.

### 3 **2.1.2 Clear and Reasonable Warnings**

4 For Covered Products that contain acrylamide manufactured and packaged for distribution  
5 for authorized sale or use in California on or after the after the Effective Date, Melinda's shall  
6 provide one of the following warnings statements.  
7

#### 8 **Option 1:**

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

#### 12 **Option 2:**

13 **WARNING:** Cancer and Reproductive Harm -  
14 [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food)

15 The warning shall be provided through one of the following methods: (1) a product specific  
16 warning provided on a posted sign, shelf tag, or shelf sign, for the consumer product at each point  
17 of display of the product; or (2) a product-specific warning provided via any electronic device or  
18 process that automatically provides the warning to the purchaser prior to or during the purchase of  
19 the consumer product, without requiring the purchaser to seek out the warning; or (3) a warning on  
20 the label that is securely affixed to or printed upon the label and complied with this section 2.2.1. If  
21 the warning statement is displayed on the Covered Products' packaging, it must be in a type size no  
22 smaller than the largest type size used for other consumer information of the product. In no case  
23 shall a warning statement displayed on the Covered Products' packaging appear in a type size  
24 smaller than 6-point type. The same warning shall be posted on any websites under the exclusive  
25 control of Melinda's where Covered Products are sold into California. The warning requirements  
26 set forth herein as imposed pursuant to the terms of this section and are recognized by the Parties as  
27 not being the exclusive manner of providing a warning for the Covered Products. Warnings may be  
28 provided as specified in the Proposition 65 regulations or guidance from the California Office of

1 Environmental Health Hazard Assessment for food in effect as of the Effective Date (Title 27,  
2 California Code of Regulations, section 25601, et seq.) or as such regulations may be amended in the  
3 future. In addition, Melinda's may follow the notification procedure set out in Title 27, California Code  
4 of Regulations, section 25600.2 or a similar procedure where Melinda's instructs its distributor or  
5 retailer customers to provide warnings for the Covered Products consistent with Section 2.1.2.

## 6 **2.2 Sell-Through Period**

7 Notwithstanding anything else in this Consent Judgment, the Covered Products that are  
8 manufactured on or prior to the Effective Date shall be subject to release of liability pursuant  
9 to this Consent Judgment, without regard to when such Covered Products were, or are in  
10 the future, distributed or sold to customers. As a result, the obligation of Melinda's do not apply to  
11 these Covered Products manufactured on or prior to the Effective Date.

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

### 13 **3.1 Settlement Amount**

14 Melinda's shall pay fifty thousand dollars (\$50,000.00) in settlement and total satisfaction of  
15 all the claims referred to in the Notice, the Complaint, and this Consent Judgment as described in  
16 Section 3 of this Consent Judgment. This includes civil penalties in the amount of three thousand  
17 dollars (\$3,000.00) pursuant to Health and Safety Code section 25249.7(b) and attorneys' fees and  
18 costs in the amount of forty-seven thousand dollars (\$47,000.00) pursuant to Code of Civil Procedure  
19 section 1021.5.

### 20 **3.2 Civil Penalty**

21 The portion of the settlement attributable to civil penalties shall be allocated according to  
22 Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the  
23 penalty, two thousand two hundred and fifty dollars (\$2,250.00), paid to the California Office of  
24 Environmental Health Hazard Assessment ("OEHHA"), and the remaining twenty-five percent (25%)  
25 of the penalty, seven hundred and fifty dollars (\$750.00), paid to EHA individually. These payments  
26 will be sent to the below addresses within fourteen (14) days of the Effective Date.

27 ///

28 ///

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  
6 OEHHA (Memo Line “Prop 65 Penalties”) at the following addresses:

7 For United States Postal Service Delivery:

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

13 For Federal Express 2-Day Delivery:

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

19 Melinda’s agrees to provide EHA’s counsel with a copy of the check payable to  
20 OEHHA, simultaneous with its penalty payments to EHA.

21 Plaintiff and its counsel will provide completed IRS 1099, W-9, or other tax forms as  
22 required prior to the Effective Date. Relevant information is set out below:

- 23 • “Glick Law Group” (EIN: 47-1838518) at the address provided in Section 3.2(a)(i);
- 24 • “Nicholas & Tomasevic” (EIN: 46-3474065) at the address provided in Section 3.2(a)(i);

25 and

- 26 • “Office of Environmental Health Hazard Assessment” 1001 I Street, Sacramento, CA  
27 95814.

### 28 **3.3 Attorneys’ Fees and Costs**

The portion of the settlement attributable to attorneys’ fees and costs, forty-seven thousand dollars (\$47,000.00), shall be paid to EHA’s counsel, who are entitled to attorneys’ fees and costs incurred by it in this action, including but not limited to investigating potential violations, bringing this matter to Melinda’s attention, as well as litigating and negotiating a settlement in the public interest.

1 Melinda's shall provide their payment to EHA's counsel in two installments per Section 3.4 of  
2 this Consent Judgment.

3 The first installment shall be in the amount of eleven thousand dollars (\$11,000.00), payable  
4 to Glick Law Group, PC and eleven thousand dollars (\$11,000.00), payable to Nicholas & Tomasevic,  
5 LLP, respectively. The second installment shall be in the amount of twelve thousand five hundred  
6 dollars (\$12,500.00), payable to Glick Law Group, PC and twelve thousand five hundred dollars  
7 (\$12,500.00), payable to Nicholas & Tomasevic, LLP, respectively. If the first installment payments  
8 totaling twenty-two thousand dollars (\$22,000.00) are paid on time, then the second installment of  
9 twenty-five thousand dollars (\$25,000.00) shall be waived by EHA and EHA's counsel. The  
10 addresses for these two entities are:

11 Noam Glick  
12 Glick Law Group  
13 225 Broadway, 19<sup>th</sup> Floor  
14 San Diego, CA 92101

15 Craig Nicholas  
16 Nicholas & Tomasevic, LLP  
17 225 Broadway, 19th Floor  
18 San Diego, CA 92101

### 19 **3.4 Timing**

20 The first installment of the attorneys' fees payments required by Section 3.3. of this Consent  
21 Judgment will be sent within fourteen (14) days of the Effective Date, and the second installment,  
22 unless waived pursuant to Section 3.3, will be sent within thirty (30) days of the Effective Date. If the  
23 deadline is on Saturday, Sunday or holiday, it will be extended until the next day that is not a  
24 weekend or holiday.

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

### 26 **4.1 EHA's Public Release of Proposition 65 Claims**

27 Plaintiff acting on its own behalf and in the public interest releases Melinda's and its parents,  
28 subsidiaries, affiliated entities under common ownership, its directors, officers, principals, agents,  
employees, attorneys, insurers, accountants, predecessors, successors, and assigns ("Defendant  
Entities"), and each entity to whom Defendant directly or indirectly distributes, ships, or sells the

1 Covered Products including but not limited to downstream distributors, wholesalers, customers, and  
2 retailers (including but not limited to Marshall's of MA, Inc.), franchisees, franchisors,  
3 cooperative members, suppliers, licensees, and licensors, and all of the foregoing entities'  
4 owners, directors, officers, agents, principals, employees, attorneys, insurers, accountants,  
5 representatives, predecessors, successors, and assigns (collectively referred to as the  
6 "Releasees") from all claims for violations of Proposition 65 based on exposure to acrylamide from  
7 Covered Products imported by Melinda's on or prior to the Effective Date as set forth in the Notice.  
8 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65  
9 with respect to exposures to acrylamide from Covered Products as set forth in the Notice.

#### 10 **4.2 EHA's Individual Release of Claims**

11 EHA, in its individual capacity, also provides a release to Melinda's and Releasees, which shall be a full  
12 and final accord and satisfaction of, as well as a bar to, all actions, causes of action, obligations, costs,  
13 expenses, attorneys' fees, damages, losses, claims, liabilities, and demands of every nature,  
14 character, and kind, whether known or unknown, suspected or unsuspected, arising out of alleged or  
15 actual exposures to acrylamide in Covered Products manufactured, imported, sold, or distributed by  
16 Melinda's before the Effective Date.

17 It is possible that other claims not known to the Parties arising out of the facts alleged in the  
18 Notice and relating to the Covered Product will develop or be discovered. EHA on behalf of itself only,  
19 acknowledges that this Consent Judgment is expressly intended to cover and include all such claims  
20 up through the Effective Date. The Parties acknowledge that the claims released in Sections 4.3 may  
21 include unknown claims, and EHA nevertheless waives and relinquishes any right or benefit it has or  
22 may have under California Civil Code section 1542 as to any such unknown claims. California Civil  
23 Code section 1542 reads as follows:

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



1 **4.3 Melinda’s Release of EHA**

2 Melinda’s on its own behalf, hereby waives any and all claims against EHA and its attorneys  
3 and other representatives, for any and all actions taken, or statements made by EHA and its attorneys  
4 and other representatives, whether in the course of investigating claims or otherwise seeking to enforce  
5 proposition 65 against them in this matter or with respect to the covered products.

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 the date it has been fully executed by the  
9 Parties, or by such additional time as the Parties may agree to in writing.

10 **7. GOVERNING LAW**

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

17 In the event the California Office of Health Hazard Assessment adopts a regulation or safe  
18 use determination, or issues an interpretive guideline that exempts Covered Products from meeting  
19 the requirements of Proposition 65; or if acrylamide cases are permanently enjoined by a court of  
20 competent jurisdiction; or if Proposition 65 is determined to be preempted by federal law or a burden  
21 on First Amendment rights with respect to acrylamide in Covered Products or products substantially  
22 similar to Covered Products, then Melinda’s shall have no further injunctive obligations pursuant to  
23 this Consent Judgment.

24 **8. NOTICE**

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

1                   If to Melinda's:  
2                   Z. Carter Figueroa  
3                   Executive Vice President & General  
4                   Counsel  
5                   Melinda's Foods, LLC  
6                   1740 Hurd Drive  
7                   Irving, TX 75038

If to EHA:  
                      Jake Schulte  
                      Nicholas & Tomasevic, LLP  
                      225 Broadway, 19th Floor  
                      San Diego, CA 92101

5                   With copy to:  
6                   Jeffrey Margulies  
7                   Norton Rose Fulbright US LLP  
8                   555 South Flower Street 41st Floor  
9                   Los Angeles, CA 90071

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

## 12                  **9. COUNTERPARTS; DIGITAL SIGNATURES**

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

## 16                  **10. POST EXECUTION ACTIVITIES**

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

## 26                  **11. MODIFICATION**

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

