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7 Environmental Health Advocates, Inc.

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

10 ENVIRONMENTAL HEALTH
11 ADVOCATES, INC., a California corporation,

12 Plaintiff,

13 v.

14 JODY'S, INC., a Virginia corporation,
15 AMAZON.COM, INC., a Delaware
16 corporation, and DOES 1 through 100,
inclusive,

17 Defendants.

Case No. 22CV007094

[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 Jody’s, Inc. (“Defendant” or “Jody’s”) with EHA and Jody’s each
5 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 Jody’s employs ten or more individuals and is a “person in the course of doing business” for
12 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 Jody’s manufactures, imports, sells, and distributes for sale Jody’s Gourmet
16 Popcorn that contains acrylamide. EHA further alleges that Jody’s does so without providing a
17 sufficient health hazard warning as required by Proposition 65 and related Regulations. Pursuant to
18 Proposition 65, acrylamide is listed as a chemical known to cause cancer, birth defects and other
19 reproductive harm.

20 **1.5 Notices of Violation**

21 On or around August 17, 2021, EHA served Jody’s, Amazon.com, Inc., the California
22 Attorney General, and all other required public enforcement agencies with a 60-Day Notice of
23 Violation of Proposition 65 (“Notice”). The Notice alleged that Jody’s had violated Proposition 65 by
24 failing to sufficiently warn consumers in California of the health hazards associated with exposures to
25 acrylamide contained in Jody’s Gourmet Popcorn.

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 popcorn including but not limited to all
3 variations/flavors of Jody’s Gourmet Popcorn manufactured or processed by Jody’s and sold by
4 Jody’s or its customers that allegedly contain acrylamide and are imported, sold, shipped, delivered,
5 or distributed for sale to consumers in California by Releasees (as defined in section 4.1) (“Covered
6 Products”).

7 **1.7 State of the Pleadings**

8 On or around February 16, 2022, EHA filed a Complaint against Jody’s for the alleged
9 violations of Proposition 65 that are the subject of the Notice (“Complaint”).

10 **1.8 No Admission**

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

19 **1.9 Jurisdiction**

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

24 **1.10 Effective Date**

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

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1 **2. INJUNCTIVE RELIEF**

2 **2.1 Reformulation of the Covered Products**

3 Except as otherwise provided herein, any Covered Products that are manufactured by Jody's
4 on and after the Effective Date that Jody's sells in California or distributes for sale in California shall
5 not exceed 281 parts per billion ("ppb") for acrylamide, using tests performed by a laboratory
6 accredited by the State of California, a federal agency, or a nationally recognized accrediting
7 organization, using LC-MS/MS (Liquid Chromatography-Mass Spectrometry), or any other test
8 method approved by the State of California, unless such Covered Products comply with the warning
9 requirements of Section 2.2. As used in this Section 2, "distributed for sale in California" means to
10 directly ship Covered Products into California, for purposes of selling the Products in California, or
11 to sell Covered Products to a distributor, retailer (including an online retailer), or co-packing
12 customer Jody's knows may or will sell Covered Products in California.

13 **2.2 Clear and Reasonable Warnings**

14 For Covered Products that contain acrylamide in a concentration exceeding the 281 ppb level
15 set forth in section 2.1 above, and which are manufactured and packaged for distribution for
16 authorized sale or use in California on or after the Effective Date, Jody's shall provide one of the
17 following warning statements.

18 **Option 1:**

19 **WARNING:** Consuming this product can expose you to chemicals
20 including acrylamide, which is known to the State of California to
21 cause cancer and birth defects or other reproductive harm. For more
 information go to www.P65Warnings.ca.gov/food.

22 **Option 2:**

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

24 The warning requirements set forth herein are imposed pursuant to the terms of this Consent
25 Judgment and are recognized by the Parties as not being the exclusive manner of providing a warning
26 for the Products. Warnings may be provided as specified in the Proposition 65 regulations (Title 27,
27 California Code of Regulations, section 25601, *et seq.*) in effect as of the Effective Date or as such
28

1 regulations may be amended in the future, or pursuant to any other settlement agreement or consent
2 judgment involving acrylamide. In addition, Jody's may follow the notification procedure set out in
3 Title 27, California Code of Regulations, section 25600.2 or a similar procedure to provide warnings
4 for the Products consistent with the Consent Judgment. The same warning shall be posted on any
5 websites under the exclusive control of Jody's where Covered Products are sold into California.
6 Jody's shall instruct any third-party website to which it sells the Products to include the same
7 warning as a condition of selling the Products.

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 Jody's, or any Releasees (if applicable),
13 do not apply to these Covered Products manufactured on or prior to the Effective Date.

14 **3. MONETARY SETTLEMENT TERMS**

15 **3.1 Settlement Amount**

16 Jody's shall pay fifty thousand dollars (\$50,000.00) in settlement and total satisfaction of all
17 the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes civil
18 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 2100
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 Jody's 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
18 required. Relevant information is set out below:

- 19 • "Entorno Law, LLP" (EIN: 68-0284486) at the address provided in Section 3.3;
- 20 • "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA 95814.

21 **3.3 Attorney's Fees and Costs**

22 The portion of the settlement attributable to attorneys' fees and costs, forty-five thousand
23 dollars (\$45,000.00), shall be paid to Entorno Law, LLP, who is entitled to attorneys' fees and costs
24 incurred by it in this action, including but not limited to investigating potential violations, bringing
25 this matter to Jody's attention, as well as litigating and negotiating a settlement in the public
26 interest.

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

- The First Installment shall be in the amount of thirty-five thousand dollars (\$35,000.00),
payable to Entorno Law, LLP, within fifteen (15) days of the transmittal to Jody's counsel

1 of the paperwork from the Court indicating the date on which the Court grants the motion
2 for approval of this Consent Judgment.

- 3 • The Second Installment shall be in the amount of ten thousand dollars (\$10,000.00), payable
4 to Entorno Law, LLP, within forty (40) days of the Effective Date (“Second Installment”). If
5 the First Installment is timely made by Jody’s or its counsel, then EHA’s and its counsel
6 agree to waive the Second Installment.

7 Noam Glick
8 Entorno Law, LLP
225 Broadway, Suite 2100
9 San Diego, CA 92101

10 **4. CLAIMS COVERED AND RELEASED**

11 **4.1 EHA’s Public Release of Proposition 65 Claims**

12 Plaintiff acting on its own behalf and in the public interest releases Jody’s and its parents,
13 subsidiaries, affiliated entities under common ownership, its directors, officers, principals, agents,
14 employees, attorneys, insurers, accountants, predecessors, successors, and assigns (“Defendant
15 Entities”), each entity to whom Defendant manufactures popcorn for, or directly or indirectly
16 distributes, ships, or sells the Covered Products including but not limited to downstream distributors,
17 wholesalers, customers, and retailers (including but not limited to Amazon.com, Inc., Crave, Inc. (and
18 all its brands), Major Popcorn, LLC, and Team Butter, Inc.) franchisees, franchisors, cooperative
19 members, suppliers, licensees, and licensors, and all of the foregoing entities’ owners, directors,
20 officers, agents, principals, employees, attorneys, insurers, accountants, representatives, predecessors,
21 successors, and assigns (collectively referred to as the “Releasees”) from all claims for violations of
22 Proposition 65 up through the Effective Date based on exposure to acrylamide from Covered
23 Products as set forth in the Notice. Compliance with the terms of this Consent Judgment constitutes
24 compliance with Proposition 65 with respect to exposures to acrylamide from Covered Products as
25 set forth in the Notice. This release does not extend to any third-party retailers selling the product on
26 a website who, after receiving instruction from Jody’s to include a warning as set forth above in
27 section 2.2, do not include such a warning.

28 **4.2 EHA’s Individual Release of Claims**

1 EHA, in its individual capacity, on behalf of itself, its past and current agents, representatives,
2 attorneys, successors, and/or assignees and *not* in its representative capacity, also provides a general
3 release to Jody's and/or Releasees, which shall be a full and final accord and satisfaction of, as well
4 as a bar to, all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses,
5 claims, liabilities, and demands of every nature, character, and kind, whether known or unknown,
6 suspected or unsuspected, arising out of alleged or actual exposures to acrylamide in Covered
7 Products manufactured, imported, sold, or distributed by Jody's and/or Releasees before the Effective
8 Date. EHA acknowledges that it is familiar with California Civil Code section 1542, which provides
9 as follows:

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

17 EHA, in its capacity only, and on behalf of itself, its past and current agents, representatives,
18 attorneys, successors, and/or assignees expressly waives and relinquishes any and all rights and
19 benefits which it may have under, or which may be conferred on it by the provisions of California
20 Civil Code section 1542 as well as under any other state or federal statute or common law principle
21 of similar effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to
22 the released matters. EHA acknowledges that it has been advised by legal counsel and is familiar
23 with the provisions of California Civil Code Section 1542.

24 **4.3 Jody's Release of EHA**

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

1 **5. COURT APPROVAL**

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

5 **6. SEVERABILITY**

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

9 **7. GOVERNING LAW**

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

16 **7.1 Change in Proposition 65**

17 If Proposition 65 or its implementing regulations (including but not limited to the published
18 “no significant risk level” for acrylamide set forth at Cal. Code Regs., tit 27, section 25705,
19 subdivision (c)(2) or any “alternative risk level” adopted by regulation or court decision) are changed
20 from their terms as they exist on the date of entry of this Consent Judgment, or if OEHHA takes some
21 other final regulatory action, including but not limited to a issuing a safe use determination or
22 interpretive guideline, that determines that warnings for acrylamide are not required then Jody’s shall
23 be relieved of its obligation to comply with Section 2 herein.

24 **7.2 Other Court Decisions**

25 If a final decision of a court (including, but not limited to, the 9th Circuit Court of Appeals
26 and/or the United States District Court for the Eastern District of California in the litigation entitled
27 *California Chamber of Commerce v. Bonta*, No. 2:19-cv-02019-KJM-JDP (E.D. Cal.)) determines
28 that warnings for acrylamide exposures, or that enforcement of Proposition 65 claims for acrylamide

1 exposures, are preempted or otherwise unlawful or unconstitutional, then Jody's may file a motion to
2 modify this Consent Judgment and be relieved of its obligation to comply with Section 2 herein, and
3 the parties shall meet and confer in good faith before such motion is filed.

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6 **7.3 Federal Agency Action and Preemption**

7 If a court of competent jurisdiction or an agency of the federal government, including, but not
8 limited to, the U.S. Food and Drug Administration, states through any guidance, regulation or legally
9 binding act that federal law has preemptive effect on any of the requirements of this Consent
10 Judgment, then this Consent Judgment may be modified to bring it into compliance with or avoid
11 conflict with federal law. The Parties agree to meet and confer in good faith to modify this Consent
12 Judgment, and EHA agrees not to oppose any such modification, except for good cause shown.

13 **7.4 Scientific Studies**

14 If an agency of the federal government, including, but not limited to the U.S. Food and Drug
15 Administration, states through any guidance, regulation, or other legally binding act, following a
16 review of scientific studies and following public notice and comment, a cancer potency estimate for
17 acrylamide that equates to a no significant risk level higher than 0.2 micrograms per day, then Jody's
18 shall be entitled to seek a modification of this Consent Judgment to be relieved of its obligations to
19 meet any requirements of herein that are inconsistent with such a change. The Parties agree to meet
20 and confer in good faith to modify this Consent Judgment to conform to such changes, and EHA
21 agrees not to oppose any such modification except for good cause shown. .

22 **8. ENFORCEMENT**

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

25 **9. NOTICE**

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

1 If to Jody's:

2 Sophia Castillo
3 Downey Brand LLP
4 455 Market Street, Suite 1500
5 San Francisco, CA 94105

If to EHA:

Noam Glick
Entorno Law, LLP
225 Broadway, Suite 2100
San Diego, CA 92101

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

8 **10. COUNTERPARTS; DIGITAL SIGNATURES**

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

12 **11. POST EXECUTION ACTIVITIES**

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

22 **12. MODIFICATION**

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

26 **13. AUTHORIZATION**

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

14. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES

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

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6 **15. 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, negotiations,
9 commitments, and understandings related hereto. No representations, oral or otherwise, express or
10 implied, other than those contained herein have been made by any Party. No other agreements, oral or
11 otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.

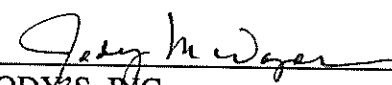
12 **AGREED TO:**

AGREED TO:

13
14 Date: 02/15/2022

Date: 2-17-22

15
16 By: 
17 ENVIRONMENTAL HEALTH
18 ADVOCATES, INC.

16 By: 
17 JODY'S, INC.

19
20
21 **IT IS SO ORDERED.**

22 Date: _____

23
24 4814-2954-9772, v. 1

JUDGE OF THE SUPERIOR COURT