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ENDORSED
FILED
ALAMEDA COUNTY
SEP 18 2018
CLERK OF THE SUPERIOR COURT
By PAM WILLIAMS
Deputy

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

CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 17-872872
Plaintiff,)
v.) ~~PROPOSED~~ CONSENT JUDGMENT
FANTASY COOKIE CORPORATION, *et al.*,) AS TO WEETABIX COMPANY, LLC
Defendants.) (FKA WEETABIX COMPANY, INC.)

1. DEFINITIONS

- 1.1 The "Complaint" means the operative complaint in the above-captioned matter.
- 1.2 The "Compliance Date" is the date that is ninety (90) days after the Effective Date.
- 1.3 "Covered Products" means animal crackers manufactured, distributed, or sold by Weetabix. An initial list of the Covered Products is attached hereto as Exhibit A.
- 1.4 "Effective Date" means the date on which notice of entry of this Consent Judgment by the Court is served upon Settling Defendant.

2. INTRODUCTION

2.1 The Parties to this Consent Judgment are the Center for Environmental Health, a

1 California non-profit corporation (“CEH”) and Weetabix Company, LLC (formerly known as
2 Weetabix Company, Inc.) (“Settling Defendant”). CEH and Settling Defendant (the “Parties”) enter
3 into this Consent Judgment to settle certain claims asserted by CEH against Settling Defendant as
4 set forth in the Complaint.

5 2.2 On or about March 20, 2017, CEH provided a 60-day Notice of Violation of
6 Proposition 65 to the California Attorney General, the District Attorneys of every county in
7 California, the City Attorneys of every California city with a population greater than 750,000, and
8 to Settling Defendant, alleging that Settling Defendant violated Proposition 65 by exposing persons
9 in California to acrylamide contained in Covered Products without first providing a clear and
10 reasonable Proposition 65 warning (the “Notice”).

11 2.3 Prior to the execution of this Consent Judgment, Settling Defendant began the
12 process of discontinuing the Covered Products.

13 2.4 On August 24, 2017, CEH filed the Complaint in the above-captioned matter,
14 naming Settling Defendant as an original defendant.

15 2.5 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
16 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
17 over Settling Defendant as to the acts alleged in the Complaint, that venue is proper in the County
18 of Alameda, and that this Court has jurisdiction to enter and enforce this Consent Judgment as a full
19 and final resolution of all claims which were or could have been raised in the Complaint based on
20 the facts alleged therein and in the Notice with respect to Covered Products manufactured,
21 distributed, and/or sold by Settling Defendant.

22 2.6 Nothing in this Consent Judgment is or shall be construed as an admission against
23 interest by the Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall
24 compliance with the Consent Judgment constitute or be construed as an admission against interest
25 by the Parties of any fact, conclusion of law, issue of law, or violation of law. Nothing in this
26 Consent Judgment shall prejudice, waive or impair any right, remedy, argument, or defense the
27 Parties may have in any other pending or future legal proceedings. This Consent Judgment is the
28 product of negotiation and compromise and is accepted by the Parties solely for purposes of

1 settling, compromising, and resolving issues disputed in this action. Nothing in this Consent
2 Judgment may be used in a case or claim involving any products beyond the Covered Products.

3 **3. INJUNCTIVE RELIEF**

4 3.1 **Reformulation of Covered Products.** Commencing on the Compliance Date,
5 Settling Defendant shall not purchase or manufacture any Covered Products that thereafter will be
6 sold or offered for sale in California that contain a concentration of more than 75 parts per billion
7 (“ppb”) acrylamide by weight (the “Reformulation Level”). Such concentration is to be determined
8 by use of a test performed by an accredited laboratory using either GC/MS (Gas
9 Chromatograph/Mass Spectrometry), LC-MS/MS (Liquid Chromatograph-Mass Spectrometry), or
10 any other testing method agreed upon by the Parties.

11 **4. ENFORCEMENT**

12 4.1 **General Enforcement Provisions.** CEH may, by motion or application for an order
13 to show cause before this Court, enforce the terms and conditions contained in this Consent
14 Judgment. Any action to enforce alleged violations of Section 3.1 by Settling Defendant shall be
15 brought exclusively pursuant to this Section 4, and be subject to the meet and confer requirement of
16 Section 4.2.4 if applicable.

17 **4.2 Enforcement of Reformulation Commitment.**

18 4.2.1 Notice of Violation. In the event that CEH purchases a Covered Product in
19 California that was sold or offered for sale by Settling Defendant with a best-by, sell-by,
20 manufacturing code(or equivalent) that reflects that the Covered Product was manufactured on or
21 after the Compliance Date, and for which CEH has laboratory test results showing that the Covered
22 Product exceeds the Reformulation Level, CEH may issue a Notice of Violation pursuant to this
23 Section.

24 4.2.2 Service of Notice of Violation and Supporting Documentation.

25 4.2.2.1 The Notice of Violation shall be sent to the person(s) identified in
26 Section 8.2 to receive notices for Settling Defendant, and must be served within sixty (60) days of
27 the date the Covered Product at issue was purchased or otherwise acquired by CEH, provided,
28 however, that CEH may have up to an additional sixty (60) days to send the Notice of Violation if,

1 notwithstanding CEH's good faith efforts, the test data required by Section 4.2.2.2 below cannot be
2 obtained by CEH from its laboratory before expiration of the initial sixty (60) day period.

3 4.2.2.2 The Notice of Violation shall, at a minimum, set forth: (a) the date the
4 Covered Product was purchased; (b) the location at which the Covered Product was purchased; (c) a
5 description of the Covered Product giving rise to the alleged violation, including the name and
6 address of the retail entity from which the sample was obtained and pictures of the product
7 packaging from all sides, which identifies the product lot; and (d) all test data obtained by CEH
8 regarding the Covered Product and supporting documentation sufficient for validation of the test
9 results, including any laboratory reports, quality assurance reports, and quality control reports
10 associated with testing of the Covered Product.

11 4.2.3 Notice of Election of Response. No more than thirty (30) days after
12 effectuation of service of a Notice of Violation, Settling Defendant shall provide written notice to
13 CEH whether it elects to contest the allegations contained in a Notice of Violation ("Notice of
14 Election"). Failure to provide a Notice of Election within thirty (30) days of effectuation of service
15 of a Notice of Violation shall be deemed an election to contest the Notice of Violation. Upon notice
16 to CEH, Settling Defendant may have up to an additional sixty (60) days to elect if, notwithstanding
17 Settling Defendant's good faith efforts, Settling Defendant is unable to verify the test data provided
18 by CEH before expiration of the initial thirty (30) day period.

19 4.2.3.1 If a Notice of Violation is contested, the Notice of Election shall
20 include all then-available documents upon which Settling Defendant is relying to contest the alleged
21 violation, including all available test data. If Settling Defendant or CEH later acquires additional
22 test or other data regarding the alleged violation during the meet and confer period described in
23 Section 4.2.4, it shall notify the other Party and promptly provide all such data or information to the
24 Party unless either the Notice of Violation or Notice of Election has been withdrawn.

25 4.2.4 Meet and Confer. If a Notice of Violation is contested, CEH and Settling
26 Defendant shall meet and confer to attempt to resolve their dispute. Within thirty (30) days of
27 serving a Notice of Election contesting a Notice of Violation, Settling Defendant may withdraw the
28 original Notice of Election contesting the violation and serve a new Notice of Election to not

1 contest the violation, provided, however, that, in this circumstance, Settling Defendant shall pay
2 \$2,500 in addition to any other payment required under this Consent Judgment. At any time, CEH
3 may withdraw a Notice of Violation, in which case for purposes of this Section 4.2 the result shall
4 be as if CEH never issued any such Notice of Violation. If no informal resolution of a Notice of
5 Violation results within thirty (30) days of a Notice of Election to contest, CEH may file an
6 enforcement motion or application pursuant to Section 4.1. In any such proceeding, CEH may seek
7 whatever fines, costs, penalties, attorneys' fees, or other remedies are provided by law for failure to
8 comply with the Consent Judgment.

9 4.2.5 Non-Contested Notices. If Settling Defendant elects to not contest the
10 allegations in a Notice of Violation, it shall undertake corrective action(s) and make payments, if
11 any, as set forth below.

12 4.2.5.1 Settling Defendant shall include in its Notice of Election a detailed
13 description with supporting documentation of the corrective action(s) that it has undertaken or
14 proposes to undertake to address the alleged violation. Any such correction shall, at a minimum,
15 provide reasonable assurance that all Covered Products having the same lot number as that of the
16 Covered Product identified in CEH's Notice of Violation (the "Noticed Covered Products") will not
17 thereafter be sold in California or offered for sale to California customers by Settling Defendant.
18 Settling Defendant shall make available to CEH upon reasonable notice (which shall not exceed
19 more than one request per year) for inspection and copying records of any non-privileged
20 correspondence regarding the foregoing to the extent it has such documents on file. Settling
21 Defendant will be excused from the corrective action obligation described in the foregoing (but not
22 the monetary payments, if any, required by this Section 4) if Settling Defendant produces test
23 results and other evidence that: (1) demonstrates that the acrylamide levels found by CEH in the
24 unit alleged to be in violation is an aberration; and (2) otherwise provides reasonable assurance that
25 the remainder of the Noticed Covered Products, aside from the unit alleged to be in violation,
26 comply with the Reformulation Level. If there is a dispute over the corrective action, or over
27 whether Settling Defendant is excused therefrom, Settling Defendant and CEH shall meet and
28 confer before seeking any remedy in court. In no case shall CEH issue more than one Notice of

1 Violation per manufacturing lot of a type of Covered Product, nor shall CEH issue more than two
2 Notices of Violation in the first year following the Compliance Date.

3 4.2.5.2 If the Notice of Violation is the first, second, third, or fourth Notice of
4 Violation received by Settling Defendant under Section 4.2.1 that was not successfully contested or
5 withdrawn, then Settling Defendant shall pay \$15,000 for each Notice of Violation. If Settling
6 Defendant has received more than four (4) Notices of Violation (each for a Covered Product from a
7 separate lot) under Section 4.2.1 that were not successfully contested or withdrawn, then Settling
8 Defendant shall pay \$25,000 for each Notice of Violation. If Settling Defendant is excused from
9 the corrective action obligation pursuant to Section 4.2.5.1, then Settling Defendant shall pay
10 \$2,500 for that Notice of Violation. If Settling Defendant produces with its Notice of Election test
11 data for the Covered Product that: (i) was conducted prior to the date CEH gave Notice of
12 Violation; (ii) was conducted on the same type of Covered Product; and (iii) demonstrates
13 acrylamide levels below the Reformulation Level, then any payment under this Section shall be
14 reduced by 100 percent (100%) for the first Notice of Violation, by seventy-five percent (75%) for
15 the second Notice of Violation, and by fifty percent (50%) for any subsequent Notice of Violation.
16 In no case shall Settling Defendant be obligated to pay more than \$100,000 for all non-contested
17 Notices of Violation in any calendar year irrespective of the total number of Notices of Violation
18 issued.

19 4.2.6 Payments. Any payments under Section 4.2 shall be made by check
20 payable to the "Lexington Law Group" and shall be paid within thirty (30) days of service of a
21 Notice of Election triggering a payment and shall be used as reimbursement for costs for
22 investigating, preparing, sending, and prosecuting Notices of Violation, and to reimburse attorneys'
23 fees and costs incurred in connection with these activities, and shall be the extent of all monetary
24 remedies available to CEH under this Consent Judgment for a non-contested Notice of Violation.

25 4.3 **Repeat Violations**. If Settling Defendant has received four (4) or more Notices of
26 Violation concerning the same type of Covered Product (each from a separate lot) that were not
27 successfully contested or withdrawn in any two (2) year period then, at CEH's option, CEH may
28 seek whatever fines, costs, penalties, attorneys' fees, or other remedies that are provided by law for

1 failure to comply with the Consent Judgment. Prior to seeking such relief, CEH shall meet and
2 confer with Settling Defendant for at least thirty (30) days to determine if Settling Defendant and
3 CEH can agree on measures that Settling Defendant can undertake to prevent future alleged
4 violations.

5 **5. PAYMENTS**

6 5.1 **Payments by Settling Defendant.** Within ten (10) calendar days of the Effective
7 Date, Settling Defendant shall pay the total sum of \$125,000 as a settlement payment as further set
8 forth in this Section.

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

17 5.2.1 \$16,860 as a civil penalty pursuant to Health & Safety Code § 25249.7(b).
18 The civil penalty payment shall be apportioned in accordance with Health & Safety Code §
19 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health
20 Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of the civil penalty payment
21 for \$12,645 shall be made payable to OEHHA and associated with taxpayer identification number
22 68-0284486. This payment shall be delivered as follows:

23 For United States Postal Service Delivery:

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

1 For Non-United States Postal Service Delivery:

2 Attn: Mike Gyurics
3 Fiscal Operations Branch Chief
4 Office of Environmental Health Hazard Assessment
1001 I Street, MS #19B
Sacramento, CA 95814

5 The CEH portion of the civil penalty payment for \$4,215 shall be made
6 payable to the Center for Environmental Health and associated with taxpayer identification number
7 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San
8 Francisco, CA 94117.

9 5.2.2 \$12,640 as an Additional Settlement Payment (“ASP”) to CEH pursuant to
10 Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3204. CEH
11 intends to restrict use of the ASPs received from this Consent Judgment to the following purposes:
12 the funds will be placed in CEH’s Toxics in Food Fund and used to support CEH programs and
13 activities that seek to educate the public about acrylamide and other toxic chemicals in food, to
14 work with the food industry and agriculture interests to reduce exposure to acrylamide and other
15 toxic chemicals in food, and to thereby reduce the public health impacts and risks of exposure to
16 acrylamide and other toxic chemicals in food sold in California. CEH shall obtain and maintain
17 adequate records to document that ASPs are spent on these activities and CEH agrees to provide
18 such documentation to the Attorney General within thirty (30) days of any request from the
19 Attorney General. The payment pursuant to this Section shall be made payable to the Center for
20 Environmental Health and associated with taxpayer identification number 94-3251981. This
21 payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA
22 94117.

23 5.2.3 \$95,500 as a reimbursement of a portion of CEH’s reasonable attorneys’
24 fees and costs. The attorneys’ fees and cost reimbursement shall be made in two separate checks as
25 follows: (a) \$80,665 payable to the Lexington Law Group and associated with taxpayer
26 identification number 94-3317175; and (b) \$14,835 payable to the Center for Environmental Health
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1 and associated with taxpayer identification number 94-3251981. These payments shall be delivered
2 to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

3 **6. MODIFICATION AND DISPUTE RESOLUTION**

4 6.1 **Modification.** This Consent Judgment may be modified from time to time by
5 express written agreement of the Parties, with the approval of the Court, or by an order of this Court
6 upon motion and in accordance with law.

7 6.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
8 shall attempt in good faith to meet and confer with the other Party prior to filing a motion to modify
9 the Consent Judgment.

10 **7. CLAIMS COVERED AND RELEASE**

11 7.1 Provided that Settling Defendant complies in full with its obligations under Section 5
12 hereof, this Consent Judgment is a full, final and binding resolution between CEH on behalf of itself
13 and the public interest and Settling Defendant and its parents, subsidiaries, affiliated entities that are
14 under common ownership, directors, officers, employees, agents, shareholders, successors, assigns,
15 and attorneys (“Defendant Releasees”), and all entities to which Settling Defendant directly or
16 indirectly distributes or sells Covered Products, including but not limited to distributors,
17 wholesalers, customers, retailers, franchisees, licensors, and licensees (“Downstream Defendant
18 Releasees”), of any violation of Proposition 65 based on failure to warn about alleged exposure to
19 acrylamide contained in Covered Products that were manufactured or purchased by Settling
20 Defendant prior to the Compliance Date.

21 7.2 Provided that Settling Defendant complies in full with its obligations under Section 5
22 hereof, CEH, for itself, its agents, successors and assigns, releases, waives, and forever discharges
23 any and all claims against Settling Defendant, Defendant Releasees, and Downstream Defendant
24 Releasees arising from any violation of Proposition 65 or any other statutory or common law claims
25 that have been or could have been asserted by CEH individually or in the public interest regarding
26 the failure to warn about exposure to acrylamide arising in connection with Covered Products
27 manufactured or purchased by Settling Defendant prior to the Compliance Date.

28 7.3 Provided that Settling Defendant complies in full with its obligations under Section 5

1 hereof, compliance with the terms of this Consent Judgment by Settling Defendant shall constitute
2 compliance with Proposition 65 by Settling Defendant, Defendant Releasees and Downstream
3 Defendant Releasees with respect to any alleged failure to warn about acrylamide in Covered
4 Products manufactured or purchased by Settling Defendant after the Compliance Date.

5 **8. PROVISION OF NOTICE**

6 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the notice
7 shall be sent by first class and electronic mail to:

8 Howard Hirsch
9 Lexington Law Group
10 503 Divisadero Street
11 San Francisco, CA 94117
12 hhirsch@lexlawgroup.com

13 8.2 When Settling Defendant is entitled to receive any notice under this Consent
14 Judgment, the notice shall be sent by first class and electronic mail to:

15 Sarah Esmaili
16 Arnold & Porter Kaye Scholer LLP
17 Three Embarcadero Center, 10th Floor
18 San Francisco, CA 94111
19 sarah.esmaili@apks.com

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

22 **9. COURT APPROVAL**

23 9.1 This Consent Judgment shall become effective upon the date signed by CEH and
24 Settling Defendant, whichever is later, provided however, that CEH shall prepare and file a Motion
25 for Approval of this Consent Judgment and Settling Defendant shall support entry of this Consent
26 Judgment by the Court.

27 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or effect
28 and shall not be introduced into evidence or otherwise used in any proceeding for any purpose other
than to allow the Court to determine if there was a material breach of Section 9.1

10. GOVERNING LAW AND CONSTRUCTION

10.1 The terms of this Consent Judgment shall be governed by the laws of the State of

1 California.

2 **11. ATTORNEYS' FEES**

3 11.1 A Party who unsuccessfully brings or contests an action, motion, or application
4 arising out of this Consent Judgment shall be required to pay the prevailing Party's reasonable
5 attorneys' fees and costs.

6 11.2 Nothing in this Section 11 shall preclude a party from seeking an award of sanctions
7 pursuant to law.

8 **12. ENTIRE AGREEMENT**

9 12.1 This Consent Judgment contains the sole and entire agreement and understanding of
10 the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
11 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and
12 therein. There are no warranties, representations, or other agreements between the Parties except as
13 expressly set forth herein. No representations, oral or otherwise, express or implied, other than
14 those specifically referred to in this Consent Judgment have been made by any Party hereto. No
15 other agreements not specifically contained or referenced herein, oral or otherwise, shall be deemed
16 to exist or to bind any of the Parties hereto. Any agreements specifically contained or referenced
17 herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto only to the
18 extent that they are expressly incorporated herein. No supplementation, modification, waiver, or
19 termination of this Consent Judgment shall be binding unless executed in writing by the Party to be
20 bound thereby. No waiver of any of the provisions of this Consent Judgment shall be deemed or
21 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such
22 waiver constitute a continuing waiver.

23 **13. RETENTION OF JURISDICTION**

24 13.1 This Court shall retain jurisdiction of this matter to implement or modify the Consent
25 Judgment.

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14. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT

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

15. NO EFFECT ON OTHER SETTLEMENTS

15.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim against an entity that is not Settling Defendant on terms that are different than those contained in this Consent Judgment. Settling Defendant may move to modify this Consent Judgment pursuant to Section 6 to substitute a higher Reformulation Level that CEH agrees to in an another consent judgment applicable to another company's animal cracker products, and CEH agrees not to oppose any such motion.

16. COMPLIANCE WITH REPORTING REQUIREMENTS

16.1 CEH agrees to comply with the reporting requirements referenced in Health and Safety Code section 25249.7(f).

17. EXECUTION IN COUNTERPARTS

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

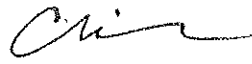
**IT IS SO ORDERED, ADJUDGED,
AND DECREED**

Dated: 9/18/18

IOANA PETROU
Judge of the Superior Court

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IT IS SO STIPULATED:

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| Dated: <u>13 July</u> , 2018 | CENTER FOR ENVIRONMENTAL HEALTH  _____ Signature <u>ASSOCIATE CHARLIE PIZZANO</u> _____ Printed Name <u>ASSOCIATE DIRECTOR</u> _____ Title |
| Dated: _____, 2018 | WEETABIX COMPANY, LLC (FKA WEETABIX COMPANY, INC.) _____ Signature _____ Printed Name _____ Title |

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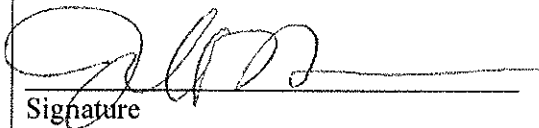
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|------------------------------|---|
| Dated: _____, 2018 | CENTER FOR ENVIRONMENTAL HEALTH _____ Signature _____ Printed Name _____ Title |
| Dated: <u>July 12</u> , 2018 | WEETABIX COMPANY, LLC (FKA WEETABIX COMPANY, INC.)  _____ Signature _____ <u>Jill H. Bollettieri</u> Printed Name _____ <u>Secretary</u> Title |

EXHIBIT A

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- Barbara's Snackimals Cookies – Vanilla
- Barbara's Snackimals Cookies – Chocolate Chip
- Barbara's Snackimals Cookies – Oatmeal
- Barbara's Snackimals Cookies – Double Chocolate
- Barbara's Snackimals Cookies – Peanut Butter
- Barbara's Snackimals Cookies – Snickerdoodle