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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 EL MILAGRO, INC., an Illinois corporation,
26 TARGET CORPORATION, a Minnesota
27 corporation, and DOES 1 through 100,
28 inclusive,

Defendants.

Case No. HG21102495

[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 El Milagro, Inc. (an Illinois corporation) (“Defendant” or “El Milagro”)
5 with EHA and El Milagro each individually referred to as a “Party” and collectively referred to as the
6 “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 El Milagro 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 El Milagro manufactures, imports, sells, and distributes for sale El Milagro
17 Totopos Estilo Casera that contain acrylamide. EHA further alleges that El Milagro does so without
18 providing a sufficient health hazard warning as required by Proposition 65 and related regulations
19 pursuant to Proposition 65, acrylamide is listed as a chemical known to cause cancer, birth defects
20 and other reproductive harm.

21 **1.5 Notices of Violation**

22 On or around March 18, 2021, EHA served a Delaware entity El Milagro, Inc. (“El Milagro
23 DE”), Target Corporation, the California Attorney General, and all other required public enforcement
24 agencies with a 60-Day Notice of Violation of Proposition 65 (“Initial Notice”). The Initial Notice
25 alleged that Defendant El Milagro had violated Proposition 65 by failing to sufficiently warn
26 consumers in California of the health hazards associated with exposures to acrylamide contained in
27 El Milagro Totopos Estilo Casera.

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1 On or around August 25, 2021, EHA served Defendant El Milagro, Target
2 Corporation, the California Attorney General, and all other required public enforcement
3 agencies with a 60-Day Notice of Violation of Proposition 65 (“Amended Notice”). The
4 Amended Notice corrected the El Milagro entity (removing El Milagro DE and substituting in
5 Defendant El Milagro) and the registered address for El Milagro.

6 No public enforcer has commenced or is otherwise prosecuting an action to enforce the
7 violations alleged in the Initial Notice or Amended Notice (hereinafter, the “Notices”).

8 **1.6 Product Description**

9 The products covered by this Consent Judgment are El Milagro products manufactured or
10 processed by El Milagro that allegedly contain acrylamide and are imported, sold, shipped, delivered,
11 or distributed for sale to consumers in California by Releasees (as defined in section 4.1) (“Covered
12 Products”).

13 **1.7 State of the Pleadings**

14 On or around June 18, 2021, EHA filed a Complaint against El Milagro DE for the alleged
15 violations of Proposition 65 that are the subject of the Notices (“Complaint”). EHA later dismissed
16 El Milagro DE and substituted in current Defendant El Milagro (an Illinois corporation).

17 **1.8 No Admission**

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

26 **1.9 Jurisdiction**

27 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
28 Court has jurisdiction over El Milagro as to the allegations in the Complaint, that venue is proper in

1 the County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
2 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

3 **1.10 Effective Date**

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

6 **2. INJUNCTIVE RELIEF**

7 **2.1 Reformulation of Covered Products**

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

16 **2.2 Clear and Reasonable Warnings**

17 For Covered Products that contain acrylamide in a concentration exceeding the 281-ppb level
18 set forth in section 2.1 above, and which are manufactured and packaged for distribution for
19 authorized sale or use in California on or after the Effective Date, El Milagro shall provide one of the
20 following warning statements.

21 **Option 1:**

22 **WARNING:** This product can expose you to chemicals including
23 Acrylamide, which is known to the State of California to cause cancer
24 and birth defects or other reproductive harm. For more information go
to www.P65Warnings.ca.gov.

25 **Option 2:**

26 **WARNING:** Cancer and Reproductive Harm –
www.P65Warnings.ca.gov

27 This warning statement shall be prominently displayed on the Covered Products, on the packing
28 of the Covered Products, or on a placard, shelf tag, or sign provided that the statement is displayed with

1 such conspicuousness, as compared with other words, statements, or designs as to render it likely to
2 be read and understood by an ordinary individual prior to sale. If the warning statement is displayed
3 on the Covered Products' packaging, it must be in a type size no smaller than the largest type size
4 used for other consumer information on the product. In no case shall a warning statement displayed
5 on the Covered Products' packaging appear in a type size smaller than 6-point type. The same
6 warning shall be posted on any websites under the exclusive control of El Milagro where Covered
7 Products are sold into California.

8 **2.3 Sell-Through Period**

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

14 **3. MONETARY SETTLEMENT TERMS**

15 **3.1 Settlement Amount**

16 El Milagro shall pay fifty thousand dollars (\$50,000.00) in settlement and total satisfaction of
17 all the claims referred to in the Notices, the Complaint, and this Consent Judgment. This includes
18 civil penalties in the amount of five thousand dollars (\$5,000.00) pursuant to Health and Safety Code
19 section 25249.7(b) and attorneys' fees and costs in the amount of forty-five thousand dollars
20 (\$45,000.00) pursuant to Code of Civil Procedure section 1021.5.

21 **3.2 Civil Penalty**

22 The portion of the settlement attributable to civil penalties shall be allocated according to
23 Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the
24 penalty paid to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and
25 the remaining twenty-five percent (25%) of the penalty paid to EHA individually.

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

27 Environmental Health Advocates
28 225 Broadway, Suite 1900
San Diego, CA 92101

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

3 For United States Postal Service Delivery:

4 Mike Gyurics
5 Fiscal Operations Branch Chief
6 Office of Environmental Health Hazard Assessment
7 P.O. Box 4010
8 Sacramento, CA 95812-4010

9 For Federal Express 2-Day Delivery:

10 Mike Gyurics
11 Fiscal Operations Branch Chief
12 Office of Environmental Health Hazard Assessment
13 1001 I Street
14 Sacramento, CA 95814

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

17 Plaintiff and its counsel will provide completed IRS 1099, W-9, or other tax forms as required.

18 Relevant information is set out below:

- 19 • "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.3;
- 20 • "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section 3.3; and
- 21 • "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA
22 95814.

23 3.3 Attorneys' Fees and Costs

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

El Milagro shall provide its payment to EHA's counsel in two installments as follows:

- The First Installment shall be in the amount of forty thousand dollars (\$40,000.00), with
\$20,000.00 payable to Glick Law Group, PC, and \$20,000.00 payable to Nicholas &
Tomasevic, LLP, within ten (10) days of the Effective Date ("First Installment").

1 • The Second Installment shall be in the amount of five thousand dollars (\$5,000.00), with
2 \$2,500.00 payable to Glick Law Group, PC and \$2,500.00 payable to Nicholas &
3 Tomasevic, LLP, within forty (40) days of the Effective Date (“Second Installment”). If
4 the First Installment is timely received by EHA’s Counsel, then EHA’s Counsel agrees to
5 waive the Second Installment.

6 The addresses for these two entities are:

7 Noam Glick
8 Glick Law Group
9 225 Broadway, 19th Floor
10 San Diego, CA 92101

11 Craig Nicholas
12 Nicholas & Tomasevic, LLP
13 225 Broadway, 19th Floor
14 San Diego, CA 92101

15 **4. CLAIMS COVERED AND RELEASED**

16 **4.1 EHA’s Public Release of Proposition 65 Claims**

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

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1 **4.2 EHA’s Individual Release of Claims**

2 EHA, in its individual capacity, also provides a release to El Milagro 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 every
5 nature, character, and kind, whether known or unknown, suspected or unsuspected, arising out of
6 alleged or actual exposures to acrylamide in Covered Products manufactured, imported, sold, or
7 distributed by El Milagro before the Effective Date.

8 **4.3 El Milagro’s Release of EHA**

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

14 **5. COURT APPROVAL**

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

18 **6. SEVERABILITY**

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

22 **7. GOVERNING LAW**

23 The terms of this Consent Judgment shall be governed by the laws of the state of California
24 as applied within the state of California. In the event that Proposition 65 is repealed, or is otherwise
25 rendered inapplicable for reasons, including but not limited to changes in the law, then El Milagro
26 may provide written notice to EHA of any asserted change, and shall have no further injunctive
27 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Covered
28 Products are so affected.

1 In the event the California Office of Health Hazard Assessment adopts a regulation or safe
2 use determination, or issues an interpretive guideline that exempts Covered Products from meeting
3 the requirements of Proposition 65; or if acrylamide cases are permanently enjoined by a court of
4 competent jurisdiction; or if Proposition 65 is determined to be preempted by federal law or a burden
5 on First Amendment rights with respect to acrylamide in Covered Products or Covered Products
6 substantially similar to Covered Products, then El Milagro shall be relieved of its obligation to
7 comply with Section 2 herein.

8 **8. ENFORCEMENT**

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

11 **9. NOTICE**

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

15 **If to El Milagro:**

16 Sam Edgerton
17 O'Hagan Meyer
18 1601 Pacific Coast Highway
Hermosa Beach, CA 90254

If to EHA:

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

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

21 **10. COUNTERPARTS; DIGITAL SIGNATURES**

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

25 **11. POST EXECUTION ACTIVITIES**

26 EHA agrees to comply with the reporting form requirements referenced in Health and Safety
27 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
28 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which

1 motion EHA shall draft and file. In furtherance of obtaining such approval, the Parties agree to
2 mutually employ their best efforts, including those of their counsel, to support the entry of this
3 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
4 purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion for
5 approval, responding to any objection that any third-party may make, and appearing at the
6 hearing before the Court if so requested.

7 **12. MODIFICATION**

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

11 **13. AUTHORIZATION**

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

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

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

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15. ENTIRE AGREEMENT

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

AGREED TO:

Date: 10/21/2021

By: 
ENVIRONMENTAL HEALTH
ADVOCATES, INC.

AGREED TO:

Date: 10/21/2021

By: 
EL MILAGRO, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT