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15 *Attorneys for People of the State of California*  
16 *ex rel. Kamala D. Harris, Attorney General of the*  
17 *State of California*

18 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
19 FOR THE COUNTY OF ALAMEDA

20 PEOPLE OF THE STATE OF CALIFORNIA  
21 *ex rel. KAMALA D. HARRIS, ATTORNEY*  
22 *GENERAL OF THE STATE OF*  
23 *CALIFORNIA,*

24 Plaintiff,

25 v.

26 SNYDER'S OF HANOVER, INC., BIRDS  
27 EYE FOODS, INC., CORAZONAS FOOD,  
28 INC., FRITO-LAY, INC., GRUMA  
CORPORATION, H.J. HEINZ COMPANY,  
L.P., KETTLE FOODS, INC., LANCE, INC.,  
RESERVE BRANDS, INC., SNAK KING  
CORPORATION, and DOES 1 through 100,

Defendants.

ENDORSED  
FILED  
ALAMEDA COUNTY

AUG 31 2011

K. McCoy, Exec. Off./Clerk

CASE NO.: RG 09455286

ASSIGNED FOR ALL PURPOSES TO:

JUDGE: Hon. Steven A. Brick  
DEPT: 17

~~[PROPOSED]~~ CONSENT JUDGMENT  
AS TO DEFENDANT KETTLE FOODS,  
INC.

Date: August 31, 2011  
Time: 3:00 p.m.  
Dept: 17  
Judge: Honorable Steven A. Brick

Reservation No.: R-1205019

Trial Date: None set.  
Action Filed: June 1, 2009

1 **1. INTRODUCTION**

2 1.1. On June 1, 2009, the People of the State of California *ex rel.* the Attorney  
3 General of the State of California (the “People” or the “Attorney General”) filed a  
4 ~~complaint for civil penalties and injunctive relief for violations of Proposition 65 and~~  
5 unlawful business practices in the Superior Court for the County of Alameda. The People’s  
6 Complaint alleges that the Defendants failed to provide clear and reasonable warnings that  
7 ingestion of the products identified in the Complaint would result in exposure to  
8 acrylamide, a chemical known to the State of California to cause cancer, in violation of the  
9 Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section  
10 25249.6 et seq., also known as “Proposition 65.” The Complaint also alleges that these acts  
11 constitute unlawful acts in violation of the Unfair Competition Law, pursuant to Business  
12 and Professions Code sections 17200 et seq.

13 1.2. Kettle Foods, Inc. (“Settling Defendant”) is among the Defendants named in  
14 the Complaint. Settling Defendant has generally denied all material allegations of the  
15 Complaint, and has asserted numerous affirmative defenses. Without limiting any other  
16 denials, Settling Defendant specifically denies that any of its products requires a Proposition  
17 65 warning or otherwise causes harm to any person. Both the People and Settling  
18 Defendant shall be referred to as a “Party” to this Consent Judgment, and collectively they  
19 shall be referred to herein as the “Parties” to this Consent Judgment.

20 1.3. Settling Defendant is an Oregon corporation that employs more than ten  
21 employees, and has employed more than ten employees at times relevant to the allegations  
22 of the Complaint, and that manufactures, distributes and/or sells products in the State of  
23 California and has done so in the past.

24 1.4. The products covered by this Consent Judgment (hereinafter, “Covered  
25 Products”) are those tortilla chip products manufactured by Settling Defendant and sold by  
26 Settling Defendant or its Affiliates (as defined in Paragraph 8 herein) that are identified in  
27 Exhibit A. After the Effective Date, should Settling Defendant introduce for sale to  
28 consumers in California a processed snack food product not described in Exhibit A and

1 desire to incorporate such product(s) into this consent judgment, then Settling Defendant  
2 shall give notice of such new product(s) ("New Product") to the Attorney General in the  
3 form of a revised version of Exhibit A. Should the Attorney General object to such notice  
4 ~~within 45 days following receipt of such notice, then the Parties shall proceed in accordance~~  
5 with Paragraph 5.1; otherwise, this Consent Judgment shall be deemed to be modified to  
6 include such product as a Covered Product ("New Covered Product"). Among other factors  
7 that may be considered by the Attorney General when determining if an objection is  
8 warranted are acrylamide concentrations in the proposed New Product(s), the product  
9 Group appropriate for the New Product(s), and the effect incorporation of the New  
10 Product(s) will have on averaging or sales-weighting allocations used to determine  
11 achievement of the Target Level.

12 1.5. For purposes of this Consent Judgment only, the People and Settling  
13 Defendant stipulate that this Court has jurisdiction over the allegations of violations  
14 contained in the People's Complaint and personal jurisdiction over Settling Defendant as to  
15 the acts alleged in the People's Complaint, that venue is proper in the County of Alameda,  
16 and that this Court has jurisdiction to enter this Consent Judgment as a full and final  
17 resolution of all claims which were or could have been raised in the Complaint based on the  
18 facts alleged therein.

19 1.6. The People and Settling Defendant stipulate to the entry of this Consent  
20 Judgment as a full and final settlement of all claims that were raised, or could have been  
21 raised, in the Complaint (except as specified in Paragraph 8 herein) arising out of the facts  
22 or conduct alleged therein. Except as expressly set forth herein, nothing in this Consent  
23 Judgment shall prejudice, waive or impair any right, remedy, or defense the Attorney  
24 General or Settling Defendant may have in any other or in future legal proceedings  
25 unrelated to these proceedings. However, this paragraph shall not diminish or otherwise  
26 affect the obligations, responsibilities, and duties of the Parties under this Consent  
27 Judgment.

28 1.7. By stipulating to the entry of this Consent Judgment and agreeing to provide

1 the relief and remedies specified herein, Settling Defendant does not admit (a) that it has  
2 violated, or threatened to violate, Proposition 65 or Business and Professions Code sections  
3 17200 et seq., or any other law or legal duty; or (b) that the chemical acrylamide in food  
4 poses any risk to human health. The Parties recognize that acrylamide is naturally formed  
5 when certain foods, such as the snack food products at issue in this case, are heated, and that  
6 levels of acrylamide formation are due to a variety of factors, including (among others)  
7 heating time and temperature.

8 1.8. The Effective Date of this Consent Judgment shall be the date on which this  
9 Consent Judgment is entered as a judgment by this Court.

10 **2. INJUNCTIVE RELIEF: ACRYLAMIDE REDUCTION**

11 2.1 *Target Level and Compliance Date.* Settling Defendant represents that as of  
12 March 1, 2011, it had ceased to manufacture or distribute for sale in California the Covered  
13 Products identified in Exhibit A (“Original Covered Products”), and has provided a  
14 declaration to this effect of a responsible corporate officer made under penalty of perjury.  
15 Settling Defendant shall keep the level of acrylamide in any Original Covered Products  
16 reintroduced for sale in California and shipped for sale in California after September 30,  
17 2011 (the “Original Compliance Date”) no higher than 281 parts per billion, calculated  
18 pursuant to the protocol described in Paragraph 2.3 (the “Target Level”), or be subject to the  
19 provisions of Paragraph 3. Original Covered Products shall not be subject to the provisions  
20 of Paragraphs 2 or 3 unless they are reintroduced for sale in California. In addition, Settling  
21 Defendant shall reduce the level of acrylamide in its New Covered Products shipped for sale  
22 in California after the compliance date established as a condition of the Attorney General’s  
23 approval of the New Covered Products’ inclusion in the Consent Judgment (the  
24 “Compliance Date”) to, or maintain it at a level no higher than, the Target Level, or be  
25 subject to the provisions of Paragraph 3. In the interim, Settling Defendant shall continue  
26 its program of research, development, and implementation of technologies and methods  
27 intended to reduce the presence of acrylamide in any Covered Products shipped for sale in  
28 California. If applicable, Settling Defendant shall endeavor in good faith, using

1 commercially and technologically reasonable efforts, to achieve the Target Level in the  
2 Covered Products shipped for sale in California by the Compliance Date.

3 2.2. "Shipped for sale in California" means Covered Products that Settling  
4 ~~Defendant either directly ships into California for sale in California or that it sells to a~~  
5 distributor who Settling Defendant knows will sell the Covered Products to consumers in  
6 California. Where a retailer or distributor sells products both in California and other states,  
7 Settling Defendant shall take commercially reasonable steps to ensure that, after the Target  
8 Level has been reached, the only Covered Products that are sold in California are either (i)  
9 Covered Products for which Settling Defendant has complied with Paragraph 2; or (ii)  
10 Covered Products for which Settling Defendant has complied with Paragraph 3.

11 2.3. *Standard and Verification.*

12 (a) Testing for acrylamide shall be performed using either GC/MS (Gas  
13 Chromatrography/Mass Spectrometry), LC-MS/MS (Liquid Chromatograph-Mass  
14 Spectrometry/Mass Spectrometry), or any other testing method agreed upon by the Parties  
15 to this Consent Judgment.

16 (b) Settling Defendant shall collect, over no less than a ten-day period, a random  
17 sample of each Type of Covered Product listed on Exhibit A from each of at least five (5)  
18 production lots of such Type of Covered Product from each location that supplies such Type  
19 of Covered Product to California. The production lots sampled shall be drawn from at least  
20 5 unique Stock Keeping Units ("SKUs") that comprise each Type, unless (1) there are fewer  
21 than 5 SKUs in that Type, in which case each SKU shall be sampled at least once, or (2)  
22 fewer than 5 SKUs in that Type are produced during the period of time Settling Defendant  
23 has chosen to conduct sampling to demonstrate compliance with this Consent Judgment,  
24 provided that such period of time is no shorter than 60 days, in which case each SKU  
25 produced during that period of time shall be sampled at least once.

26 (c) To comply with the Target Level, testing conducted in accordance with the  
27 protocol set forth in Paragraph 2.3(a) of samples selected in accordance with the protocol  
28 set forth in Paragraph 2.3(b) must establish both of the following:

1           (1)     The sales-weighted arithmetic mean of acrylamide levels for the  
2 Covered Products (“Sales-Weighted Arithmetic Mean Concentration”) is at or below 281  
3 parts per billion with a 95% confidence level, i.e.,  $p < 0.05$ . The Sales-Weighted Arithmetic  
4 Mean Concentration is to be calculated using the following formula: Multiply the  
5 arithmetic mean acrylamide concentration of each Group (as set forth in Exhibit A) shipped  
6 for sale in California by that Group’s fraction of total sales volume (net of returns) for all  
7 Groups of Covered Products shipped for sale in California, and thereafter sum all such  
8 adjusted concentrations for all Groups to be shipped for sale in California. (Thus, if there is  
9 only one Group identified on Exhibit A, then the Sales-Weighted Arithmetic Mean  
10 Concentration will be identical to that Group’s arithmetic mean concentration, because that  
11 Group will have 100% of total sales volume.) For purposes of this Paragraph, a Group’s  
12 arithmetic mean acrylamide concentration is to be determined by summing the mean  
13 acrylamide concentration of each Type of product within the Group and dividing the sum by  
14 the number of Types of products in the Group for which a sample has been collected.

15           (2)     If there is more than one Group identified on Exhibit A, the arithmetic  
16 mean acrylamide concentration in each Group of Covered Products (as set forth in Exhibit  
17 A) is no more than 25% higher than 281 parts per billion with a 95% confidence level, i.e.,  
18  $p < 0.05$ . For purposes of this Paragraph, a Group’s arithmetic mean acrylamide  
19 concentration is to be determined by summing the mean acrylamide concentration of each  
20 Type of product within the Group and dividing the sum by the number of Types of products  
21 in the Group for which a sample has been collected.

22           (d)     Sales volume for each Group and total sales volume for the Covered Products  
23 shall be based upon the most current 52-week Nielsen or IRI InfoScan data (in dollars, net  
24 of returns) for the Los Angeles, San Francisco/Oakland, Sacramento, and San Diego  
25 metropolitan areas available to Settling Defendant as of the date of the last sampling event  
26 reported under Paragraph 2.3(b).

27           (e)     All test results of acrylamide concentrations (without identifying private label  
28 customers), once provided to the Attorney General, shall be public documents, but nothing

1 in this Consent Judgment shall preclude Settling Defendant from claiming business  
2 confidentiality as to sales volume, revenue, profits, or identity of “private label” retailers,  
3 of any or all of the Covered Products.

4 ~~(f) If Settling Defendant’s test results demonstrate that the Target Level has been~~  
5 achieved on or before the Compliance Date for the Covered Products shipped for sale in  
6 California, then, on or before the Compliance Date, it shall provide the Attorney General  
7 with written notice of compliance, including the calculation required to demonstrate  
8 achievement of the Target Level, and test results (provided separately from any sales or  
9 revenue data or related calculations, or identification of “private label” retailers).

10 Thereafter, Settling Defendant shall be required to test the Covered Products according to  
11 the protocol described in this Paragraph 2.3 on two additional occasions only – once during  
12 the first year and once during the second year after the Target Level has been achieved,  
13 provided there is at least a nine-month interval between these two testing occasions. If  
14 those additional tests confirm that the Target Level has been achieved for all of the Covered  
15 Products shipped for sale in California, as determined by the protocol set forth in this  
16 Paragraph 2.3, then Settling Defendant shall have no further duty to test the Covered  
17 Products.

18 (g) If Settling Defendant has not achieved the Target Level by the Compliance  
19 Date (including any extensions provided under Paragraph 2.4) for all of the Covered  
20 Products shipped for sale in California, it shall provide warnings for the Covered Products  
21 shipped for sale in California as provided herein in Paragraph 3. Settling Defendant may  
22 continue testing of the Covered Products until tests demonstrate that the Target Level has  
23 been achieved for all of the Covered Products shipped for sale in California, at which time,  
24 upon providing the Attorney General with written notice of compliance, including the  
25 calculation required to demonstrate achievement of the Target Level, and test results  
26 (provided separately from any sales or revenue data or related calculations), Settling  
27 Defendant shall have no further duty to warn.

28 (h) After Settling Defendant has demonstrated that the Target Level has been

1 achieved, if the Attorney General believes that the Target Level has not been achieved, the  
2 Parties shall meet and confer. If, after such meet and confer, the Attorney General  
3 continues to believe that the Target Level has not been achieved, the Attorney General may  
4 apply to the Court for enforcement of this Consent Judgment based on results of the  
5 Attorney General's own testing showing that the Target Level has not been achieved. Any  
6 data used by the Attorney General for this purpose must be the result of testing and analysis  
7 performed by methods consistent with Paragraph 2.3(a) and include as many samples of  
8 each Covered Product as are required by Paragraph 2.3(b). A prima facie showing of  
9 violation based on such test results may be rebutted by a showing of achievement of the  
10 Target Level made in compliance with all aspects of the testing and sampling protocol  
11 under Paragraph 2.3.

12       2.4. *Extension of Compliance Date.* Settling Defendant may request a grace  
13 period extending the Compliance Date by a period of up to three (3) months by notifying  
14 the Attorney General at least ninety (90) days before the Compliance Date. The Attorney  
15 General will consider the extension for good cause shown based on Settling Defendant's  
16 diligence in reducing acrylamide levels in Covered Products as well as reported progress at  
17 the time of the requested extension. If the Attorney General denies the extension, Settling  
18 Defendant may apply to the Court to extend the Compliance Date and the Court may grant  
19 the requested extension, upon timely application, for good cause shown based on Settling  
20 Defendant's diligence and good faith efforts to reduce acrylamide in Covered Products as  
21 well as reported progress at the time the request for extension is considered.

22       2.5. *Technology Licensing.*

23       The requirements in this Consent Judgment are not contingent upon the use of any  
24 particular method to achieve the Target Level, but Settling Defendant shall license any  
25 patented technology owned by Settling Defendant used to meet the Target Level, whether  
26 existing or in the future, to others for use in other food products, at a commercially  
27 reasonable price and using other commercially reasonable terms.

28 ///



1 **3. INJUNCTIVE RELIEF: CLEAR AND REASONABLE WARNINGS**

2 3.1. If Settling Defendant does not achieve the Target Level by the Compliance  
3 Date (including any extensions provided under Paragraph 2.4), Settling Defendant shall,  
4 ~~within 30 days and until such time as it achieves the Target Level:~~

5 (a) provide warnings by placing a warning label as described in Paragraph 3.2 (or  
6 Paragraph 3.4, if applicable) on the package of all Covered Products shipped for sale in  
7 California that Settling Defendant would need to exclude from the calculations in Paragraph  
8 2.3(c) in order to achieve the Target Level; or, at Settling Defendant's option,

9 (b) provide warnings by providing signs as described in Paragraph 3.3 (or  
10 Paragraph 3.4, if applicable) for all Covered Products shipped for sale in California that  
11 Settling Defendant would need to exclude from the calculations in Paragraph 2.3(c) in order  
12 to achieve the Target Level; or, at Settling Defendant's option,

13 (c) cease selling such Covered Product(s) shipped for sale in California that  
14 Settling Defendant would need to exclude from the calculations in Paragraph 2.3(c) in order  
15 to achieve the Target Level.

16 3.2. *Label Warnings.* A label warning placed on the package of a Covered  
17 Product pursuant to Paragraph 3.1(a) shall either (a) conform to the requirements for the  
18 "safe harbor" warning methods set out in Cal. Code Regs., tit. 27, sections 25601 et seq.,  
19 and, at Settling Defendant's option, may also state that acrylamide is the chemical in  
20 question; or (b) provide substantially the same information as set forth for sign warnings in  
21 Paragraph 3.3(b).

22 3.3. *Sign Warnings.*

23 (a) *Form of Sign.* A warning sign shall be rectangular and at least 36 square  
24 inches in size, with the word "WARNING" centered one-half of an inch from the top of the  
25 sign in ITC Garamond bold condensed type face all in one-half inch capital letters. The  
26 body of the warning message shall be in ITC Garamond bold condensed type face. For the  
27 body of the warning message, left and right margins of at least one-half of an inch, and a  
28 bottom margin of at least one-half inch shall be observed. Larger signs shall bear

1 substantially the same proportions of type size and spacing to sign dimension as a sign that  
2 is 36 square inches in size.

3 (b) *Text of Sign.* Unless modified by agreement of the Parties to this Consent  
4 Judgment, or as provided in Paragraph 3.4, the sign shall contain the following text (text in  
5 brackets is optional):

6 **WARNING**

7 This product contains acrylamide, a chemical known to the State of California to  
8 cause cancer [and reproductive toxicity<sup>1</sup>]. Acrylamide is not added to this food, but  
9 is created when this food and certain other foods, such as French fries, chips and  
10 crisps, crackers, and cookies, are cooked at high temperatures. The FDA has not  
11 advised people to stop eating these snack food products or any other foods  
12 containing acrylamide as a result of cooking. For more information, see the FDA's  
13 website at [www.fda.gov](http://www.fda.gov).

14 (c) *Placement of Sign.* To the extent that Settling Defendant is required to  
15 provide a warning under this Consent Judgment and chooses to do so by providing signs, it  
16 shall instruct retailers that the sign shall be posted as follows: on the shelf(ves) or in the  
17 aisle(s) where the Covered Products for which the warning is being provided are sold;  
18 unless the store has less than 7,500 square feet of retail space and no more than two cash  
19 registers, in which case it may be placed at each cash register. In addition, if the store  
20 operates a customer service desk or similar central facility, the sign shall also be posted at  
21 that location.

22 (d) *Distribution.* Settling Defendant (or its agent) shall provide signs to retailers  
23 who operate retail locations in California that are collectively responsible for at least 70  
24 percent of Settling Defendant's sales in the State of California of Covered Products for  
25 which the warning is being provided. Signs shall be provided with a letter substantially as  
26 provided in Exhibit B, in which posting instructions are provided. The letter shall request  
27 that the receiving retailer provide Settling Defendant a written acknowledgment that the

28 <sup>1</sup> The language in brackets must be added if the Covered Product(s) contain acrylamide in levels exceeding the Maximum Allowable Dose Level.

1 sign will be posted. Settling Defendant shall send a follow up letter substantially as  
2 provided in Exhibit C to the same retailers who were sent the original letter and who did not  
3 send any acknowledgment. Settling Defendant (or its agent) shall maintain files  
4 ~~demonstrating compliance with this provision, including the letters sent and receipts of any~~  
5 acknowledgments from retailers, which shall be provided to the Attorney General on  
6 written request.

7 (e) *Effect of Prior or Subsequent Signage.* To the extent that Settling Defendant  
8 is required to provide a warning under this Consent Judgment and chooses to provide signs,  
9 but warning signs are in place as a result of obligations of parties other than Settling  
10 Defendant, Settling Defendant may rely on such prior signage (or, in the case of signage  
11 posted after the Compliance Date, subsequent signage) to satisfy its warning obligations  
12 under this Consent Judgment if the signs in place materially satisfy the requirements of this  
13 Paragraph 3 for Covered Products. If the prior or subsequent signs do not materially satisfy  
14 the requirements of this Paragraph 3 for Covered Products, the Parties shall negotiate in  
15 good faith regarding a modification of the required type, size, placement and language set  
16 forth in Paragraph 3.3(a) – (d) in consideration of the signs already in place.

17 3.4. *Alternative Warning Language.* If any other defendant in this action is  
18 allowed to provide warnings using language set forth in another consent judgment entered  
19 in this case that differs from the language required by this Consent Judgment, then after the  
20 Compliance Date Settling Defendant may, after providing 60 days' written notice to the  
21 Attorney General, use the same warning language set forth in that other consent judgment  
22 for labels or the text of signs, to the extent that such language is applicable to the Covered  
23 Products, provided that the Attorney General does not make a written objection within thirty  
24 days of the Attorney General's receipt of the proposed change in warning language.  
25 Settling Defendant may file an application with this Court in order to resolve any objection  
26 received from the Attorney General. Nothing in this Paragraph 3.4 shall limit or otherwise  
27 affect Settling Defendant's right to seek a modification of this Consent Judgment in  
28 accordance with Paragraph 5 herein.

1           3.5.   *Option to Provide Warnings.*

2           (a)    With respect to the Covered Products, Settling Defendant may opt to provide  
3 warnings under Paragraph 3.1 and cease its acrylamide reduction efforts under Paragraph 2  
4 ~~if either or both of the following conditions have been satisfied with respect to the Covered~~  
5 Products: (i) acrylamide warnings covering one or more products manufactured and sold by  
6 other companies that are of the same type as the Covered Products appear on packages of  
7 such products accounting for 20% of sales of all such products in California that are not  
8 produced by Settling Defendant, based on IRI sales data; and/or (ii) non-package  
9 acrylamide warnings specifically mentioning one or more such products appear at 500 or  
10 more store locations in California. Nothing in this Paragraph 3.5(a) shall limit or otherwise  
11 affect Settling Defendant's right in accordance with Paragraph 3.3(e) to rely on prior or  
12 subsequent signage.

13           (b)    If Settling Defendant believes either or both conditions has/have occurred  
14 with respect to the Covered Products, it shall give notice of such to the Attorney General,  
15 together with documentation evidencing such occurrence. Following such notice, Settling  
16 Defendant and the Attorney General will promptly meet and confer regarding the situation,  
17 and following a meet and confer period of no longer than 30 days, Settling Defendant, by  
18 giving further notice of at least 30 days to the Attorney General, which the Attorney  
19 General may extend, at the Attorney General's option, by up to 60 days, may elect to (i)  
20 cease acrylamide reduction efforts with respect to the Covered Products; (ii) provide the  
21 warnings required by Paragraph 3.1(a) or 3.1(b) for the Covered Products or otherwise rely  
22 on signage consistent with Paragraph 3.3(e); and (iii) within 30 days make all remaining  
23 payments required by Paragraph 4, if applicable, with respect to the Covered Products.

24           3.6.    *Extra-Territorial Effect.* Nothing in this Consent Judgment requires that  
25 warnings be given for any Covered Products that are not shipped for sale in California.

26           **4.    PAYMENTS**

27           4.1.    *Civil Penalty.* Within 30 days of the Effective Date, Settling Defendant shall  
28 pay a civil penalty of \$10,000 pursuant to Health & Safety Code section 25249.7,

1 subdivision (b). This payment shall be divided in accordance with Health & Safety Code  
2 section 25249.12, subdivisions (c) and (d), with \$7,500 (75% of the penalty) to be deposited  
3 in the Safe Drinking Water and Toxic Enforcement Fund, and \$2,500 (25% of the penalty)  
4 to be paid to the Office of the Attorney General.

5 (a) The 75% share of the penalty to be deposited in the Safe Drinking Water and  
6 Toxic Enforcement Fund shall be paid by check payable to the Office of Environmental  
7 Health Hazard Assessment, with the check to bear the notation "Proposition 65 – AG  
8 Matter ID OK2009900946."

9 (b) The 25% share of the penalty to be paid to the Office of the Attorney General  
10 shall be paid by check payable to the "California Department of Justice – Litigation Deposit  
11 Fund." The check shall bear on its face "Proposition 65 Recoveries Fund" and the Attorney  
12 General's internal reference number for this matter (OK2009900946). The money paid to  
13 the Attorney General's Office pursuant to this paragraph shall be administered by the  
14 California Department of Justice and shall be used by the Environment Section of the Public  
15 Rights Division of the Attorney General's Office, until all funds are exhausted, for any of  
16 the following purposes: (1) implementation of the Attorney General's authority to protect  
17 the environment and natural resources of the State pursuant to Government Code section  
18 12600 et seq. and as Chief Law Officer of the State of California pursuant to Article V,  
19 section 13 of the California Constitution; (2) enforcement of laws related to environmental  
20 protection, including, but not limited to, Chapters 6.5 and 6.95, Division 20, of the  
21 California Health & Safety Code; (3) enforcement of the Unfair Competition Law, Business  
22 & Professions Code section 17200 et seq., as it relates to protection of the environment and  
23 natural resources of the State of California; and (4) other environmental actions that benefit  
24 the State and its citizens as determined by the Attorney General. Such funding may be used  
25 for the costs of the Attorney General's investigation, filing fees and other court costs,  
26 payment to expert witnesses and technical consultants, purchase of equipment, laboratory  
27 analyses, personnel costs, travel costs, and other costs necessary to pursue environmental  
28 actions investigated or initiated by the Attorney General for the benefit of the State of

1 California and its citizens. The payment, and any interest derived therefrom, shall solely  
2 and exclusively augment the budget of the Attorney General's Office as it pertains to the  
3 Environment Section of the Public Rights Division and in no manner shall supplant or cause  
4 any reduction of any portion of the Attorney General's budget.

5 4.2. *Enforcement Fund Payment.* Within 30 days of the Effective Date, Settling  
6 Defendant shall pay \$15,000 to be used by the Attorney General for the enforcement of  
7 Proposition 65. This payment shall be made by check payable to the "California  
8 Department of Justice." The check shall bear on its face "Proposition 65 Enforcement  
9 Fund" and the Attorney General's internal reference number for this matter  
10 (OK2009900946). Funds paid pursuant to this paragraph shall be placed in an interest-  
11 bearing Special Deposit Fund established by the Attorney General. These funds, including  
12 any interest, shall be used by the Attorney General, until all funds are exhausted, for the  
13 costs and expenses associated with the enforcement and implementation of Proposition 65,  
14 including investigations, enforcement actions, and other litigation or activities as  
15 determined by the Attorney General to be reasonably necessary to carry out his duties and  
16 authority under Proposition 65. Such funding may be used for the costs of the Attorney  
17 General's investigation, filing fees and other court costs, payment to expert witnesses and  
18 technical consultants, purchase of equipment, travel, purchase of written materials,  
19 laboratory testing, sample collection, or any other cost associated with the Attorney  
20 General's duties or authority under Proposition 65. Funding placed in the Special Deposit  
21 Fund pursuant to this paragraph, and any interest derived therefrom, shall solely and  
22 exclusively augment the budget of the Attorney General's Office and in no manner shall  
23 supplant or cause any reduction of any portion of the Attorney General's budget.

24 4.3. *Delivery.* The payments required by this Consent Judgment shall be made as  
25 follows:

26 (a) The payment required by Paragraph 4.1(a) shall be sent directly to:  
27  
28

1 Senior Accounting Officer – MS 19-B  
2 Office of Environmental Health Hazard Assessment  
3 P.O. Box 4010  
4 Sacramento, CA 95812-0410

5 (b) The payment required by Paragraphs 4.1(b) and 4.2 shall be made through the  
6 delivery of separate checks to the attention of Laura J. Zuckerman, Deputy Attorney  
7 General, California Department of Justice, 1515 Clay Street, 20th Floor, Oakland, CA  
8 94612, with a copy of the checks and cover letter to be sent to Robert Thomas, Legal  
9 Analyst, California Department of Justice, 1515 Clay Street, 20th Floor, Oakland, CA  
10 94612.

## 10 5. MODIFICATION OF CONSENT JUDGMENT

11 5.1. *Procedure for Modification.* Except as provided in Paragraph 1.4, this  
12 Consent Judgment may be modified by written agreement of the Attorney General and  
13 Settling Defendant, after noticed motion, and upon entry of a modified consent judgment by  
14 the Court thereon, or upon motion of the Attorney General or Settling Defendant as  
15 provided herein or as otherwise provided by law, and upon entry of a modified consent  
16 judgment by the Court. Before either the Attorney General or Settling Defendant files an  
17 application with the Court for a modification to this Consent Judgment, the Parties agree  
18 that they will meet and confer on a proposed modification. If a proposed modification is  
19 agreed upon, then Settling Defendant and the Attorney General will present the  
20 modification to the Court by means of a stipulated modification to this Consent Judgment.  
21 Otherwise, the Party seeking the modification shall bear the burden of establishing that the  
22 modification is appropriate, either because of the occurrence of a condition set forth in this  
23 Consent Judgment or as otherwise provided by law. Bases for a motion to modify under  
24 this Paragraph 5 shall include, but are not limited to, the basis for a motion to modify under  
25 Paragraph 5.6 herein.

### 26 5.2 *Other Settlements.*

27 (a) If the Attorney General agrees or has agreed in a settlement or judicially  
28 entered consent judgment with another manufacturer of processed snack foods on terms, as

1 drafted or as implemented, that (i) are materially more beneficial to Settling Defendant than  
2 those set forth in this Consent Judgment as to the Compliance Date, or the form, manner or  
3 content of warning, or (ii) allow tortilla chips, or other similar processed snack food  
4 products, with a designated Target Level higher than 281 ppb to be shipped for sale and/or  
5 sold in California without a warning, this may provide grounds for Settling Defendant to  
6 seek modification pursuant to Paragraph 5.1.

7 (b) If the Attorney General agrees or has agreed in a settlement or judicially  
8 entered consent judgment that some or all of the products sold by other companies that are  
9 similar to the Covered Products do not require a warning under Proposition 65 (based on the  
10 presence of acrylamide), or if a court of competent jurisdiction renders a final judgment,  
11 and the judgment becomes final, that some or all of the products sold by other companies  
12 that are similar to the Covered Products do not require a warning for acrylamide under  
13 Proposition 65, then Settling Defendant may seek a modification of this Consent Judgment  
14 to eliminate its duties to warn and/or other duties related to the reduction of acrylamide  
15 levels as to those products.

16 5.3. *Change in Proposition 65.* If Proposition 65 or its implementing regulations  
17 are changed from their terms as they exist on the date of entry of this Consent Judgment,  
18 either Party or both Parties may seek modification of this Consent Judgment through  
19 stipulated or noticed motion as follows:

20 (a) If the change establishes that warnings for acrylamide in Covered Products  
21 are not required, Settling Defendant may seek a modification of this Consent Judgment to  
22 eliminate its duties to warn and/or its duty to reduce acrylamide levels.

23 (b) If the change establishes that the warnings provided by this Consent Judgment  
24 would not comply with Proposition 65 or its implementing regulations, either Party may  
25 seek a modification of this Consent Judgment to conform the judgment to the change in law.

26 (c) If the change would provide a new form, manner, or content for an optional or  
27 safe-harbor warning, Settling Defendant shall meet and confer with the Attorney General  
28 and, following agreement (if one is reached), jointly apply to the Court for approval of a



1 plan for implementing warnings in such manner. If no agreement is reached, Settling  
2 Defendant may seek a modification of this Consent Judgment to provide a new form,  
3 manner, or content for an optional or safe-harbor warning. In the absence of agreement  
4 between the Parties, it shall be Settling Defendant's burden to establish that the proposed  
5 warning complies with any new safe harbor method of providing warnings for food that is  
6 applicable to Covered Products, or that the warning is provided in a manner that complies  
7 with the law and is at least as effective (i.e., is not materially less informative or likely to be  
8 seen, read, and understood) as the forms of warning otherwise required by this Consent  
9 Judgment.

10       5.4. *Necessary Technology Unavailability.* If Settling Defendant is unable to  
11 reduce acrylamide levels in the Covered Products below the Target Level but would be able  
12 to do so but for a failure by any other defendant to this action to comply with technology  
13 licensing requirements in any settlement in this action with the Attorney General, then  
14 Settling Defendant shall be deemed to have good cause to seek a modification to this  
15 Consent Judgment that extends the Compliance Date. For the purposes of this Paragraph  
16 5.4, "any other defendant to this action" shall include such defendant, and/or its affiliates,  
17 subsidiaries or any other entity in which such defendant has a direct or indirect financial  
18 interest of 50% or more.

19       5.5 *Correspondence with the Federal Government.* If Settling Defendant  
20 corresponds in writing to an agency or branch of the United States Government in  
21 connection with the application of Proposition 65 to acrylamide in food products, then so  
22 long as such correspondence does not fall within one of the exemptions to the Freedom of  
23 Information Act, Settling Defendant shall provide the Attorney General with a copy of such  
24 communication as soon as practicable, but not more than 10 days after sending or receiving  
25 the correspondence; provided, however, that this Paragraph shall not apply to  
26 correspondence solely to or from trade associations or other groups of which Settling  
27 Defendant is a member, nor shall this Paragraph apply if Settling Defendant is no longer  
28 required to test for acrylamide under this Consent Judgment.

1           5.6. *Federal Preemption.* If a court of competent jurisdiction or an agency of the  
2 federal government (including, but not limited to, the U.S. Food and Drug Administration)  
3 states, through any regulation or legally binding act, that federal law has preemptive effect  
4 on any of the requirements of this Consent Judgment, including, but not limited to  
5 precluding Settling Defendant from providing any of the warnings set forth in this Consent  
6 Judgment or the manner in which such warnings are given, then Settling Defendant may  
7 seek to modify this Consent Judgment to bring it into compliance with or avoid conflict  
8 with federal law. The modification shall not be granted unless this Court concludes, in a  
9 final judgment or order, that such modification is necessary to bring this Consent Judgment  
10 into compliance with or avoid conflict with federal law. Specifically, a determination that  
11 the provision of some, but not all, forms of warning described in Paragraph 3 above is not  
12 permitted shall not relieve Settling Defendant of the duty to provide one of the other  
13 warnings described under this judgment for which such determination has not been made.

14 **6. ENFORCEMENT**

15           The People may, by motion or application for an order to show cause before this  
16 Court, enforce the terms and conditions contained in this Consent Judgment. In any such  
17 proceeding, the People may seek whatever fines, costs, penalties, or remedies are provided  
18 by law for failure to comply with this Consent Judgment, and where said violations of this  
19 Consent Judgment constitute subsequent violations of Proposition 65 or other laws  
20 independent of this Consent Judgment and/or those alleged in the Complaint, the People are  
21 not limited to enforcement of this Consent Judgment, but may seek in another action  
22 whatever fines, costs, penalties, or remedies are provided for by law for failure to comply  
23 with Proposition 65 or other laws. In any action brought by the People alleging subsequent  
24 violations of Proposition 65 or other laws, Settling Defendant may assert any and all  
25 defenses that are available.

26 **7. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

27           Each signatory to the Parties' stipulation for entry of this Consent Judgment has  
28 certified that he or she is fully authorized by the Party he or she represents to stipulate to

1 this Consent Judgment, to enter into and execute the stipulation on behalf of the Party  
2 represented, and legally to bind that Party.

3 **8. CLAIMS COVERED**

4 ~~This Consent Judgment is a full, final, and binding resolution between the People~~  
5 and Settling Defendant, of any alleged violation of Proposition 65 or its implementing  
6 regulations, Business & Professions Code sections 17200 et seq., and any other statutory,  
7 regulatory or common law duty or requirement, and fully and finally resolves all claims that  
8 have been or could have been asserted in the Complaint against Settling Defendant, for  
9 failure to provide clear and reasonable warnings of exposure to acrylamide from the  
10 consumption of the Covered Products, as well as any other claim that was alleged or could  
11 have been asserted based on the facts or conduct alleged in the Complaint as to the Covered  
12 Products, whether based on actions committed by Settling Defendant or by any entity or  
13 person to whom it distributes or sells, and/or has distributed or sold, directly or indirectly,  
14 Covered Products, or by any entity or person that has sold or sells the Covered Products to  
15 consumers in the State of California, including but not limited to distributors, wholesalers  
16 and retailers. Compliance with the terms of this Consent Judgment, as it may be modified,  
17 resolves, as to Covered Products, including new products incorporated as Covered Products  
18 under Paragraph 1.4, any issue or claim, now, in the past, and in the future, concerning  
19 compliance with the requirements of Proposition 65 and its implementing regulations as to  
20 the duty to warn about acrylamide in Covered Products shipped for sale in California, and  
21 Business & Professions Code sections 17200 et seq. with regard to the same, by (1) Settling  
22 Defendant, its parents, shareholders, directors, officers, divisions, subdivisions, subsidiaries,  
23 sister companies, affiliates, franchisees, cooperative members, and licensees (collectively  
24 “Released Persons”); (2) the Released Persons’ distributors, wholesalers, and retailers who  
25 have sold or sell Covered Products; (3) any other entity or person in the chain of distribution  
26 who has sold or sells the Covered Products; and (4) the predecessors, successors, and  
27 assigns of any of them (collectively, “Affiliates”). The preceding sentence does not apply  
28 to, or resolve any claims against, retailers who, after the Compliance Date, do not post signs

1 sent to them pursuant to Paragraph 3.3(c) and (d).

2 **9. RETENTION OF JURISDICTION**

3 This Court shall retain jurisdiction of this matter to implement and enforce this  
4 ~~Consent Judgment. Either Party may bring a motion pursuant to the Court's continuing~~  
5 jurisdiction requesting that the Court give full effect to any provision of this Consent  
6 Judgment.

7 **10. PROVISION OF NOTICE**

8 10.1. When any Party is entitled to receive any notice under this Consent Judgment,  
9 the notice shall be sent by overnight courier service to the person and address set forth in  
10 this Paragraph. Any Party may modify the person and address to whom the notice is to be  
11 sent by sending the other Party notice by certified mail, return receipt requested. Said  
12 change shall take effect on the date the return receipt is signed by the Party receiving the  
13 change.

14 10.2. Notices shall be sent to:

15 For the People/the Attorney General:

16 Laura J. Zuckerman  
17 Timothy E. Sullivan  
18 Deputy Attorneys General  
19 1515 Clay Street, 20th Floor  
Oakland, CA 94612

20 For Kettle Foods, Inc.:

21 Stephen Kim, Esq.	<i>with a copy to:</i>	Joshua A. Bloom
22 Sr. Vice President, General Counsel		Barg Coffin Lewis & Trapp LLP
23 600 Montgomery Street, 13th Floor		350 California Street, 22nd Floor
San Francisco, CA 94111-2702		San Francisco, CA 94104-1435

24 **11. COURT APPROVAL**

25 This Consent Judgment shall be submitted to the Court for entry by noticed motion.  
26 If this Consent Judgment is not approved by the Court, it shall be of no force or effect and  
27 may not be used by the Attorney General or Settling Defendant for any purpose.

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**12. ENTIRE AGREEMENT**

12.1. This Consent Judgment contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, 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 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties.

12.2. This Consent Judgment is the result of mutual drafting and no ambiguity found herein shall be construed in favor of or against any Party.

**13. EXECUTION IN COUNTERPARTS**

The stipulations to this Consent Judgment may be executed in counterparts and by means of facsimile or electronic mail by PDF document, which taken together shall be deemed to constitute one document.

IT IS SO ORDERED, ADJUDGED, AND DECREED:

Dated:

**AUG 31 2011**

**STEVEN A. BRICK**

Hon. Steven A. Brick  
Judge of the Superior Court

Exhibit A

**ORIGINAL COVERED PRODUCTS**

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**Group A.** All tortilla chips manufactured by Settling Defendant, including the following:

- Type 1:** Kettle Multigrain Tortilla Chips
- Type 2:** Kettle Yellow Corn Tortilla Chips
- Type 3:** Kettle Chile Lime Tortilla Chips
- Type 4:** Kettle Black Bean Tortilla Chips
- Type 5:** Kettle Blue Corn Tortilla Chips

Exhibit B

(For use if Settling Defendant provides sign warnings pursuant to Paragraph 3.3)

**THIS COMMUNICATION APPLIES ONLY TO  
RETAIL LOCATIONS IN CALIFORNIA**

Kettle Foods, Inc. has entered into a consent judgment with the Attorney General for the State of California regarding the presence of acrylamide in specified snack food products sold by retailers at retail locations in California.

Under the terms of this consent judgment, Kettle Foods, Inc. is providing the enclosed sign warnings to retailers to be posted in retail stores selling any of the specified snack food products identified below in California. In the consent judgment, Kettle Foods, Inc. obtained a conditional release on your behalf. For the release to continue to be effective after the date of this letter, you need to comply with the directions in this communication.

We request that you post these signs on your shelf(ves) or in your aisle(s) where the identified products are sold. For stores less with than 7,500 square feet of retail space and no more than two cash registers, the sign may be placed at each cash register instead of on the shelf(ves) or in the aisle(s). Additionally, stores that operate a customer service desk or similar central facility must also post a sign at that location.

Please sign and return the written acknowledgment below to acknowledge that you have received the signs and that they will be posted in accordance with these specifications until you receive written instruction from Kettle Foods, Inc. to the contrary.

Thank you for your cooperation. If you need more signs or have any questions, such as the appropriate sign locations for your specific retail store(s), please contact \_\_\_\_\_.

Acknowledged by:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Signature)  
(Print Name)  
(Company/Store Location)  
(Date)

List of Products

Exhibit C

(For use if Settling Defendant provides sign warnings pursuant to Paragraph 3.3)

**THIS COMMUNICATION APPLIES ONLY TO  
RETAIL LOCATIONS IN CALIFORNIA**

On [Date], Kettle Foods, Inc. sent you a letter enclosing sign warnings for posting in your store(s) in California pursuant to a consent judgment entered into between Kettle Foods, Inc. and the Attorney General for the State of California regarding the presence of acrylamide in specified snack food products sold by retailers at retail locations in California.

These signs are to be posted on your shelf(ves) or in your aisle(s) where any of the specified snack food products identified below are sold in your stores in California. For stores with less than 7,500 square feet of retail space and no more than two cash registers, the sign may be placed at each cash register instead of on the shelf(ves) or in the aisle(s). Additionally, stores that operate a customer service desk or similar central facility must also post a sign at that location.

As stated in our prior letter, Kettle Foods, Inc. obtained a conditional release in the consent judgment on your behalf. For the release to be effective after the date of the prior letter, you need to comply with the directions in this communication.

We have not received your written acknowledgment that you have received the signs and that your store(s) will post these signs. Please sign and return the written acknowledgement below to acknowledge that you have received the signs and that they will be posted in accordance with these specifications until you receive written instruction from Kettle Foods, Inc. to the contrary.

Thank you for your cooperation. If you need more signs or have any questions, such as the appropriate sign locations for your specific retail store(s), please contact \_\_\_\_\_.

Acknowledged by:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Signature)  
(Print Name)  
(Company/Store Location)  
(Date)

List of Products