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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 THE KROGER CO., an Ohio corporation,  
24 RALPHS GROCERY COMPANY, an Ohio  
25 corporation, and DOES 1 through 100,  
26 inclusive,

27 Defendants.

Case No. RG21103781

**[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 Shearer’s Foods, LLC (“Defendant”). EHA and Defendant (the “Parties”)  
5 enter in this Consent Judgment to settle certain claims asserted by EHA against Defendant and  
6 Downstream Defendants (defined in Section 1.4 below) as set forth in the Complaint.

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              Defendant 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  
14 Code section 25249.6 *et seq.* (“Proposition 65”).

15                  **1.4 Downstream Defendants**

16              “Downstream Defendants” are defined as Amerifoods Trading Company, LLC, Amerifoods  
17 Trading Co., Smart & Final, LLC, The Kroger Co., and Ralphs Grocery Company.

18                  **1.5 Covered Products**

19              “Covered Products” means all tortilla chips manufactured by Defendant Shearer’s Foods,  
20 LLC and imported, sold, shipped, delivered, or distributed for sale to consumers in California.

21                  **1.6 Notice of Violation**

22              On or around September 14, 2021, EHA served Defendant, certain Downstream Defendants,  
23 the California Attorney General, and all other required public enforcement agencies with a 60-Day  
24 Notice of Violation of Proposition 65 alleging that Defendant violated Proposition 65 by exposing  
25 persons in California to acrylamide contained in Sun Harvest Organic Blue Corn Tortilla Chips  
26 without first providing a clear and reasonable Proposition 65 warning (AG Number 2021-002285).  
27 This amended a prior 60-Day Notice sent on August 2, 2021.

28              On or around October 19, 2021, EHA served Defendant, certain Downstream Defendants, the

1 California Attorney General, and all other required public enforcement agencies with an amended 60-  
2 Day Notice of Violation of Proposition 65 alleging that Defendant violated Proposition 65 by  
3 exposing persons in California to acrylamide contained in Simple Truth Organic White Corn Tortilla  
4 Chips without first providing a clear and reasonable Proposition 65 warning (AG Number 2021-  
5 02575). This amended a prior 60-Day Notice sent on March 2, 2021.

6 No public enforcer has commenced or is otherwise prosecuting an action to enforce the  
7 violations alleged in the foregoing notices.

8 **1.7 State of the Pleadings**

9 On or around June 30, 2021, EHA filed the operative Complaint in this action, naming The  
10 Kroger Co. and Ralphs Grocery Company. On or around February 3, 2022, EHA amended the  
11 complaint to add defendant Shearer's Foods, LLC.

12 **1.8 No Admission**

13 Nothing in this Consent Judgment shall constitute or be construed as an admission against  
14 interest by the Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall  
15 compliance with this Consent Judgment constitute or be construed as an admission against of any  
16 fact, conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall  
17 prejudice, waive or impair any right, remedy, argument, or defense the Parties may have in any other  
18 pending or future legal proceedings. The Consent Judgment is the product of negotiation and  
19 compromise and is accepted by the Parties solely for purposes of settling, compromising, and  
20 resolving issues disputed in this action. This section shall not, however, diminish or otherwise affect  
21 the Parties obligations under this Consent Judgment.

22 **1.9 Jurisdiction**

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

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**1.10 Effective Date and Compliance Date**

For purposes of this Consent Judgment, the term “Effective Date” means the date on which the Court grants the motion for approval of this Consent Judgment, as discussed in Section 5. The “Compliance Date” is the date that is 9 months after the Effective Date, provided that the Compliance Date may be extended up to an additional 3 months by Defendant notifying EHA at least 30 days before the Compliance Date that good cause exists for such extension. If EHA believes in good faith that such extension is without basis, EHA shall notify Defendant of such determination and the parties shall meet and confer to resolve the dispute.

**2. INJUNCTIVE RELIEF**

**2.1 Reformulation of Covered Products**

Except as otherwise provided herein, Covered Products manufactured by Defendant on or after the Compliance Date that Defendant sells or distributes for sale in California shall not exceed 281.6 parts per billion (“ppb”) for acrylamide, calculated in accordance with the protocol set forth in Section 2.2 (“Reformulation Level”), unless such Covered Products comply with the warning requirements of Section 2.3.

**2.2 Reformulation Level Protocol**

(a) Testing for acrylamide shall be performed by a laboratory accredited by the State of California, a federal agency, or nationally recognized accrediting organization, using either GC/MS (Gas Chromatography/Mass Spectrometry), LC-MS/MS (Liquid Chromatograph-Mass Spectrometry/Mass Spectrometry), or any other generally accepted testing method agreed upon by the Parties to this Consent Judgment.

(b) The Reformulation Level is determined by randomly selecting and testing samples of the Covered Products from up to 5 production lots during a testing period of 60-days. The production lots shall be drawn from each unique Stock Keeping Unit (“SKU”) that are within the Covered Products category and are shipped for sale in California, provided that at least one sample of each SKU is included among the samples.

1 (c) To demonstrate that the Reformulation Level has been achieved, testing conducted in  
2 accordance with the protocol set forth in Section 2.2(b) must establish that the sales weighted  
3 arithmetic mean of acrylamide levels for the Covered Products (“Sales-Weighted Arithmetic Mean  
4 Concentration”) is at or below 281.6 parts per billion. The Sales-Weighted Arithmetic Mean  
5 Concentration is to be calculated by multiplying the acrylamide concentration of each SKU sample  
6 (or the arithmetic average of multiple samples of a specific SKU) by the fraction of total sales volume  
7 for all Covered Products shipped for sale in California, and thereafter sum all such adjusted  
8 concentrations. For purposes of illustration only, if there are two SKUs of the Covered Products  
9 shipped for sale in California, and SKU #1, with an average concentration of 240 ppb, represents  
10 60% of all such sales, and SKU #2, with an average concentration of 280 ppb, represents 40% of all  
11 such sales, the Sales-Weighted Arithmetic Mean Concentration would be  $((240 \times 0.6) + (280 \times 0.4))$   
12  $\rightarrow (144 + 112) \rightarrow 256$  ppb.

### 13 2.3 Clear and Reasonable Warnings

14 As an alternative to reformulation of the Covered Products as set forth in Section 2.1, Covered  
15 Products manufactured by Defendant on or after the Compliance Date that Defendant sells or  
16 distributes for sale in California shall include the following warning statement:

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

19 This warning statement shall be prominently displayed on the Covered Products, on the  
20 packaging of the Covered Products, or on a placard, shelf tag, or sign, provided that the warning  
21 statement is displayed with such conspicuousness, as compared with other words, statements, or  
22 designs, as to render it likely to be read and understood by an ordinary individual prior to purchase. If  
23 the warning statement is displayed on the packaging of the Covered Products, it must be set off from  
24 the surrounding information and be in a type size no smaller than the type size used for other  
25 consumer information on the Covered Products. For internet purchases, the warning shall include  
26 either the warning statement or a clearly marked hyperlink using the word “WARNING” on the  
27 product display page, or by otherwise prominently displaying the warning prior to completion of the  
28

1 purchase to be delivered in California.

2 **2.4 Sell-Through Period**

3 Notwithstanding anything else in this Consent Judgment, the Covered Products that are  
4 manufactured prior to the Compliance Date shall be subject to release of liability pursuant to this  
5 Consent Judgment, without regard to when such Covered Products were, or are in the future,  
6 distributed or sold to customers. As a result, the obligation of Defendant and the Releasees (if  
7 applicable) do not apply to Covered Products manufactured prior to the Compliance Date.

8 **3. MONETARY SETTLEMENT TERMS**

9 **3.1 Settlement Amount**

10 Defendant shall pay sixty-five thousand dollars (\$65,000.00) in settlement and total  
11 satisfaction of all the claims referred to in the Notices, the Complaint, and this Consent Judgment.  
12 This includes civil penalties in the amount of seven thousand dollars (\$7,000.00) pursuant to Health  
13 and Safety Code section 25249.7(b) and attorneys' fees and costs in the amount of fifty-eight  
14 thousand dollars (\$58,000.00) pursuant to Code of Civil Procedure section 1021.5.

15 **3.2 Civil Penalty to OEHHA and EHA**

16 The portion of the settlement attributable to civil penalties shall be allocated according to  
17 Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the  
18 penalty, five thousand two hundred and fifty dollars (\$5,250.00), paid to the California Office of  
19 Environmental Health Hazard Assessment ("OEHHA"), and the remaining twenty-five percent (25%)  
20 of the penalty, one thousand seven hundred and fifty dollars (\$1,750.00), paid to EHA.

21 Payment owed to OEHHA (EIN: 68-0284486) shall be delivered directly to OEHHA (Memo  
22 Line "Prop 65 Penalties") to one of the following addresses:

23 For United States Postal Service Delivery:

24 Mike Gyurics  
25 Fiscal Operations Branch Chief  
26 Office of Environmental Health Hazard Assessment  
27 P.O. Box 4010  
28 Sacramento, CA 95812-4010

For Federal Express 2-Day Delivery:

Mike Gyurics

1 Fiscal Operations Branch Chief  
2 Office of Environmental Health Hazard Assessment  
3 1001 I Street  
4 Sacramento, CA 95814

5 Defendant agrees to provide EHA counsel with a copy of the check payable to OEHHA,  
6 simultaneously with its penalty payments to EHA.

7 Payment owed to EHA (EIN: 84-2322975) shall be delivered to the following address:

8 Environmental Health Advocates  
9 225 Broadway, Suite 1900  
10 San Diego, CA 92101

### 11 **3.3 Attorneys' Fees and Costs**

12 The portion of the settlement attributable to attorneys' fees and costs, shall be paid to EHA's  
13 counsel, who are entitled to attorneys' 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 in the amount of fifty-eight thousand dollars  
17 (\$58,000.00) to EHA's counsel in two checks, divided equally, twenty-nine thousand dollars  
18 (\$29,000.00) payable to Glick Law Group, PC (EIN: 47-1838518) and twenty-nine thousand dollars  
19 (\$29,000.00) payable to Nicholas & Tomasevic, LLP (EIN: 46-3474065), respectively. The addresses  
20 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

EHA's counsel will provide completed IRS 1099, W-9, or other tax forms as required for  
payments to EHA and its counsel.

### **3.4 Timing**

If all required tax forms are provided by EHA's counsel prior to the Effective Date, all  
settlement payments will be issued within 14-days of the Effective Date.

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2 **4. COVERED CLAIMS AND RELEASES**

3 **4.1 Covered Claims**

4 This Consent Judgment is a full, final, and binding resolution between EHA, on behalf of  
5 itself and the public interest, and Defendant and its parents, subsidiaries, affiliated entities under  
6 common ownership, its directors, officers, principals, agents, employees, attorneys, insurers,  
7 accountants, predecessors, successors, and assigns (“Defendant Releasees”), and all entities to whom  
8 Defendant directly or indirectly distributes or sells the Covered Products including but not limited to  
9 distributors, wholesalers, customers, retailers, franchisees, licensees, licensors, and Downstream  
10 Defendants (collectively referred to as the “Downstream Releasees”), from all claims for violation of  
11 Proposition 65 arising from the alleged or actual failure to warn of exposure to acrylamide contained  
12 in Covered Products that were manufactured by Defendant prior to the Compliance Date and sold or  
13 distributed for sale in California.

14 **4.2 EHA Release of Claims**

15 EHA, for itself, its agents, successors and assigns, releases, waives, and forever discharges all  
16 claims against Defendant, Defendant Releasees, Downstream Defendants, and Downstream  
17 Releasees for violation of Proposition 65 or any other statutory or common law claims that have been  
18 or could have been asserted by EHA individually or in the public interest arising from the alleged or  
19 actual failure to warn of exposure to acrylamide contained in Covered Products that were  
20 manufactured by Defendant prior to the Compliance Date and sold or offered for sale in California.

21 **4.3 Defendant’s Release of EHA**

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



1                                   **4.4 Effect of Compliance with Consent Judgment**

2           Compliance with the terms of this Consent Judgment constitutes compliance with Proposition  
3 65 by Defendant, Defendant Releasees, Downstream Defendants, and Downstream Releasees with  
4 respect to Covered Products that are manufactured by Defendant prior to the Compliance Date and  
5 sold or distributed for sale in California.

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 as  
16 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 Defendant  
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 products substantially  
26 similar to Covered Products, then Defendant shall be relieved of its obligation to comply with Section  
27 2 of this Consent Judgment.

28   **8.    ENFORCEMENT**

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

3 **9. NOTICE**

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

7 If to Defendant:

8 George Hawk  
9 General Counsel  
10 Shearer's Foods, LLC  
11 100 Lincoln Way East  
12 Massillon, OH 44646

If to EHA:

Noam Glick  
Glick Law Group, PC  
225 Broadway, 19<sup>th</sup> Floor  
San Diego, CA 92101

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

13 **10. COUNTERPARTS; DIGITAL 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 **11. POST EXECUTION ACTIVITIES**

18 EHA agrees to comply with the reporting form requirements referenced in Health and Safety  
19 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code  
20 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which  
21 motion EHA shall draft and file. In furtherance of obtaining such approval, the Parties agree to  
22 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, and appearing at the hearing before the Court if so requested.

26 **12. MODIFICATION**

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

1 and the entry of a modified consent judgment by the Court.

2 **13. AUTHORIZATION**

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

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

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

10 **15. ENTIRE AGREEMENT**

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

16  
17 **AGREED TO:**

**AGREED TO:**

18 Date: 02/08/2022

Date: 2/22/22

19  
20 By:   
21 ENVIRONMENTAL HEALTH  
ADVOCATES, INC.

By:   
SHEARER'S FOODS, LLC

22 **IT IS SO ORDERED.**

23  
24 Date: \_\_\_\_\_

\_\_\_\_\_

25  
26 JUDGE OF THE SUPERIOR COURT