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3 Environmental Health Advocates, Inc.

4 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

6 ENVIRONMENTAL HEALTH
7 ADVOCATES, INC.,

8 Plaintiff,

9 v.

10 MARIANI PACKING CO., INC., a
11 California
12 corporation, WALMART INC., a Delaware
13 corporation, and DOES 1 through 100,
14 inclusive,

15 Defendants.

16 Case No. 22CV009785

17 **[PROPOSED] CONSENT JUDGMENT**

18 (Health & Safety Code § 25249.6 *et seq.* and
19 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 Mariani Packing Co., Inc. (“Defendant” or “Mariani”) with EHA and
5 Mariani 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 Mariani employs ten or more individuals and for purposes of this Consent Judgment only, is a
12 “person in the course of doing business” for purposes of the Safe Drinking Water and Toxic
13 Enforcement Act of 1986, Health and Safety Code section 25249.6 et seq. (“Proposition 65”).

14 **1.4 General Allegations**

15 EHA alleges that Mariani manufactures, imports, sells, and distributes for sale Mariani Mixed
16 Dried Fruit (“Mixed Dried Fruit”) that contains lead. EHA further alleges that Mariani does so without
17 providing a sufficient warning as required by Proposition 65 and related Regulations. Pursuant to
18 Proposition 65, lead is listed as a chemical known to cause cancer and lead is also listed as a
19 developmental and reproductive toxicant. Mariani denies these allegations and asserts that its products
20 are safe and in compliance with all applicable laws, rules and regulations.

21 **1.5 Notice of Violation**

22 On or around October 12, 2021, EHA served Defendant Mariani, Walmart, Inc., the California
23 Attorney General, and all other required public enforcement agencies with a 60-Day Notice of
24 Violation of Proposition 65 (“Notice”). The Notice alleged that Mariani had violated Proposition 65
25 by failing to sufficiently warn consumers in California of the health hazards associated with exposures
26 to lead contained in dried mixed fruit products, including but not limited to the Mixed Dried Fruit
27 manufactured or processed by Mariani that allegedly contain lead and are imported, sold, shipped,
28 delivered, or distributed for sale to consumers in California by Releasees (as defined in section 4.1).

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

3 **1.6 Product Description**

4 The products covered by this Consent Judgment are Mixed Dried Fruit manufactured, packed
5 or processed by Mariani, that allegedly contain lead and are imported, sold, shipped, delivered, or
6 distributed for sale to consumers in California by Releasees (as defined in section 4.1) (“Covered
7 Products”).

8 **1.7 State of the Pleadings**

9 On or around April 12, 2022, EHA filed a Complaint against Mariani for the alleged violations
10 of Proposition 65 that are the subject of the Notice (“Complaint”).

11 **1.8 No Admission**

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

20 **1.9 Jurisdiction**

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

25 **1.10 Effective Date**

26 For purposes of this Consent Judgment, the term “Effective Date” means the date on which this
27 Consent Judgment is approved and entered as a judgment of the Court, as discussed in Section 5.
28

1 **2. INJUNCTIVE RELIEF**

2 **2.1 Reformulation of the Covered Products**

3 Beginning 12 months after the Effective Date, Mariani shall be permanently enjoined from
4 manufacturing, distributing, or directly selling in the State of California, any Covered Product that
5 exposes a person to a "Daily Lead Exposure Level" of more than 0.5 micrograms of lead per day unless
6 such Covered Products comply with the warning requirements of Section 2.2. The "Daily Lead
7 Exposure Level" is calculated from the single serving size as stated on Covered Products' packaging
8 and is not to exceed 0.5 micrograms of lead per day. As used in this Section 2, "distributed for sale in
9 CA" means to directly ship Covered Products into California or to sell Covered Products to a distributor
10 Mariani knows will sell Covered Products in California.


11 **2.2 Clear and Reasonable Warnings**

12 For Covered Products that contain lead in a concentration exceeding the Reformulation
13 Standard set forth in section 2.1 above, and which are distributed or directly sold by Mariani in the
14 State of California on or after the Effective Date, Mariani shall provide one of the following warning
15 statements.

16 **Option 1:**

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

21 **Option 2:**

22  **WARNING:** Reproductive Harm –
23 www.P65Warnings.ca.gov/food

24 This warning statement shall be prominently displayed on the Covered Products, on the packing
25 of the Covered Products, or on a placard, shelf tag, or sign provided that the statement is displayed with
26 such conspicuousness, as compared with other words, statements, or designs as to render it likely to be
27 read and understood by an ordinary individual prior to sale. If the warning statement is displayed on
28 the Covered Products' packaging, it must be in a type size no smaller than the largest type size used
for other consumer information on the product. In no case shall a warning statement displayed on the
Covered Products' packaging appear in a type size smaller than 6-point type. If the Covered Products'

1 packaging contains consumer information in a foreign language, a warning statement in that language
2 is required. The same warning shall be posted on any websites under the exclusive control of Mariani
3 where Covered Products are sold into California. Mariani shall instruct any third-party website to which
4 it directly sells its Covered Products to include the same warning as a condition of selling the Covered
5 Products in California. If Mariani elects, the bolded and capitalized words “**CALIFORNIA**
6 **PROPOSITION 65**,” “**CALIFORNIA PROP. 65**,” “**CA PROP. 65**,” or “**PROPOSITION 65**” may
7 be added above and prior to the word “**WARNING**.”
8

9 **2.3 Regulatory Amendments or Changes to Warning**

10 The warning requirements set forth herein are imposed pursuant to the terms of this Consent
11 Judgment and are recognized by the Parties as not being the exclusive manner of providing a warning
12 for Covered Products. Warnings may be provided as specified in the Proposition 65 regulations (Title
13 27, California Code of Regulations, section 25601, *et seq.*) in effect as of the Effective Date of this
14 Consent Judgment or as such regulations may be amended in the future, and may include warnings for
15 chemicals in addition to lead when appropriate. Mariani shall be entitled to use such other specific
16 warning text and/or methods of transmission without being deemed in breach of this Consent Judgment.

17 **2.4 Sell-Through Period**

18 Notwithstanding anything else in this Consent Judgment, Covered Products that have been
19 manufactured, packaged, or put into commerce prior to 12 months following the Effective Date (the
20 “Sell-Through Period”) shall be subject to release of liability pursuant to this Consent Judgment,
21 without regard to when such Covered Products were, or are in the future, distributed or sold to
22 customers. As a result, the obligations of Mariani stated in this Section 2 do not apply to Covered
23 Products manufactured, packaged, or put into commerce until after the Sell-Through Period .

24 **3. MONETARY SETTLEMENT TERMS**

25 **3.1 Settlement Amount**

26 Mariani shall pay sixty-five thousand dollars (\$65,000.00) in settlement and total satisfaction
27 of all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes
28 civil penalties in the amount of seven thousand dollars (\$7,000.00) pursuant to Health and Safety Code

1 section 25249.7(b) and attorneys' fees and costs in the amount of fifty-eight thousand dollars
2 (\$58,000.00) 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 Health
5 and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid
6 to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining
7 twenty-five percent (25%) of the penalty paid to EHA individually. The seven thousand dollars
8 (\$7,000.00) in civil penalties shall be paid as follows:

- 9 • One payment of \$5,250.00 to OEHHA, due 14 (fourteen) calendar days after the
10 Effective date.
- 11 • One payment of \$1,750.00 to EHA, due 14 (fourteen) calendar days after the Effective
12 date.

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

14
15 Isaac Fayman
16 Environmental Health Advocates
225 Broadway, Suite 2100
San Diego, CA 92101

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

19 For United States Postal Service Delivery:

20 Mike Gyurics
21 Fiscal Operations Branch Chief
22 Office of Environmental Health Hazard Assessment
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
1001 I Street
28 Sacramento, CA 95814

1 Mariani agrees to provide EHA's counsel with a copy of the check payable to OEHHA,
2 simultaneous with its penalty payment to EHA.

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

4 Relevant information is set out below:

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

7 **3.3 Attorney's Fees and Costs**

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

12 Mariani shall provide its payment for attorneys' fees and costs to EHA's counsel by physical
13 check or by electronic means, including wire transfers, at Mariani's discretion, as follows: fifty-eight
14 thousand dollars (\$58,000.00) in Attorney's Fees and Costs shall be paid as follows:

- 15 • One payment of \$58,000.00, due fourteen (14) calendar days after the Effective Date.

16 The attorney fee payments shall be made payable to Entorno Law, LLP. The address for this
17 entity is:

18 Noam Glick
19 Entorno Law, LLP
20 225 Broadway, Suite 1900
21 San Diego, CA 92101

22 **4. CLAIMS COVERED AND RELEASE**

23 **4.1 EHA's Public Release of Proposition 65 Claims**

24 Plaintiff, acting on its own behalf and in the public interest, releases Mariani, and its parents,
25 subsidiaries, affiliated entities under common ownership or control, its directors, officers, principals,
26 agents, employees, attorneys, insurers, accountants, predecessors, successors, and assigns ("Defendant
27 Entities"), each entity to whom Defendant directly or indirectly distributes, ships, or sells the Covered
28 Products, including but not limited to downstream distributors, wholesalers, customers, retailers,
marketplaces, including but not limited to Walmart Inc. (and its direct and indirect subsidiaries, as well
as affiliates), and marketplaces franchisees, franchisors, cooperative members, suppliers, licensees, and

1 licensors, and all of the foregoing entities' owners, directors, officers, agents, principals, employees,
2 attorneys, insurers, accountants, representatives, predecessors, successors, and assigns (collectively
3 referred to as the "Releasees") from all claims for violations of Proposition 65 up through the Effective
4 Date based on exposure to lead from Covered Products as set forth in the Notice. Compliance with the
5 terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures
6 to lead from Covered Products as set forth in the Notice. This Consent Judgment is a full, final, and
7 binding resolution of all claims under Proposition 65 that were or could have been asserted against
8 Mariani and/or Releasees for failure to comply with Proposition 65 for alleged exposure to lead from
9 Covered Products.

10 **4.2 EHA's Individual Release of Claims**

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

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

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

23 **4.4 No Other Known Claims or Violations**

24 EHA and EHA's counsel, on their own behalf, affirm that they are not presently aware of
25 any actual or alleged violations of Proposition 65 by Mariani or for which Mariani bears legal
26 responsibility other than those that are fully resolved by this Consent Judgment. It is possible that
27 other claims not known to the Parties, arising out of the facts alleged in the Notice and Complaint,
28 and relating to the Covered Products, will develop or be discovered. EHA on behalf of itself only,
and Mariani, on its own behalf only, acknowledge that this Consent Judgment is expressly intended

1 to cover and include all such claims up through and including the Effective Date, including all rights
2 of action therefore. EHA and Mariani acknowledge that the claims released in this Consent
3 Judgment above may include unknown claims, and nevertheless, on their own behalf, waive
4 California Civil Code section 1542 as to any such unknown claims.

5 EHA and Mariani acknowledge that each have been advised by legal counsel and are familiar
6 with California Civil Code section 1542, which states:

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

13 EHA, in its individual capacity, and on behalf of itself, its past and current agents,
14 representatives, attorneys, successors, and /or assignees, and Mariani, on behalf of itself, its past and
15 current agents, representatives, attorneys, successors, and /or assignees, expressly waives and
16 relinquishes any and all rights and benefits which it may have under, or which may be conferred on it
17 by the provisions of California Civil Code section 1542 as well as under any other state or federal
18 statute or common law principle of similar effect, to the fullest extent that they may lawfully waive
19 such rights or benefits pertaining to the released matters.

20 **5. COURT APPROVAL**

21 This Consent Judgment is not effective until it is approved by the Court and shall be null and
22 void if it is not approved by the Court within one year after it has been fully executed by the Parties, or
23 by such additional time as the Parties may agree to in writing. EHA shall dismiss the complaint and
24 all causes of action and claims against Walmart, Inc. from this action, with prejudice.

25 **6. SEVERABILITY**

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

28 **7. GOVERNING LAW**

The terms of this Consent Judgment shall be governed by the laws of the state of California as
applied within the state of California. In the event that Proposition 65 is repealed, or is otherwise
rendered inapplicable for any reason, including but not limited to changes in the law, then Mariani 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 lead cases are permanently enjoined by a court of competent
7 jurisdiction; or if Proposition 65 is determined to be preempted by federal law or a burden on First
8 Amendment rights with respect to lead in Covered Products or Covered Products substantially similar
9 to Covered Products, then Mariani may seek a modification from the Court to be relieved of its
10 obligation to comply with Section 2 herein, as described in Section 12 herein. Likewise, if a final
11 decision of any court, state or federal, provides that a Proposition 65 warning for Covered Products, or
12 Covered Products substantially similar to Covered Products, is no longer required, Mariani may seek
13 a modification from the Court of this Consent Judgment, as described in Section 12 herein. EHA agrees
14 to meet and confer in good faith regarding any proposed modification on any such ground by Mariani.
15 As described in Section 12 herein, the Parties may also stipulate to any such modification, after serving
16 notice of such modification on the Attorney General 45 days prior to the hearing on the matter.

17 **8. ENFORCEMENT**

18 This Consent Judgment shall be enforced solely by the parties thereto. In any action to enforce
19 the terms of this Consent Judgment, the prevailing party shall be entitled to its reasonable attorneys'
20 fees and costs.

21 **9. NOTICE**

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

1 If to Mariani:

2 John McCarron
3 Downey Brand LLP
4 621 Capitol Mall, 18th Fl.
5 Sacramento, CA 95814
6 jmccarron@downeybrand.com

7 Sophia B. Castillo
8 Keller & Heckman LLP
9 Three Embarcadero Center
10 Suite 1420
11 San Francisco, CA
12 94111castillo@khlaw.com

If to EHA:

Noam Glick
Entorno Law, LLP
225 Broadway, Suite 2100
San Diego, CA 92101
noam@entornolaw.com

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

15 **10. COUNTERPARTS: DIGITAL SIGNATURES**

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

19 **11. POST EXECUTION ACTIVITIES**

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

12. MODIFICATION

This Consent Judgment may be modified by: (i) a written agreement of the Parties and entry of
a modified consent judgment thereon by the Court after 45 days notice to the Attorney General; or (ii)
a successful motion or application of any Party (with notice to the non-moving party and an opportunity

1 to oppose, and 45 days notice to the Attorney General), and the entry of a modified consent judgment
2 thereon by the Court.

3 **13. AUTHORIZATION**

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

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

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

11 **15. ENTIRE AGREEMENT**

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

17 **AGREED TO:**

AGREED TO:

18 Date: 10/13/2023

19 Date: 10/17/23

20 By: 
21 ENVIRONMENTAL HEALTH
22 ADVOCATES, INC.

20 By: 
21 MARIANI PACKING CO., INC.

23
24 **IT IS SO ORDERED.**

25
26 Date: _____

27 _____
28 JUDGE OF THE SUPERIOR COURT