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3 **ENDORSED**
4 **FILED**
5 **ALAMEDA COUNTY**

6 **AUG - 8 2017**

7 CLERK OF THE SUPERIOR COURT
8 By YOLANDA ESTRADA Deputy

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF ALAMEDA**

11 CENTER FOR ENVIRONMENTAL HEALTH,)
12)

13 Plaintiff,

14 v.)

15 FOODSHOULDTASTEGOOD, INC., *et al.*,)

16 Defendants.)
17)
18)
19)
20)

Case No. RG 17-851469

[PROPOSED] CONSENT JUDGMENT
AS TO LIVE BETTER BRANDS, LLC

21 **1. DEFINITIONS**

22 1.1 The "Complaint" means the operative complaint in the above-captioned matter.

23 1.2 "Covered Products" means fried or baked potato or sweet potato based snack food
24 products, including snack food products containing potato or sweet potato flour (such as extruded
25 vegetable chips, vegetable sticks, and vegetable straws), but excluding sliced potato chips. It is
26 the Parties' intent that the Covered Products in this Consent Judgment are the kind of products
27 falling within Type 4 in the "extruded, pellet, and baked products" category in the Consent

1 Judgment as to Defendant Snak King Corporation, entered August 31, 2011, in People v.
2 Snyder's of Hanover, Alameda County Superior Court Case No. RG09455286.¹ An initial list of
3 the Covered Products is attached as Exhibit A hereto.

4 1.3 "Effective Date" means the date on which notice of entry of this Consent
5 Judgment by the Court is served upon Settling Defendant.

6 **2. INTRODUCTION**

7 2.1 The Parties to this Consent Judgment are the Center for Environmental Health, a
8 California non-profit corporation ("CEH"), and Live Better Brands, LLC ("Settling Defendant").
9 CEH and Settling Defendant (the "Parties") enter into this Consent Judgment to settle certain
10 claims asserted by CEH against Settling Defendant as set forth in the Complaint.

11 2.2 On or about September 30, 2016, CEH provided a 60-day Notice of Violation of
12 Proposition 65 to the California Attorney General, the District Attorneys of every county in
13 California, the City Attorneys of every California city with a population greater than 750,000,
14 and to Settling Defendant, alleging that Settling Defendant violated Proposition 65 by exposing
15 persons to acrylamide contained in fried or baked potato based snack foods without first
16 providing a clear and reasonable Proposition 65 warning.

17 2.3 Settling Defendant is a corporation or other business entity that manufactures,
18 distributes, sells, or offers for sale Covered Products that are sold in the State of California or has
19 done so in the past.

20 2.4 On March 2, 2017, CEH filed the Complaint in the above-captioned matter,
21 naming Settling Defendant as an original defendant.

22 2.5 For purposes of this Consent Judgment only, the Parties stipulate that this Court
23 has jurisdiction over the allegations of violations contained in the Complaint and personal
24 jurisdiction over Settling Defendant as to the acts alleged in the Complaint, that venue is proper
25 in the County of Alameda, and that this Court has jurisdiction to enter and enforce this Consent
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27 ¹ These products are referred to as "Group C, Type 4" products in Exhibit A to the Snak King Consent Judgment,
28 which is available on the Attorney General's website, at <https://oag.ca.gov/prop65/litigation>.

Judgment as a full and final resolution of all claims which were or could have been raised in the Complaint based on the facts alleged therein with respect to Covered Products manufactured, distributed, and/or sold by Settling Defendant.

2.6 Nothing in this Consent Judgment is or shall be construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy, argument, or defense the Parties may have in any other pending or future legal proceedings. This Consent Judgment is the product of negotiation and compromise and is accepted by the Parties solely for purposes of settling, compromising, and resolving issues disputed in this Action.

3. INJUNCTIVE RELIEF

3.1 **Reformulation of Covered Products.** Commencing on the October 1, 2017 (the “Compliance Date”), Settling Defendant shall not purchase, manufacture, ship, sell, or offer for sale Covered Products that will be sold or offered for sale in California that exceed the following acrylamide concentration limits, such concentration to be determined by use of a test performed by an accredited laboratory using either GC/MS (Gas Chromatograph/Mass Spectrometry), LC-MS/MS (Liquid Chromatograph-Mass Spectrometry) or any other testing method agreed upon by the Parties:

3.1.1 The average acrylamide concentration shall not exceed 350 parts per billion (“ppb”) by weight (the “Average Level”). The Average Level is determined by randomly selecting and testing at least 1 sample each from 5 different lots of a particular type of Covered Product (or the maximum number of lots available for testing if less than 5) during a testing period of at least 60 days.

3.1.2 The acrylamide concentration of any individual unit shall not exceed 490 ppb by weight, based on a representative composite sample taken from the individual unit being tested (the “Unit Level”).

1 3.2 **Technology Licensing.** The requirements in this Consent Judgment are not
2 contingent upon the use of any particular method to achieve the Reformulation Levels, but
3 Settling Defendant shall license any patented technology used to meet the Reformulation Levels,
4 whether existing or in the future, to others for use in other food products, at a commercially
5 reasonable price, and using other commercially reasonable terms.

6 **4. ENFORCEMENT**

7 4.1 **General Enforcement Provisions.** CEH may, by motion or application for an
8 order to show cause before this Court, enforce the terms and conditions contained in this Consent
9 Judgment. Any action to enforce alleged violations of Section 3.1 by Settling Defendant shall be
10 brought exclusively pursuant to this Section 4, and be subject to the meet and confer requirement
11 of Section 4.2.4 if applicable.

12 4.2 **Enforcement of Reformulation Commitment.**

13 4.2.1 Notice of Violation. In the event that CEH identifies a Covered Product
14 that was sold or offered for sale to California consumers with a best-by or sell-by (or equivalent)
15 date or other code that reflects that the Covered Product was manufactured on or after the
16 Compliance Date, and for which CEH has laboratory test results showing that the Covered
17 Product has an acrylamide level exceeding the Unit Level, then CEH may issue a Notice of
18 Violation pursuant to this Section.

19 4.2.2 Service of Notice of Violation and Supporting Documentation.

20 4.2.2.1 Subject to Section 4.2.1, the Notice of Violation shall be sent to the
21 person(s) identified in Section 8.2 to receive notices for Settling Defendant, and must be served
22 within sixty (60) days of the later of the date the Covered Products at issue were purchased or
23 otherwise acquired by CEH or the date that CEH can reasonably determine that the Covered
24 Products at issue were manufactured, shipped, sold, or offered for sale by Settling Defendant,
25 provided, however, that CEH may have up to an additional sixty (60) days to send the Notice of
26 Violation if, notwithstanding CEH's good faith efforts, the test data required by Section 4.2.2.2
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below cannot be obtained by CEH from its laboratory before expiration of the initial sixty (60) day period.

4.2.2.2 The Notice of Violation shall, at a minimum, set forth: (a) the date the Covered Products were purchased; (b) the location at which the Covered Products were purchased; (c) a description of the Covered Products giving rise to the alleged violation, including the name and address of the retail entity from which the sample was obtained and pictures of the product packaging from all sides, which identifies the product lot; and (d) all test data obtained by CEH regarding the Covered Products and supporting documentation sufficient for validation of the test results, including any laboratory reports, quality assurance reports, and quality control reports associated with testing of the Covered Products.

4.2.3 Notice of Election of Response. No more than forty-five (45) days after effectuation of service of a Notice of Violation, Settling Defendant shall provide written notice to CEH whether it elects to contest the allegations contained in a Notice of Violation (“Notice of Election”). Failure to provide a Notice of Election within forty-five (45) days of effectuation of service of a Notice of Violation shall be deemed an election to contest the Notice of Violation. Upon notice to CEH, Settling Defendant may have up to an additional sixty (60) days to elect if, notwithstanding Settling Defendant’s good faith efforts, Settling Defendant is unable to verify the test data provided by CEH before expiration of the initial forty-five (45) day period.

4.2.3.1 If a Notice of Violation is contested, the Notice of Election shall include all documents upon which Settling Defendant is relying to contest the alleged violation, including all available test data. If Settling Defendant or CEH later acquires additional test or other data regarding the alleged violation during the meet and confer period described in Section 4.2.4, it shall notify the other party and promptly provide all such data or information to the party unless either the Notice of Violation or Notice of Election has been withdrawn.

4.2.4 Meet and Confer. If a Notice of Violation is contested, CEH and Settling Defendant shall meet and confer to attempt to resolve their dispute. Within thirty (30) days of serving a Notice of Election contesting a Notice of Violation, Settling Defendant may withdraw

1 the original Notice of Election contesting the violation and serve a new Notice of Election to not
2 contest the violation, provided, however, that, in this circumstance, Settling Defendant shall pay
3 \$2,500 in addition to any payment required under this Consent Judgment. At any time, CEH may
4 withdraw a Notice of Violation, in which case for purposes of this Section 4.2 the result shall be
5 as if CEH never issued any such Notice of Violation. If no informal resolution of a Notice of
6 Violation results within thirty (30) days of a Notice of Election to contest, CEH may file an
7 enforcement motion or application pursuant to Section 4.1. In any such proceeding, CEH may
8 seek whatever fines, costs, penalties, attorneys' fees, or other remedies are provided by law for an
9 alleged failure to comply with the Consent Judgment.

10 4.2.5 Non-Contested Notices. If Settling Defendant elects to not contest the
11 allegations in a Notice of Violation, it shall undertake corrective action(s) and make payments, if
12 any, as set forth below.

13 4.2.5.1 Settling Defendant shall include in its Notice of Election a detailed
14 description with supporting documentation of the corrective action(s) that it has undertaken or
15 proposes to undertake to address the alleged violation. Any such correction shall, at a minimum,
16 provide reasonable assurance that all Covered Products having the same lot number as that of the
17 Covered Product identified in CEH's Notice of Violation (the "Noticed Covered Products") will
18 not be thereafter sold in California or offered for sale to California customers. Settling Defendant
19 shall make available to CEH for inspection and copying records any correspondence regarding
20 the market withdrawal and destruction of the Noticed Covered Products to the extent it has such
21 documents on file. If there is a dispute over the corrective action, Settling Defendant and CEH
22 shall meet and confer before seeking any remedy in court. In no case shall CEH issue more than
23 one Notice of Violation per manufacturing lot of a type of Covered Product, nor shall CEH issue
24 more than two Notices of Violation in the first calendar year following the Effective Date.

25 4.2.5.2 If the Notice of Violation is the first, second, third, or fourth Notice
26 of Violation received by Settling Defendant under Section 4.2.1 that was not successfully
27 contested or withdrawn, then Settling Defendant shall pay \$15,000 for each Notice of Violation.

1 If Settling Defendant has received more than four (4) Notices of Violation under Section 4.2.1
2 that were not successfully contested or withdrawn, then Settling Defendant shall pay \$25,000 for
3 each Notice of Violation. If Settling Defendant produces with its Notice of Election test data for
4 the Covered Product that: (i) was conducted prior to the date CEH gave Notice of Violation;
5 (ii) was conducted on the same or same type of Covered Product; and (iii) demonstrates
6 acrylamide levels below the Unit Level, then any payment under this Section shall be reduced by
7 100 percent (100%) for the first Notice of Violation, by seventy-five percent (75%) for the
8 second Notice of Violation, and by fifty percent (50%) for any subsequent Notice of Violation.
9 In no case shall Settling Defendant be obligated to pay more than \$100,000 for uncontested
10 Notices of Violation in any calendar year irrespective of the total number of Notices of Violation
11 issued.

12 4.2.6 Payments. Any payments under Section 4.2 shall be made by check
13 payable to the “Lexington Law Group” and shall be paid within thirty (30) days of service of a
14 Notice of Election triggering a payment and shall be used as reimbursement for costs for
15 investigating, preparing, sending, and prosecuting Notices of Violation, and to reimburse
16 attorneys’ fees and costs incurred in connection with these activities and shall be the extent of all
17 monetary remedies available to CEH under this Agreement for a non-contested Notice of
18 Violation..

19 4.3 **Repeat Violations.** If Settling Defendant has received four (4) or more Notices of
20 Violation concerning the same type of Covered Product that were not successfully contested or
21 withdrawn in any two (2) year period then, at CEH’s option, CEH may seek whatever fines,
22 costs, penalties, attorneys’ fees, or other remedies that are provided by law for failure to comply
23 with the Consent Judgment. Prior to seeking such relief, CEH shall meet and confer with Settling
24 Defendant for at least thirty (30) days to determine if Settling Defendant and CEH can agree on
25 measures that Settling Defendant can undertake to prevent future alleged violations.

26 **5. PAYMENTS**

27 5.1 **Payments by Settling Defendant.** Settling Defendant shall pay the total sum of
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1 \$50,000 as a settlement payment as further set forth in this Section according to the following
2 schedule: (a) on or before July 31, 2017: \$25,000; and (b) on or before September 18, 2017:
3 \$25,000.

4 **5.2 Allocation of Payments.** The total settlement amount for Settling Defendant shall
5 be paid in the amounts specified below and delivered as set forth below. Any failure by Settling
6 Defendant to comply with the payment terms herein shall be subject to a stipulated late fee to be
7 paid by Settling Defendant in the amount of \$100 for each day the full payment is not received
8 after the applicable payment due date set forth in Section 5.1. The late fees required under this
9 Section shall be recoverable, together with reasonable attorneys' fees, in an enforcement
10 proceeding brought pursuant to Section 4 of this Consent Judgment. The funds paid by Settling
11 Defendant shall be allocated as set forth below between the following categories and made
12 payable as follows:

13 **5.2.1** \$6,570 as a civil penalty pursuant to Health & Safety Code § 25249.7(b).
14 The civil penalty payment shall be apportioned in accordance with Health & Safety Code §
15 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health
16 Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of the civil penalty
17 payment for \$4,927.50 shall be made payable to OEHHA and associated with taxpayer
18 identification number 68-0284486. This total amount shall be made in two payments of
19 \$2,463.75 each payable on or before July 31, 2017 and on or before September 18, 2017 and
20 delivered as follows:

21 For United States Postal Service Delivery:

22 Attn: Mike Gyurics
23 Fiscal Operations Branch Chief
24 Office of Environmental Health Hazard Assessment
25 P.O. Box 4010, MS #19B
26 Sacramento, CA 95812-4010

27 For Non-United States Postal Service Delivery:

28 Attn: Mike Gyurics
29 Fiscal Operations Branch Chief
30 Office of Environmental Health Hazard Assessment
31 1001 I Street, MS #19B
32 Sacramento, CA 95814

1 The CEH portion of the civil penalty payment for \$1,642.50 shall be made
2 payable to the Center for Environmental Health and associated with taxpayer identification
3 number 94-3251981. This total amount shall be made in two payments of \$821.25 each payable
4 on or before July 31, 2017 and on or before September 18, 2017 and delivered to Lexington Law
5 Group, 503 Divisadero Street, San Francisco, CA 94117.

6 5.2.2 \$4,925 as an Additional Settlement Payment (“ASP”) to CEH pursuant to
7 Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3204. CEH
8 intends to restrict use of the ASPs received from the Consent Judgment before the Court to the
9 following purposes: the funds will be placed in CEH’s Toxics in Food Fund and used to support
10 CEH programs and activities that seek to educate the public about acrylamide and other toxic
11 chemicals in food, to work with the food industry and agriculture interests to reduce exposure to
12 acrylamide and other toxic chemicals in food, and to thereby reduce the public health impacts and
13 risks of exposure to acrylamide and other toxic chemicals in food sold in California. CEH shall
14 obtain and maintain adequate records to document that ASPs are spent on these activities and
15 CEH agrees to provide such documentation to the Attorney General within thirty days of any
16 request from the Attorney General. The payment pursuant to this Section shall be made payable
17 to the Center for Environmental Health and associated with taxpayer identification number 94-
18 3251981. The total amount under this section shall be made in two payments of \$2,462.50 each
19 payable on or before July 31, 2017 and on or before September 18, 2017 and delivered to
20 Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

21 5.2.3 \$38,505 as a reimbursement of a portion of CEH’s reasonable attorneys’
22 fees and costs. The attorneys’ fees and cost reimbursement shall be allocated as follows: (a)
23 \$32,670 payable to the Lexington Law Group and associated with taxpayer identification number
24 94-3317175; and (b) \$5,835 payable to the Center for Environmental Health and associated with
25 taxpayer identification number 94-3251981. The total amounts due under this section shall be
26 made in four payments delivered to Lexington Law Group, 503 Divisadero Street, San Francisco,
27 CA 94117 as follows: (a) \$16,335 payable to the Lexington Law Group on or before July 31,

2017; (b) \$2,917.50 payable to the Center For Environmental Health on or before July 31, 2017; (c) \$16,335 payable to the Lexington Law Group on or before September 18, 2017; and (d) \$2,917.50 payable to the Center For Environmental Health on or before September 18, 2017.

6. MODIFICATION AND DISPUTE RESOLUTION

6.1 **Modification.** This Consent Judgment may be modified from time to time by express written agreement of the Parties, with the approval of the Court and prior notice to the Attorney General's Office, or by an order of this Court upon motion and prior notice to the Attorney General's Office and in accordance with law.

6.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to modify the Consent Judgment.

7. CLAIMS COVERED AND RELEASE

7.1 This Consent Judgment is a full, final, and binding resolution between CEH on behalf of itself and the public interest and Settling Defendant and its parents, subsidiaries, affiliated entities that are under common ownership, directors, officers, employees, agents, shareholders, successors, assigns, and attorneys ("Defendant Releasees"), and all entities to which Settling Defendant directly or indirectly distributes or sells Covered Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees, licensors, and licensees ("Downstream Defendant Releasees"), of any violation of Proposition 65 based on failure to warn about alleged exposure to acrylamide contained in Covered Products that were sold, distributed or offered for sale by Settling Defendant prior to the Effective Date.

7.2 CEH, for itself, its agents, successors and assigns, releases, waives, and forever discharges any and all claims against Settling Defendant, Defendant Releasees, and Downstream Defendant Releasees arising from any violation of Proposition 65 or any other statutory or common law claims that have been or could have been asserted by CEH individually or in the public interest regarding the failure to warn about exposure to acrylamide arising in connection with Covered Products manufactured, distributed or sold by Settling Defendant prior to the

Effective Date.

7.3 Compliance with the terms of this Consent Judgment by Settling Defendant shall constitute compliance with Proposition 65 by Settling Defendant, Defendant Releasees, and Downstream Defendant Releasees with respect to any alleged failure to warn about acrylamide in Covered Products manufactured, distributed or sold by Settling Defendant after the Effective Date.

8. PROVISION OF NOTICE

8.1 When CEH is entitled to receive any notice under this Consent Judgment, the notice shall be sent by first class and electronic mail to:

Howard Hirsch
Lexington Law Group
503 Divisadero Street
San Francisco, CA 94117
hhirsch@lexlawgroup.com

8.2 When Settling Defendant is entitled to receive any notice under this Consent Judgment, the notice shall be sent by first class and electronic mail to:

Abhishek K. Gurnani
Amin Talati Upadhye, LLP
100 South Wacker Drive, Suite 2000
Chicago, IL 60606
abhishek@amintalati.com

Any Party may modify the person and/or address to whom the notice is to be sent by sending the other Party notice by first class and electronic mail.

9. COURT APPROVAL

9.1 This Consent Judgment shall become effective upon the date signed by CEH and Settling Defendant, whichever is later, provided however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant shall support entry of this Consent Judgment by the Court.

9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or effect and shall not be introduced into evidence or otherwise used in any proceeding for any

1 purpose.

2 **10. GOVERNING LAW AND CONSTRUCTION**

3 10.1 The terms of this Consent Judgment shall be governed by the laws of the State of
4 California.

5 **11. ATTORNEYS' FEES**

6 11.1 A Party who unsuccessfully brings or contests an action, motion, or application
7 arising out of this Consent Judgment shall be required to pay the prevailing Party's reasonable
8 attorneys' fees and costs.

9 11.2 Nothing in this Section 11 shall preclude a Party from seeking an award of
10 sanctions pursuant to law.

11 **12. ENTIRE AGREEMENT**

12 12.1 This Consent Judgment contains the sole and entire agreement and understanding
13 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
14 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
15 and therein. There are no warranties, representations, or other agreements between the Parties
16 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
17 other than those specifically referred to in this Consent Judgment have been made by any Party
18 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
19 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
20 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
21 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
22 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
23 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
24 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
25 whether or not similar, nor shall such waiver constitute a continuing waiver.

26 **13. RETENTION OF JURISDICTION**

27 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
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1 Consent Judgment.

2 **14. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

3 14.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
4 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
5 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

6 **15. NO EFFECT ON OTHER SETTLEMENTS**

7 15.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
8 against an entity that is not Settling Defendant on terms that are different than those contained in
9 this Consent Judgment.

10 **16. EXECUTION IN COUNTERPARTS**

11 16.1 The stipulations to this Consent Judgment may be executed in counterparts and by
12 means of facsimile or portable document format (pdf), which taken together shall be deemed to
13 constitute one document.

14
15 **IT IS SO ORDERED, ADJUDGED,**
16 **AND DECREED.**

17
18 Dated: AUG - 8 2017

GEORGE C. HERNANDEZ, JR.

Judge of the Superior Court

1 IT IS SO STIPULATED:

2
3 Dated: 9 JUNE, 2017

CENTER FOR ENVIRONMENTAL HEALTH

4
5
6 Signature

7
8 Printed Name

9
10 Title

11
12
13 Dated: _____, 2017

LIVE BETTER BRANDS, LLC


14
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16 Signature

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18 Printed Name

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20 Title

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IT IS SO STIPULATED:

<p>Dated: _____, 2017</p>	<p>CENTER FOR ENVIRONMENTAL HEALTH</p> <p>_____ Signature</p> <p>_____ Printed Name</p> <p>_____ Title</p>
<p>Dated: <u>May 26</u>, 2017</p>	<p>LIVE BETTER BRANDS, LLC</p> <p> _____ Signature</p> <p><u>James M. Breed</u> _____ Printed Name</p> <p><u>CEO</u> _____ Title</p>

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EXHIBIT A

Covered Products
Chipotle Barbeque Sweet Potato Tortilla Chips
Sweet Potato Tortilla Chips
Ginger Sweet Potato Tortilla Chips
Ginger Snap Whole Grain Corn Tortilla Chips
Apple Cinnamon Whole Grain Corn Tortilla Chips