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17 Attorneys for Plaintiff
18 Environmental Health Advocates, Inc.

19 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

21 **ENVIRONMENTAL HEALTH**
22 **ADVOCATES, INC.,**

23 Plaintiff,

24 v.

25 **ABIMAR FOODS, INC., and DOES 1 through**
26 **100, inclusive,**

27 Defendants.

28 Case No. HG21103377

[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,
4 Inc., (“EHA” or “Plaintiff”) and AbiMar Foods, Inc. (“Defendant” or “AbiMar”) with EHA and
5 AbiMar 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
8 general public. It seeks to promote awareness of exposures to toxic chemicals and to improve
9 human health by reducing or eliminating hazardous substances contained in consumer products.

10 **1.3 Defendant**

11 AbiMar 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
13 Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 EHA alleges that AbiMar manufactures, imports, sells, and distributes for sale Lil’ Dutch
16 Maid Almond Windmill Cookies that contain acrylamide. EHA further alleges that Abimar 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 March 2, 2021, EHA served AbiMar, Big Lots Stores, Inc. (“Big Lots”), the
22 California Attorney General, and all other required public enforcement agencies with a 60-Day
23 Notice of Violation of Proposition 65 (“Notice”). The Notice alleged that AbiMar had violated
24 Proposition 65 by failing to sufficiently warn consumers in California of the health hazards
25 associated with exposures to acrylamide contained in Lil' Dutch Maid Almond Windmill Cookies

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

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1 **1.6 Product Description**

2 The products covered by this Consent Judgment are cookies including but not limited to Lil'
3 Dutch Maid Almond Windmill Cookies manufactured or processed by AbiMar that allegedly contain
4 acrylamide and are imported, sold, shipped, delivered, or distributed for sale to consumers in
5 California by Releasees (as defined in section 4.1) ("Covered Products").

6 **1.7 State of the Pleadings**

7 On or around June 24, 2021, EHA filed a Complaint against AbiMar and Big Lots for the
8 alleged violations of Proposition 65 that are the subject of the Notice ("Complaint"). On or about
9 August 2, 2021, Big Lots filed an Answer to EHA's Complaint, denying the material allegations
10 contained therein. On or about August 23, 2021, AbiMar filed an Answer to EHA's Complaint,
11 denying the material allegations contained therein.

12 **1.8 No Admission**

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

21 **1.9 Jurisdiction**

22 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
23 Court has jurisdiction over AbiMar as to the allegations in the Complaint, that venue is proper in the
24 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
25 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
3 the Court enters a written order granting the motion for approval of this Consent Judgment, as
4 discussed in Section 5.

5 **1.11 Compliance Date**

6 The Compliance Date is the date that is six months after Notice of the Effective Date is
7 transmitted to AbiMar.

8 **2. INJUNCTIVE RELIEF**

9 **2.1 Reformulation of Covered Products**

10 Except as otherwise provided herein, any Covered Products that are manufactured by
11 AbiMar on and after the Compliance Date that AbiMar sells in California or distributes for sale in
12 California shall not exceed 281 parts per billion (“ppb”) for acrylamide on average of 3 units, and
13 not exceed 300 ppb for any one unit, using tests performed by a laboratory accredited by the State
14 of California, a federal agency, or a nationally recognized accrediting organization, using LC-
15 MS/MS (Liquid Chromatograph-Mass Spectrometry), unless such Covered Products comply with
16 the warning requirements of Section 2.2. As used in this Section 2, “sells in California or
17 distributed for sale in California” means to directly ship Covered Products into California or to sell
18 Covered Products to a distributor AbiMar knows will sell Covered Products in California.

19 **2.2 Clear and Reasonable Warnings**

20 For Covered Products that contain acrylamide in a concentration exceeding the 281/300
21 ppb level set forth in section 2.1 above, and which are manufactured and packaged for distribution
22 for authorized sale or use in California on or after the Compliance Date, AbiMar shall provide one
23 of the following warning statements.

24 **Option 1:**

25 **WARNING:** This product can expose you to Acrylamide, a chemical
26 which is known to the State of California to cause cancer and birth
27 defects or other reproductive harm. Acrylamide is not added to our
28 products but results from the process of baking our products. As a
result, Acrylamide is present in our baked goods. Your personal cancer
risk is affected by a wide variety of factors. For more information
regarding Acrylamide see www.fda.gov. For more information about

1 Acrylamide and Proposition 65 visit
2 www.oeaha.ca.gov/prop65/acrylamide.html. For more information
3 generally go to www.P65Warnings.ca.gov.

4 **Option 2:**

5 **WARNING: Cancer and Reproductive Harm –**
6 **www.P65Warnings.cs.gov**

7 This warning statement shall be prominently displayed on the Covered Products, on the
8 packing of the Covered Products, or on a placard, shelf tag, or sign provided that the statement is
9 displayed with such conspicuousness, as compared with other words, statements, or designs as to
10 render it likely to be read and understood by an ordinary individual prior to sale. If the warning
11 statement is displayed on the Covered Products' label, it must be set off from other surrounding
12 information. The same warning shall be posted on any websites under the exclusive control of
13 AbiMar where Covered Products are sold by AbiMar into California directly to consumers.

14 In the event changes to the statutes or regulations governing Proposition 65 are changed,
15 modified, or eliminated, AbiMar may modify or eliminate any warning statement it places on or with
16 the Covered Products in a manner consistent with the changed statutes or regulations without needing
17 to obtain a modification of this Consent Judgment.

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 Compliance 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 obligations of AbiMar, or any Releasees (if
23 applicable) set forth in Sections 2.1 and 2.2 do not apply to Covered Products manufactured on or
24 prior to the Compliance Date.

25 **3. MONETARY SETTLEMENT TERMS**

26 **3.1 Settlement Amount**

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

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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
8 (25%) of the penalty, one thousand, two hundred and fifty dollars (\$1,250.00), paid to EHA
9 individually. These payments will be sent to the below addresses within fourteen (14) days of
10 Notice of the Effective Date being transmitted to AbiMar's counsel.

11 All payments owed to EHA shall be delivered to the following address or shall be
12 electronically transmitted to a bank account owned and/or controlled by EHA:

13 Environmental Health Advocates
14 225 Broadway, Suite 1900
15 San Diego, CA 92101

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

18 For United States Postal Service Delivery:

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

24 For Federal Express 2-Day Delivery:

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

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

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

2 Relevant information is set out below:

- 3 • "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.2(a)(i);
- 4 • "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section
- 5 3.2(a)(i);
- 6 • EHA – (EIN: 84-2322975) at address provided in Section 3.2; and
- 7 • "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA
- 8 95814.

9 **3.3 Attorneys' Fees and Costs**

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

15 AbiMar shall provide their payment to EHA's Counsel in two installments as follows. Payment
16 may be by physical check or by electronic means, including wire transfers, at AbiMar's discretion:

- 17 • The First Installment shall be in the amount of thirty-five thousand dollars (\$35,000.00),
18 with \$17,500.00 payable to Glick Law Group, PC and \$17,500.00 payable to Nicholas &
19 Tomasevic, LLP, within ten (10) days of the transmittal to AbiMar's counsel of (i) Notice of
20 the Effective Date, (ii) IRS W-9 forms as described in Section 3.2 above, and (iii) bank
21 coordinate information for electronic transmission of payment for EHA and Plaintiff's
22 counsel ("First Installment").
- 23 • The Second Installment shall be in the amount of ten thousand dollars (\$10,000.00), with
24 \$5,000.00 payable to Glick Law Group, PC and \$5,000.00 payable to Nicholas &
25 Tomasevic, LLP, within forty (40) days of the transmittal to AbiMar's counsel of Notice of
26 the Effective Date ("Second Installment"). If the First Installment is timely made by
27 AbiMar or its counsel, then EHA's Counsel agrees to waive the Second Installment.
28 Timeliness of payments shall mean on or before the designated date if payment is effected

1 electronically. If payment is effected by physical check, timeliness of payments shall mean
2 delivery of the check(s) to an overnight courier delivery service on or before the designated
3 date.

4 The addresses for these two entities are:

5 Noam Glick
6 Glick Law Group
7 225 Broadway, 19th Floor
8 San Diego, CA 92101

9 Craig Nicholas
10 Nicholas & Tomasevic, LLP
11 225 Broadway, 19th Floor
12 San Diego, CA 92101

13 **4. CLAIMS COVERED AND RELEASED**

14 **4.1 EHA's Public Release of Proposition 65 Claims**

15 Plaintiff acting on its own behalf and in the public interest releases AbiMar and its parents,
16 subsidiaries, affiliated entities under common ownership, its directors, officers, principals, agents,
17 employees, attorneys, insurers, accountants, predecessors, successors, and assigns ("Defendant
18 Entities"), each entity to whom Defendant directly or indirectly distributes, ships, or sells the Covered
19 Products including but not limited to downstream distributors, wholesalers, customers, and retailers
20 (including but not limited to Big Lots Stores, Inc.), franchisees, franchisors, cooperative members,
21 suppliers, licensees, and licensors, and all of the foregoing entities' owners, directors, officers, agents,
22 principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors, and
23 assigns (collectively referred to as the "Releasees") from all claims for violations of Proposition 65
24 up through the Compliance Date based on exposure to acrylamide from Covered Products as set forth
25 or which could have been set forth in the Notice and the Complaint. Compliance with the terms of
26 this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to
27 acrylamide from Products as set forth in the Notice and the Complaint.

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1 **4.2 EHA's Individual Release of Claims; Civil Code Section 1542**

2 EHA, in its individual capacity, also provides a release to AbiMar and/or Releasees, which
3 shall be a full and final accord and satisfaction of, as well as a bar to, all actions, causes of action,
4 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities, and demands of
5 every nature, character, and kind, whether known or unknown, suspected or unsuspected, arising out
6 of alleged or actual exposures to acrylamide in Covered Products manufactured, imported, sold, or
7 distributed by AbiMar before the Effective Date. EHA acknowledges that it is familiar with Section
8 1542 of the California Civil Code, which provides as follows:

9 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
10 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
11 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE
12 AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY
13 AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED
14 PARTY.

15 EHA understands and acknowledges the significance and consequence of this waiver of
16 California Civil Code Section 1542.

17 **4.3 AbiMar's Release of EHA**

18 AbiMar on its own behalf as well as its past and current agents, representatives, attorneys,
19 successors, and assignees, hereby waives any and all claims against EHA and its attorneys and other
20 representatives, for any and all actions taken or statements made by EHA and its attorneys and other
21 representatives, whether in the course of investigating claims, otherwise seeking to enforce
22 Proposition 65 against them, in this matter or with respect to the Covered Products.

23 **5. COURT APPROVAL**

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

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1 **6. SEVERABILITY**

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

5 **7. GOVERNING LAW; CHANGE IN LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the state of California
7 as applied within the state of California. In the event that Proposition 65 is repealed, or is
8 otherwise rendered inapplicable for reasons, including but not limited to changes in the law, then
9 AbiMar shall have no further injunctive obligations pursuant to this Consent Judgment with
10 respect to, and to the extent that, the Covered Products are so affected.

11 In the event the California Office of Health Hazard Assessment adopts a regulation or safe
12 use determination, or issues an interpretive guideline that exempts Covered Products from meeting
13 the requirements of Proposition 65; or if the Ninth Circuit Court of Appeals upholds the District
14 Court decision to grant a preliminary injunction in *California Chamber of Commerce v. Becerra*,
15 No. 2:19-cv-01019-KJM-JDP (E.D. Cal.); or if Proposition 65 is determined to be preempted by
16 federal law or a burden on First Amendment rights with respect to acrylamide in Covered Products
17 or Covered Products substantially similar to Covered Products, then AbiMar shall be relieved of
18 its obligation to comply with Section 2 herein without needing to obtain modification of this
19 Consent Judgment.

20 **8. NOTICE**

21 Unless otherwise specified herein, all correspondence and notice required by this Consent
22 Judgment shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified
23 mail, return receipt requested; or (iii) a recognized overnight courier; (iv) facsimile transmission; or
24 (v) electronic transmission to the following addresses:

25 *[Rest of page intentionally left blank]*
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1 If to AbiMar:

2 Henry Ben-Zvi
3 Ben-Zvi & Associates
4 3231 Ocean Park Blvd., STE 212
5 Santa Monica, CA 90405
6 Fax: 310.664.1571
7 Email: henry@ben-zvilaw.com

If to EHA:

Noam Glick
Glick Law Group, P.C.
225 Broadway, 19th Floor
San Diego, CA 92101
Fax: 619.393.0154
Email: noam@glicklawgroup.com

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

10 **9. COUNTERPARTS; DIGITAL SIGNATURES**

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

14 **10. POST EXECUTION ACTIVITIES**

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

24 **11. MODIFICATION**

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

28 **12. AUTHORIZATION**

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

1. **13. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**


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

6 **14. ENTIRE AGREEMENT**

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

13 **AGREED TO:**

14 Date: September 28, 2021

15
16 By: 
17 ENVIRONMENTAL HEALTH
ADVOCATES, INC.

AGREED TO:

Date: September 30, 2021

By: 
ABIMAR FOODS, INC.

18 **IT IS SO ORDERED.**

19
20 Date: _____

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22 JUDGE OF THE SUPERIOR COURT

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