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12 Environmental Health Advocates, Inc.

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

15 ENVIRONMENTAL HEALTH
16 ADVOCATES, INC., a California corporation,

17 Plaintiff,

18 v.

19 FUSION GOURMET, INC., a California
20 corporation, ROSS STORES, INC., a Delaware
21 corporation, and DOES 1 through 100,
22 inclusive,

23 Defendants.

Case No. 22CV007823

[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 Fusion Gourmet, Inc. (“Defendant” or “Fusion”) with EHA and Fusion
5 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 by
9 reducing or eliminating hazardous substances contained in consumer products.

10 **1.3 Defendant**

11 Fusion 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 Fusion manufactures, imports, sells, and distributes for sale Vintage Gourmet
16 Wafer Rolls that contain acrylamide. EHA further alleges that Fusion 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 September 23, 2021, EHA served Fusion, Ross Stores, 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 Fusion 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 wafers, including but not limited to Vintage Gourmet Wafer Rolls.

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

2 **1.6 Product Description**

3 The products covered by this Consent Judgment are wafers including but not limited to Vintage
4 Gourmet Wafer Rolls manufactured or processed by Fusion that allegedly contain acrylamide and are
5 imported, sold, shipped, delivered, or distributed for sale to consumers in California by Releasees (as
6 defined in section 4.1) (“Covered Products”).

7 **1.7 State of the Pleadings**

8 On or around March 2, 2022, EHA filed a Complaint against Fusion for the alleged violations
9 of Proposition 65 that are the subject of the Notice (“Complaint”).

10 **1.8 No Admission**

11 Fusion denies the material factual and legal allegations of the Notice and Complaint and
12 maintains that all of the Covered Products it has manufactured, imported, sold, and/or distributed for
13 sale in California, including Covered Products, have been, and are, in compliance with all laws.
14 Nothing in this Consent Judgment shall be construed as an admission of any fact, finding, conclusion
15 of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment be construed
16 as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section
17 shall not, however, diminish or otherwise affect Fusion’s obligations, responsibilities, and duties under
18 this 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 Fusion 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 the
26 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 Fusion
4 on and after the Effective Date that Fusion sells or distributes in California shall not exceed 115 parts
5 per billion (“ppb”) for acrylamide, using tests performed by a laboratory accredited by the State of
6 California, a federal agency, or a nationally recognized accrediting organization, using LC-MS/MS
7 (Liquid Chromatograph-Mass Spectrometry), unless such Covered Products comply with the warning
8 requirements of Section 2.2. As used in this Section 2, “distributed for sale in California” means to
9 directly ship Covered Products into California or to sell Covered Products to a distributor Fusion knows
10 will sell Covered Products in California.


11 **2.2 Clear and Reasonable Warnings**

12 For Covered Products that contain acrylamide in a concentration exceeding the 115-ppb level
13 set forth in section 2.1 above, and which are manufactured and packaged for distribution for authorized
14 sale or use in California on or after the Effective Date, Fusion shall provide one of the following
15 warning statements.

16 **Option 1:**

17  **CALIFORNIA WARNING:** Consuming this product can expose you
18 to Acrylamide, a probable human carcinogen formed in some foods
19 during cooking or processing at high temperatures. Many factors affect
20 your cancer risk, including the frequency and amount of the chemical
 consumed. For more information including ways to reduce your
 exposure, see www.P65Warnings.ca.gov/acrylamide.

21 **Option 2:**

22  **WARNING:** Cancer and Reproductive Harm –
 www.P65Warnings.ca.gov/acrylamide.

23 This warning statement shall be prominently displayed on the Covered Products, on the packing
24 of the Covered Products, or on a placard, shelf tag, or sign provided that the statement is displayed with
25 such conspicuousness, as compared with other words, statements, or designs as to render it likely to be
26 read and understood by an ordinary individual prior to sale. If the warning statement is displayed on
27 the Covered Products’ packaging, it must be in a type size no smaller than the largest type size used
28 for other consumer information on the product. In no case shall a warning statement displayed on the

1 Covered Products’ packaging appear in a type size smaller than 6-point type. The same warning shall
2 be posted on any websites under the exclusive control of Fusion where Covered Products are sold into
3 California. Fusion shall instruct any third-party website to which it sells its Covered Products to include
4 the same warning as a condition of selling the Covered Products.

5 The warning shall be provided to California consumers in a manner that complies with 27 C.CR
6 § 25602 (b). Specifically, for internet purchases, a warning must also be provided by including either
7 the warning or a clearly marked hyperlink using the “**WARNING**” on the product display page, or by
8 the otherwise prominently displaying the warning to the purchaser prior to completing the purchase.

9 **2.3 Sell-Through Period**

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

15 **3. MONETARY SETTLEMENT TERMS**

16 **3.1 Settlement Amount**

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

22 **3.2 Civil Penalty**

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

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

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3 Environmental Health Advocates
4 225 Broadway, Suite 2100
5 San Diego, CA 92101

6 All payments owed to OEHHA (EIN: 68-0284486) shall be delivered directly to 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 Fusion agrees to provide EHA's counsel with a copy of the check payable to OEHHA,
20 simultaneous with its penalty payments to EHA.

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

22 Relevant information is set out below:

- 23 • "Environmental Health Advocates, Inc." (EIN: 84-2322975) at the address provided above.
- 24 • "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA 95814.

25 **3.3 Attorney's Fees and Costs**

26 The portion of the settlement attributable to attorneys' fees and costs shall be paid to EHA's
27 counsel, who are entitled to attorneys' fees and costs incurred by it in this action, including but not
28 limited to investigating potential violations, bringing this matter to 's attention, as well as litigating and
negotiating a settlement in the public interest.

Fusion shall provide their payment to EHA's counsel in two installments as follows:

- The First Installment shall be in the amount of thirty-five thousand dollars (\$35,000.00)
payable to Entorno Law, LLP, within fourteen (14) days of the of the Effective Date ("First

1 Installment”).

- 2 • The Second Installation shall be in the amount of ten thousand dollars (\$10,000.00) payable
3 to Entorno Law, LLP within thirty (30) 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 All installments will be sent to the following address:

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

10 **3.4 Timing**

11 The above-mentioned checks will be issued within fourteen (14) days of the Effective Date.

12 **4. CLAIMS COVERED AND RELEASED**

13 **4.1 EHA’s Public Release of Proposition 65 Claims**

14 Plaintiff acting on its own behalf and in the public interest releases Fusion and its parents,
15 subsidiaries, affiliated entities under common ownership, its directors, officers, principals, agents,
16 employees, attorneys, insurers, accountants, predecessors, successors, and assigns (“Defendant
17 Entities”), each entity to whom Defendant directly or indirectly distributes, ships, or sells the Covered
18 Products including but not limited to downstream distributors, wholesalers, customers, and retailers
19 (including but not limited to Ross Stores, Inc., franchisees, franchisors, cooperative members,
20 suppliers, licensees, and licensors, and all of the foregoing entities’ owners, directors, officers, agents,
21 principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors, and
22 assigns (collectively referred to as the “Releasees”) from all claims for violations of Proposition 65 up
23 through the Effective Date based on exposure to acrylamide from Covered Products as set forth in the
24 Notice(s). Compliance with the terms of this Consent Judgment constitutes compliance with
25 Proposition 65 with respect to exposures to acrylamide from Covered Products as set forth in the
26 Notice(s). This Consent Judgment is a full, final, and binding resolution of all claims under Proposition
27 65 that were or could have been asserted against Fusion and/or Releasees for failure to provide
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1 warnings required under Proposition 65 for alleged exposure to acrylamide through reasonably
2 foreseeable use of the Covered Products. This release does not extend to any third-party retailers selling
3 the product on a website who, after receiving instruction from Fusion to include a warning as set forth
4 above in section 2.2, do not include such a warning.

5 **4.2 EHA's Individual Release of Claims**

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

12 **4.3 Fusion's Release of EHA**

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

18 **5. COURT APPROVAL**

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

22 **6. SEVERABILITY**

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

25 **7. GOVERNING LAW**

26 The terms of this Consent Judgment shall be governed by the laws of the state of California as
27 applied within the state of California. In the event that Proposition 65 is repealed, or is otherwise
28 rendered inapplicable for reasons, including but not limited to changes in the law, then Fusion may

1 provide written notice to EHA of any asserted change, and shall have no further injunctive obligations
2 pursuant to this Consent Judgment with respect to, and to the extent that, the Covered Products are so
3 affected.

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

11 **8. ENFORCEMENT**

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

14 **9. NOTICE**

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

18 If to Fusion:

19 Michael Hambly
20 Salmas Law
21 1880 Century Park East Suite 611
22 Los Angeles, CA 90067

If to EHA:

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

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

24 **10. COUNTERPARTS; DIGITAL SIGNATURES**

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

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1 **11. POST EXECUTION ACTIVITIES**

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

11 **12. MODIFICATION**

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

15 **13. AUTHORIZATION**

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

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

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

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1 **15. ENTIRE AGREEMENT**

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

7 **AGREED TO:**

AGREED TO:

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9 Date: 11/29/2022

Date: 11/30/2022

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11 By: 
12 ENVIRONMENTAL HEALTH
ADVOCATES, INC.

By: 
FUSION GOURMET, INC.

13 **IT IS SO ORDERED.**

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15 Date: _____

16 JUDGE OF THE SUPERIOR COURT

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