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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 BETTERBODY FOODS & NUTRITION
15 LLC, a Utah limited liability company, and
DOES 1 through 100, inclusive,

16 Defendants.

Case No. 22CV008655

[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 BetterBody Foods & Nutrition LLC (“Defendant” or “BFN”) with EHA
5 and BFN 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
9 by reducing or eliminating hazardous substances contained in consumer products.

10 **1.3 Defendant**

11 BFN 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 BFN manufactures, imports, sells, and distributes for sale Organic Super
16 Seeds that contain Cadmium. EHA further alleges that BFN does so without providing a sufficient
17 health hazard warning as required by Proposition 65 and related Regulations. Pursuant to Proposition
18 65, Cadmium is listed as a chemical known to cause cancer, birth defects and other reproductive
19 harm.

20 **1.5 Notices of Violation**

21 On or around October 14, 2021, EHA served Amazon.com, Inc., the California Attorney
22 General, and all other required public enforcement agencies with a 60-Day Notice of Violation of
23 Proposition 65 (“Notice”). The Notice was served on BFN on December 9, 2021. The Notice alleged
24 that BFN had violated Proposition 65 by failing to sufficiently warn consumers in California of the
25 health hazards associated with exposures to Cadmium contained in Organic Super Seeds.

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

28 ///

1 **1.6 Product Description**

2 The products covered by this Consent Judgment are seeds including but not limited to
3 Organic Super Seeds manufactured or processed by BFN that allegedly contain Cadmium and are
4 imported, sold, shipped, delivered, or distributed for sale to consumers in California by Releasees (as
5 defined in section 4.1) (“Covered Products”).

6 **1.7 State of the Pleadings**

7 On or around March 21, 2022, EHA filed a Complaint against BFN for the alleged violations
8 of Proposition 65 that are the subject of the Notice (“Complaint”).

9 **1.8 No Admission**

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

18 **1.9 Jurisdiction**

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

23 **1.10 Effective Date**

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

26 **2. INJUNCTIVE RELIEF**

27 **2.1 Reformulation of the Covered Products**

28 Except as otherwise provided herein, any Covered Products that are manufactured by BFN

1 after the Effective Date that BFN sells in California or distributes for sale in California shall not
2 contain Cadmium, using tests performed by a laboratory accredited by the State of California, a
3 federal agency, or a nationally recognized accrediting organization, using ICP-MS (Inductively
4 Coupled Plasma–Mass Spectrometry), unless such Covered Products comply with the warning
5 requirements of Section 2.2. As used in this Section 2, “distributed for sale in California” means to
6 directly ship Covered Products into California or to sell Covered Products to a distributor BFN know
7 will sell Covered Products in California.

8 **2.2 Clear and Reasonable Warnings**

9 For Covered Products that contain Cadmium, and which are manufactured and packaged for
10 distribution for authorized sale or use in California on or after the Effective Date, BFN shall provide
11 the following warning statement:

12
13 **WARNING:** Consuming this product can expose you to chemicals
14 including Cadmium, which is known to the State of California to cause
15 cancer and birth defects or other reproductive harm. For more
16 information go to www.P65Warnings.ca.gov.

17 This warning statement shall be displayed on the Covered Products, on the packing of the
18 Covered Products, or on a placard, shelf tag, or sign for the consumer product at each point of display
19 of the product. The same warning shall be posted on any websites under the exclusive control of BFN
20 where Covered Products are sold into California, or by otherwise prominently displaying the warning
21 to the purchaser prior to completing the purchase. BFN shall instruct any third-party website to which
22 it sells its Covered Products to include the same warning as a condition of selling the Covered
23 Products.

24 Should the California Office of Health Hazard Assessment adopt or amend the Clear and
25 Reasonable Warning regulations, including proposed amendments to California Code of
26 Regulations section 25607.2, BFN shall be allowed to modify its warning in accordance with the new
27 or amended regulations without seeking a modification of this judgment.

28 **2.3 Sell-Through Period**

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

6 **3. MONETARY SETTLEMENT TERMS**

7 **3.1 Settlement Amount**

8 BFN shall pay fifty thousand dollars (\$50,000.00) in settlement and total satisfaction of all the
9 claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes civil
10 penalties in the amount of five thousand dollars (\$5,000.00) pursuant to Health and Safety Code
11 section 25249.7(b) and attorneys' fees and costs in the amount of forty-five thousand dollars
12 (\$45,000.00) pursuant to Code of Civil Procedure section 1021.5.

13 **3.2 Civil Penalty**

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

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

19 Environmental Health Advocates
20 225 Broadway, Suite 2100
San Diego, CA 92101

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

23 For United States Postal Service Delivery:

24 Mike Gyurics
25 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
26 P.O. Box 4010
Sacramento, CA 95812-4010

27 For Federal Express 2-Day Delivery:

28 Mike Gyurics

Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

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

Plaintiff and its counsel will provide completed IRS 1099, W-9, or other tax forms as required. Relevant information is set out below:

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

3.3 Attorney's Fees and Costs

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

BFN shall provide their payment to EHA's counsel in one check for forty-five thousand dollars (\$45,000.00) payable to Entorno Law, LLP. The payment shall be delivered to the following address:

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

3.4 Timing

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

4. CLAIMS COVERED AND RELEASED

4.1 EHA's Public Release of Proposition 65 Claims

Plaintiff acting on its own behalf and in the public interest releases BFN and its parents, subsidiaries, affiliated entities under common ownership, its directors, officers, principals, agents, employees, attorneys, insurers, accountants, predecessors, successors, and assigns ("Defendant Entities"), each entity to whom Defendant directly or indirectly distributes, ships, or sells the Covered

1 Products including but not limited to downstream distributors, wholesalers, customers, and retailers
2 (including but not limited to Amazon.com, Inc.), franchisees, franchisors, cooperative members,
3 suppliers, licensees, and licensors, and all of the foregoing entities' owners, directors, officers, agents,
4 principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors, and
5 assigns (collectively referred to as the "Releasees") from all claims for violations of Proposition 65
6 up through the Effective Date based on exposure to Cadmium from Covered Products as set forth in
7 the Notice(s). Compliance with the terms of this Consent Judgment constitutes compliance with
8 Proposition 65 with respect to exposures to Cadmium from Covered Products as set forth in the
9 Notice(s). This release does not extend to any third-party retailers selling the product on a website
10 who, after receiving instruction from BFN to include a warning as set forth above in section 2.2, do
11 not include such a warning.

12 **4.2 EHA's Individual Release of Claims**

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

19 **4.3 BFN's Release of EHA**

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

26 **5. COURT APPROVAL**

27 This Consent Judgment is not effective until it is approved by the Court and shall be null and
28 void if it is not approved by the Court within one year after it has been fully executed by the Parties,

1 or by such additional time as the Parties may agree to in writing.

2 **6. SEVERABILITY**

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

6 **7. GOVERNING LAW**

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

13 In the event the California Office of Health Hazard Assessment adopts a regulation or safe use
14 determination, or issues an interpretive guideline that exempts Covered Products from meeting the
15 requirements of Proposition 65; or if Cadmium cases are permanently enjoined by a court of
16 competent jurisdiction; or if Proposition 65 is determined to be preempted by federal law or a burden
17 on First Amendment rights with respect to Cadmium in Covered Products or Covered Products
18 substantially similar to Covered Products, then BFN shall be relieved of its obligation to comply with
19 Section 2 herein.

20 **8. ENFORCEMENT**

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

23 **9. NOTICE**

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

1 If to BFN:

If to EHA:

2 Owen M. Praskievics
3 Solomon Ward Seidenwurm & Smith LLP
4 401 B Street Suite 1200
5 San Diego, CA 92101

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.

5 **15. ENTIRE AGREEMENT**


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

11 **AGREED TO:**

AGREED TO:

12
13 Date: 02/18/2022

Date: 2/23/2022

14
15 By: 
16 ENVIRONMENTAL HEALTH
17 ADVOCATES, INC.

By: 
BETTERBODY FOODS & NUTRITION
LLC

18
19
20 **IT IS SO ORDERED.**

21 Date: _____

22
23 JUDGE OF THE SUPERIOR COURT