



22811138

FILED
ALAMEDA COUNTY

DEC 22 2020

CLERK OF THE SUPERIOR COURT

By *C. J. [Signature]* Deputy

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

CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 18-928947

Plaintiff,

~~[PROPOSED]~~ CONSENT JUDGMENT
AS TO MCCAIN FOODS USA, INC.

v.

GALLERIA MARKET, LP, *et al.*,

Defendants.

1. DEFINITIONS

1.1 The "Complaint" means the operative Second Amended Complaint in the above-captioned matter.

1.2 "Compliance Date" shall mean the date that is six months after the Effective Date.

1.3 "Covered Products" shall mean french-fried potatoes (including potato wedge products) sold by Settling Defendant that have been or will be sold or offered for sale to California consumers.

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

2. INTRODUCTION

2.1 The Parties to this Consent Judgment are the Center for Environmental Health ("CEH"), a California non-profit corporation, and McCain Foods USA, Inc. ("Settling Defendant"). CEH and Settling Defendant (the "Parties") enter into this Consent Judgment to settle certain claims asserted by CEH against Settling Defendant as set forth in the Complaint.

2.2 On November 9, 2018, CEH issued a 60-day Notice of Violation of Proposition 65 to the California Attorney General, to the District Attorneys of every county in California, to the City Attorneys of every California city with a population greater than 750,000, and to Settling Defendant, alleging that Settling Defendant violated Proposition 65 by exposing persons to acrylamide in excess of the warning threshold when consuming french-fried potatoes sold under private label brands when used under the provided directions for use, without first providing a clear and reasonable Proposition 65 warning.

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

2.4 On November 16, 2018, CEH filed the original complaint in this action. On January 18, 2019, CEH filed the First Amended Complaint, naming Settling Defendant as a defendant in the action as to french-fried potatoes sold by Settling Defendant under private label brands that have been or will be sold or offered for sale to California consumers. On May 21, 2019, CEH filed the Complaint, which added unrelated claims and parties but did not alter CEH's allegations against Settling Defendant. Upon entry of this Consent Judgment, the Complaint shall be deemed amended

1 *nunc pro tunc* to assert allegations as to alleged exposures to acrylamide in all Covered Products
2 sold by Settling Defendant that are sold or offered for sale to California consumers.

3 2.5 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
4 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
5 over Settling Defendant as to the acts alleged in the Complaint, that venue is proper in the County
6 of Alameda, and that this Court has jurisdiction to enter and enforce this Consent Judgment as a full
7 and final resolution of all claims which were or could have been raised in the Complaint based on
8 the facts alleged therein with respect to Covered Products manufactured, distributed, and/or sold by
9 Settling Defendant.

10 2.6 Nothing in this Consent Judgment is or shall be construed as an admission by the
11 Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall compliance with
12 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
13 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
14 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
15 other pending or future legal proceedings. This Consent Judgment is the product of negotiation and
16 compromise and is accepted by the Parties solely for purposes of settling, compromising, and
17 resolving issues disputed in this Action.

18 **3. INJUNCTIVE RELIEF**

19 3.1 **Reformulation of Covered Products.** Beginning on the Compliance Date, Settling
20 Defendant shall not purchase or manufacture any Covered Product that will thereafter be sold or
21 offered for sale in California that exceeds the following acrylamide concentration limits (the
22 "Reformulation Levels"):

23 3.1.1 The average acrylamide concentration of Covered Products as used per
24 cooking instructions, shall not exceed, on average, 280 parts per billion ("ppb") by weight (the
25 "Average Level"). The Average Level is determined by randomly selecting and testing at least 1
26 sample each from at least five (5) and up to thirty (30) different lots of a particular type of Covered
27

Product (or the maximum number of lots available for testing if fewer than five (5)) during a testing period of at least sixty (60) days. The mean and standard deviation shall be calculated using the sampling data. Any data points that are more than three standard deviations outside the mean shall be discarded once, and the mean and standard deviation recalculated using the remaining data points. The mean determined in accordance with this procedure shall be deemed the "Average Level."

3.1.2 The acrylamide concentration of any individual unit, as used per cooking instructions, shall not exceed 400 ppb by weight (the "Unit Level"), based on a representative composite sample taken from the individual unit being tested.

3.2 Compliance Testing. Compliance with the Reformulation Levels shall 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. Sampling shall be performed in accordance with the sampling protocol attached hereto as Exhibit A, or any other sampling protocol agreed to by Settling Defendant and CEH. Compliance with the Reformulation Levels shall be determined after cooking a Covered Product as if prepared for consumption in accordance with the instructions on the packaging label of that Covered Product. If the label's recommended method includes a range of cooking temperatures or times, the midpoint of those ranges shall be used in evaluating compliance with the Reformulation Levels. Any samples of a Covered Product tested under Sections 3.1.1 and 3.1.2 shall be homogenized before testing for acrylamide content.

4. ENFORCEMENT

4.1 General Enforcement Provisions. CEH may, by motion or application for an order to show cause before this Court, enforce the terms and conditions contained in this Consent Judgment. Any action to enforce alleged violations of Section 3.1 by Settling Defendant shall be brought exclusively pursuant to this Section 4, and be subject to the meet and confer requirement of Section 4.2.6, if applicable.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

20
21
22
23
24
25
26
27
28

4.2.3 Service of Notice of Violation and Supporting Documentation.

4.2.3.1 The Notice of Violation shall be sent to the person(s) identified in Section 8.2 to receive notices for Settling Defendant, and must be served within thirty (30) days of the later of the date the Covered Product at issue was purchased or otherwise acquired by CEH or the date that CEH can reasonably determine that the Covered Product at issue was manufactured, distributed, or sold by Settling Defendant, provided, however, that CEH may have up to an additional thirty (30) days to send the Notice of Violation if, notwithstanding CEH's good faith efforts, the test data required by Section 4.2.3.2 below cannot be obtained by CEH from its laboratory before expiration of the initial thirty (30) day period.

4.2.3.2 The Notice of Violation shall, at a minimum, set forth: (a) the date the Covered Product was purchased; (b) a description of the Covered Product giving rise to the alleged violation, including the name and address of the retail entity from which the sample was obtained and if available information that identifies the product lot; and (c) all test data obtained by CEH regarding the Covered Product 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 Product.

4.2.4 Notice of Election of Response. No more than thirty (30) days after effectuation of service of a Notice of Violation, Settling Defendant shall provide written notice to CEH whether or not it elects to contest the allegations contained in a Notice of Violation (“Notice of Election”). Failure to provide a Notice of Election within thirty (30) days of effectuation of service of a Notice of Violation shall be deemed an election to contest the Notice of Violation.

4.2.5 If a Notice of Violation is contested, the Notice of Election shall include all then-available non-privileged documentary evidence regarding the alleged violation, including all available test data. If Settling Defendant or CEH later acquires additional test or other non-privileged data regarding the alleged violation, it shall notify the other party and promptly provide all such non-privileged data or information to the party.

1 4.2.6 Meet and Confer. If a Notice of Violation is contested, CEH and Settling
2 Defendant shall meet and confer to attempt to resolve their dispute. Within fifteen (15) days of
3 serving a Notice of Election contesting a Notice of Violation, Settling Defendant may withdraw the
4 original Notice of Election contesting the violation and serve a new Notice of Election to not
5 contest the violation, provided, however, that, in this circumstance, Settling Defendant shall pay
6 \$2,500 in addition to any payment required under this Consent Judgment. At any time, CEH may
7 withdraw a Notice of Violation, in which case for purposes of this Section 4.2 the result shall be as
8 if CEH never issued any such Notice of Violation. If no informal resolution of a Notice of
9 Violation results within thirty (30) days of a Notice of Election to contest, CEH may file an
10 enforcement motion or application pursuant to Section 4.1. The Parties may extend this thirty (30)
11 day time period by an additional thirty (30) days by stipulation if they are making progress toward
12 resolving their dispute. In any enforcement proceeding, CEH may seek whatever fines, costs,
13 penalties, attorneys' fees, or other remedies are provided by law for failure to comply with the
14 Consent Judgment, including but not limited to an order by the Court requiring Settling Defendant
15 to implement corrective action to remedy any violations of this Consent Judgment. In the event
16 CEH proves a violation of Section 3.1 in an enforcement proceeding, the Court in its discretion may
17 order that Settling Defendant cease selling any affected Covered Products in California without a
18 clear and reasonable warning pursuant to Proposition 65. In any enforcement proceeding regarding
19 this Consent Judgment, Settling Defendant may assert any and all defenses that are available

20 4.2.7 Non-Contested Notices. If Settling Defendant elects to not contest the
21 allegations in a Notice of Violation, it shall undertake corrective action(s) and make payments, if
22 any, as set forth below. Settling Defendant shall include in its Notice of Election a detailed
23 description with supporting documentation of the corrective action(s) that it has undertaken or
24 proposes to undertake to address the alleged violation. Any such correction shall, at a minimum,
25 provide reasonable assurance that all Covered Products having the same lot number or lot code as
26 that of the Covered Product identified in CEH's Notice of Violation (the "Noticed Covered
27

Products”) will not thereafter be sold or offered for sale to consumers in California by retailer or distributor customers of Settling Defendant, nor shipped for sale in California by Settling Defendant without a clear and reasonable warning. Any such warning shall contain the following statement:

WARNING: Consuming this product can expose you to chemicals including acrylamide, which is known to the State of California to cause cancer [and birth defects or other reproductive harm]. For more information go to www.P65Warnings.ca.gov/food.

The word “**WARNING**” shall be displayed in all capital letters and bold print. This warning statement shall be prominently displayed on the Noticed Covered Product, on the packaging of the Noticed Covered Product, or on a placard, shelf tag, or sign, provided that the statement is displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual prior to sale. If the warning statement is displayed on the Noticed Covered Product’s label, it must be set off from other surrounding information and enclosed in a text box. If the warning statement is displayed on a placard, shelf tag, or sign where the Noticed Covered Product is offered for sale, the warning placard or sign must enable an ordinary individual to easily determine which Noticed Covered Products the warning applies to, and to differentiate between the Noticed Covered Products and other products to which the warning statement does not apply. For sales by Settling Defendant on the internet or by catalog where the consumer is not physically present, the warning statement shall be displayed in such a manner that it is likely to be read and understood by an ordinary individual prior to the authorization of or actual payment.

4.2.8 Settling Defendant shall make available to CEH for inspection and copying records of non-privileged correspondence sufficient to show market withdrawal of and/or the provision of warnings on the Noticed Covered Products to the extent it has such documents on file. If the Notice of Violation is based on a violation of the Unit Level with respect to a single Covered Product, Settling Defendant will be excused from the corrective action obligation if Settling Defendant produces test results or other evidence showing that the Noticed Covered Products

1 comply with the Average Level specified in Section 3.1.1. However, to avail itself of this
2 provision, Settling Defendant must provide CEH with all non-privileged acrylamide test data in its
3 possession, custody, or control pertaining to the type of Covered Product at issue in the Notice of
4 Violation that was performed within the year prior to Settling Defendant producing test results to
5 CEH under this Section 4.2.8.1. If there is a dispute over whether Settling Defendant is excused
6 from the corrective action, Settling Defendant and CEH shall meet and confer before seeking any
7 remedy in court.

8 4.2.8.1 If the Notice of Violation is the first, second, or third Notice of
9 Violation received by Settling Defendant under Section 4.2.1 that was not successfully contested or
10 withdrawn, then Settling Defendant shall pay \$15,000 for each Notice of Violation as the total
11 monetary amount. If Settling Defendant has received more than three (3) Notices of Violation
12 under Section 4.2.2 that were not successfully contested or withdrawn, then Settling Defendant shall
13 pay \$25,000 for each subsequent Notice of Violation. If Settling Defendant produces with its
14 Notice of Election test data for the specific SKU, or comparative like items, that reasonably
15 demonstrate predicted acrylamide levels below the Unit Level, then any payment under this Section
16 shall be reduced by 100 percent (100%) for the first Notice of Violation, by seventy-five percent
17 (75%) for the second Notice of Violation, and by fifty percent (50%) for any subsequent Notice of
18 Violation. If Settling Defendant is excused from the corrective action obligation pursuant to
19 Section 4.2.8, then Settling Defendant shall pay \$2,500 for that Notice of Violation. In no case
20 shall Settling Defendant be obligated to pay more than \$100,000 for uncontested Notices of
21 Violation in any calendar year irrespective of the total number of Notices of Violation issued.
22 Nothing in Sections 4.2.7 or 4.2.8 (addressing non-contested violations) shall impact the Court's
23 authority in an enforcement proceeding to impose appropriate remedies for any contested Notices of
24 Violation.

25 4.2.8.2 In no case shall CEH issue more than one Notice of Violation per
26 manufacturing lot of a type of Covered Product. CEH shall be limited to issuing no more than two
27

1 total Notices of Violation to Settling Defendant in the first twelve (12) months after the Compliance
2 Date.

3 4.2.9 Payments. Any payments under Section 4.2 shall be made by check payable
4 to the "Lexington Law Group" and shall be paid within thirty (30) days of service of a Notice of
5 Election triggering a payment and which shall be used as reimbursement for costs for investigating,
6 preparing, sending, and prosecuting Notices of Violation, and to reimburse attorneys' fees and costs
7 incurred in connection with these activities, and shall be the extent of all monetary remedies
8 available to CEH under this Consent Judgment for a non-contested Notice of Violation.

9 4.2.10 **Repeat Violations**. If Settling Defendant has received three (3) or more
10 Notices of Violation concerning the same type of Covered Product that were not successfully
11 contested or withdrawn, as to the third and subsequent Notices of Violation, at CEH's option, CEH
12 may seek from Settling Defendant whatever fines, costs, penalties, attorneys' fees, or other
13 remedies that are provided by law for failure to comply with the Consent Judgment, including but
14 not limited to issuing an order requiring that Settling Defendant cease selling any affected Covered
15 Products in California without a clear and reasonable warning pursuant to Proposition 65. Prior to
16 seeking such relief, CEH shall meet and confer with Settling Defendant for at least thirty (30) days
17 to determine if Settling Defendant and CEH can agree on measures that Settling Defendant can
18 undertake to prevent future violations. In any enforcement proceeding regarding this Consent
19 Judgment, Settling Defendant may assert any and all defenses that are available.

20 **5. PAYMENTS**

21 5.1 **Payments by Settling Defendant**. Within thirty (30) calendar days of the Effective
22 Date, Settling Defendant shall pay the total sum of \$180,000 as a settlement payment as further set
23 forth in this Section.

24 5.2 **Allocation of Payments**. The total settlement amount for Settling Defendant shall
25 be paid in four (4) separate checks in the amounts specified below and delivered as set forth below.
26 Any failure by Settling Defendant to comply with the payment terms herein shall be subject to a
27

1 stipulated late fee to be paid by Settling Defendant in the amount of \$100 for each day the full
2 payment is not received after the applicable payment due date set forth in Section 5.1. The late fees
3 required under this Section shall be recoverable, together with reasonable attorneys' fees, in an
4 enforcement proceeding brought pursuant to Section 4.1 of this Consent Judgment. The funds paid
5 by Settling Defendant shall be allocated as set forth below between the following categories and
6 made payable as follows:

7 5.2.1 \$31,440 as a civil penalty pursuant to Health & Safety Code § 25249.7(b).

8 The civil penalty payment shall be apportioned in accordance with Health & Safety Code §
9 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard
10 Assessment ("OEHHA")). Accordingly, the OEHHA portion of the civil penalty payment for
11 \$23,580 shall be made payable to OEHHA and associated with taxpayer identification number 68-
12 0284486. This payment shall be delivered as follows:

13 For United States Postal Service Delivery:

14 Attn: Mike Gyurics
15 Fiscal Operations Branch Chief
16 Office of Environmental Health Hazard Assessment
 P.O. Box 4010, MS #19B
 Sacramento, CA 95812-4010

17 For Non-United States Postal Service Delivery:

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

21 The CEH portion of the civil penalty payment for \$7,860 shall be made payable to the
22 Center for Environmental Health and associated with taxpayer identification number 94-3251981.
23 This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco,
24 CA 94117.

25 5.2.2 \$23,580 as an Additional Settlement Payment ("ASP") to CEH pursuant to
26 Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3204. CEH
27

intends to restrict use of the ASPs received from the Consent Judgment before the Court to the following purposes: the funds will be placed in CEH's Toxics in Food Fund and used to support CEH programs and activities that seek to educate the public about acrylamide and other toxic chemicals in food, to work with the food industry and agriculture interests to reduce exposure to acrylamide and other toxic chemicals in food, and to thereby reduce the public health impacts and risks of exposure to acrylamide and other toxic chemicals in food sold in California. CEH shall obtain and maintain adequate records to document that ASPs are spent on these activities and CEH agrees to provide such documentation to the Attorney General within thirty (30) days of any request from the Attorney General. The payment pursuant to this Section shall be made payable to the Center for Environmental Health, associated with taxpayer identification number 94-3251981, and delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

5.2.3 \$124,980 as a reimbursement of a portion of CEH's reasonable attorneys' fees and costs (including but not limited to expert and investigative costs). The attorneys' fees and cost reimbursement shall be made payable to the Lexington Law Group and associated with taxpayer identification number 94-3317175. These payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

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 the other Party prior to filing a motion to modify the Consent Judgment.

6.3 **Change in Proposition 65.** If Proposition 65 or its implementing regulations (including but not limited to the "safe harbor no significant risk level" for acrylamide set forth at

Cal. Code Regs., tit. 27, section 25705, subdivision (c)(2) or any “alternative risk level” adopted by regulation or court decision) are changed from their terms as they exist on the date of entry of this Consent Judgment in a manner that impacts the Reformulation Levels, or if OEHHA takes some other final regulatory action for products similar to the Covered Products in a manner that impacts the Reformulation Levels or determines that warnings for acrylamide are not required for such products, then Settling Defendant may seek to modify this Consent Judgment to modify the Reformulation Levels. The Parties recognize that the Reformulation Levels are based on a compromise of a number of issues, and that a change to the “safe harbor no significant risk level” for acrylamide would not necessarily entitle a Party to a modification of the terms of this Consent Judgment corresponding to a linear relationship with such a change.

6.4 **Other Court Decisions.** If a final decision of a court determines that warnings for acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide exposures are preempted or otherwise unlawful or unconstitutional with respect to products similar to the Covered Products, then Settling Defendant may move to modify this Consent Judgment to conform to such ruling in order to avoid unfair, inconsistent, or anti-competitive results.

6.5 Federal Agency Action and Preemption. If a court of competent jurisdiction or an agency of the federal government, including, but not limited to, the U.S. Food and Drug Administration, states through any guidance, regulation or legally binding act that federal law has preemptive effect on any of the requirements of this Consent Judgment, then this Consent Judgment may be modified in accordance with the procedure for noticed motions set forth in Section 6.1 to bring it into compliance with or avoid conflict with federal law. Any such modification shall be limited to those changes that are necessary to bring this Consent Judgment into compliance with or avoid conflict with federal law.

6.6 Before filing any motion to modify the Consent Judgment, Settling Defendant shall provide written notice to CEH to initiate the meet and confer procedure in Section 6.2. If the Parties do not agree on the proposed modification during informal meet and confer efforts, Settling

1 Defendant may file a motion to modify the Consent Judgment within sixty (60) days of the date of
2 the written notice that Settling Defendant provides to CEH under this Section 6.

3 **7. CLAIMS COVERED AND RELEASE**

4 7.1 Provided that Settling Defendant complies in full with its obligations under Section 5
5 hereof, this Consent Judgment is a full, final, and binding resolution between CEH on behalf of
6 itself and the public interest and Settling Defendant and Settling Defendant's parents, subsidiaries,
7 affiliated entities that are under common ownership, directors, officers, employees, agents,
8 shareholders, successors, assigns, and attorneys ("Defendant Releasees"), and all entities to which
9 Settling Defendant directly or indirectly distributes or sells Covered Products, including but not
10 limited to distributors, wholesalers, customers, retailers (including but not limited to Aldi Inc. and
11 Aldi Foods Inc.), franchisees, licensors, and licensees ("Downstream Defendant Releasees"), of any
12 violation of Proposition 65 based on failure to warn about alleged exposure to acrylamide contained
13 in Covered Products that were sold, distributed, or offered for sale by Settling Defendant prior to
14 the Compliance Date.

15 7.2 Provided that Settling Defendant complies in full with its obligations under Section 5
16 hereof, CEH, for itself, its agents, successors, and assigns, releases, waives, and forever discharges
17 any and all claims against Settling Defendant, Defendant Releasees, and Downstream Defendant
18 Releasees arising from any violation of Proposition 65 or any other statutory or common law claims
19 that have been or could have been asserted by CEH individually or in the public interest regarding
20 the failure to warn about exposure to acrylamide arising in connection with Covered Products
21 manufactured, distributed, or sold by Settling Defendant prior to the Compliance Date.

22 Provided that Settling Defendant complies in full with its obligations under Section 5 hereof,
23 CEH, in its individual capacity only and not in its representative capacity, also provides a release to
24 Settling Defendant, Defendant Releasees, and Downstream Defendant Releasees which shall be
25 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
26 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities, and demands of
27

1 CEH of any nature, character, or kind, whether known or unknown, suspected or unsuspected,
2 arising out of alleged or actual exposures to acrylamide in the Covered Products manufactured,
3 distributed, or sold by Settling Defendant prior to the Compliance Date.

4 7.3 Provided that Settling Defendant complies in full with its obligations under Section 5
5 hereof, compliance with the terms of this Consent Judgment by Settling Defendant and Defendant
6 Releasees shall constitute compliance with Proposition 65 by Settling Defendant, Defendant
7 Releasees, and Downstream Defendant Releasees with respect to any alleged failure to warn about
8 acrylamide in Covered Products manufactured, distributed, or sold by Settling Defendant after the
9 Compliance Date.

10 **8. PROVISION OF NOTICE**

11 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the notice
12 shall be sent by first class and electronic mail to:

13 Howard Hirsch
14 Lexington Law Group
15 503 Divisadero Street
16 San Francisco, CA 94117
17 hhirsch@lexlawgroup.com

18 8.2 When Settling Defendant is entitled to receive any notice under this Consent
19 Judgment, the notice shall be sent by first class and electronic mail to:

20 Ian Mitchell
21 McCain Foods USA, Inc.
22 One Tower Lane
23 Oakbrook Terrace, Illinois 60181
24 ian.mitchell@mccain.com

25 and

26 Sarah Esmaili
27 Arnold & Porter Kaye Scholer LLP
28 3 Embarcadero Center, Suite 1000
San Francisco, CA 94111
Sarah.Esmaili@arnoldporter.com

8.3 Any Party may modify the person and/or address to whom the notice is to be sent by

1 sending the other Parties notice by first class and electronic mail.

2 **9. COURT APPROVAL**

3 9.1 This Consent Judgment shall become effective upon the date signed by CEH and
4 Settling Defendant, whichever is later, provided, however, that CEH shall prepare and file a Motion
5 for Approval of this Consent Judgment and Settling Defendant shall support approval of such
6 Motion.

7 This Consent Judgment is not effective until it is approved and entered by the Court. The
8 Parties acknowledge that, pursuant to California Health and Safety Code section 25249.7(f), a
9 noticed motion is required for judicial approval of this Consent Judgment, which motion CEH shall
10 draft and file and Settling Defendant shall support, appearing at the hearing if so requested. If any
11 third party objection to the motion for approval is filed, CEH and Settling Defendant agree to work
12 together to file a response and appear at any hearing.

13 If the Court does not approve the Consent Judgment, the Parties agree to meet and confer as
14 to whether to modify the language or appeal the ruling. If the Parties do not jointly agree on a
15 course of action to take, then the case shall proceed in its normal course on the Court's trial
16 calendar. If the Court's approval is ultimately overturned by an appellate court, the Parties shall
17 meet and confer as to whether to modify the terms of this Consent Judgment. If the Parties do not
18 jointly agree on a course of action to take then the case shall proceed in its normal course on the
19 Court's trial calendar. In the event that this Consent Judgment is entered by the Court and
20 subsequently overturned by any appellate court, then any monies that have been provided to CEH or
21 its counsel under this Consent Judgment shall be refunded within fifteen (15) days of the appellate
22 decision becoming final and the Parties shall reasonably cooperate to obtain a timely refund of
23 monies paid to OEHHA under this Consent Judgment.

24 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or effect
25 and shall not be introduced into evidence or otherwise used in any proceeding for any purpose other
26 than to determine whether there was a material breach of Section 9.1.

1 **10. GOVERNING LAW AND CONSTRUCTION**

2 10.1 The terms of this Consent Judgment shall be governed by the laws of the State of
3 California.

4 **11. ATTORNEYS' FEES**

5 11.1 Should CEH prevail on any motion, application for an order to show cause, or other
6 proceeding to enforce a violation of this Consent Judgment, CEH shall be entitled to its reasonable
7 attorneys' fees and costs incurred as a result of such motion or application. Should Settling
8 Defendant prevail on any motion application for an order to show cause, or other proceeding,
9 Settling Defendant may be awarded its reasonable attorneys' fees and costs as a result of such
10 motion or application upon a finding by the Court that CEH's prosecution of the motion or
11 application lacked substantial justification. For purposes of this Consent Judgment, the term
12 substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986,
13 Code of Civil Procedure §§ 2016, *et seq.*

14 11.2 Nothing in this Section 11 shall preclude a party from seeking an award of sanctions
15 pursuant to law.

16 **12. ENTIRE AGREEMENT**

17 12.1 This Consent Judgment contains the sole and entire agreement and understanding of
18 the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
19 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and
20 therein. There are no warranties, representations, or other agreements between the Parties except as
21 expressly set forth herein. No representations, oral or otherwise, express or implied, other than
22 those specifically referred to in this Consent Judgment have been made by any Party hereto. No
23 other agreements not specifically contained or referenced herein, oral or otherwise, shall be deemed
24 to exist or to bind any of the Parties hereto. Any agreements specifically contained or referenced
25 herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto only to the
26 extent that they are expressly incorporated herein. No supplementation, modification, waiver, or
27

1 termination of this Consent Judgment shall be binding unless executed in writing by the Party to be
2 bound thereby. No waiver of any of the provisions of this Consent Judgment shall be deemed or
3 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such
4 waiver constitute a continuing waiver.

5 **13. RETENTION OF JURISDICTION**

6 13.1 This Court shall retain jurisdiction of this matter to implement or modify the Consent
7 Judgment. Notwithstanding the provisions of Section 6, nothing in this Consent Judgment limits or
8 affects the Court's authority to modify this Consent Judgment as provided by law.

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

10 14.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
11 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and execute
12 the Consent Judgment on behalf of the Party represented and legally to bind that Party.

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

14 15.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
15 against any entity other than Settling Defendant on terms that are different from those contained in
16 this Consent Judgment. Settling Defendant may move to modify this Consent Judgment pursuant to
17 Section 6 to substitute higher Reformulation Levels that CEH agrees to in a future consent judgment
18 applicable to products substantially similar to the Covered Products, and CEH agrees not to oppose
19 any such motion except for good cause shown.

20 **16. SUCCESSORS AND ASSIGNS**

21 16.1 This Consent Judgment shall apply to and be binding upon CEH and Settling
22 Defendant, and their respective divisions, subdivisions, and subsidiaries, and the successors or
23 assigns of any of them.

24 **17. COMPLIANCE WITH REPORTING REQUIREMENTS; DISMISSAL**


25 17.1 CEH agrees to comply with the reporting form requirements referenced in Health
26 and Safety Code section 25249.7(f).

17.2 Within ten (10) days of receiving the payments required by Section 5, CEH shall file a request for dismissal without prejudice as to Defendant Aldi, Inc. from this action, and Aldi, Inc. shall waive all costs in this action.

18. EXECUTION IN COUNTERPARTS

18.1 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 STIPULATED:


Dated: _____, 2020	CENTER FOR ENVIRONMENTAL HEALTH _____ Signature _____ Printed Name _____ Title
Dated: <u>9/25</u> , 2020	MCCAIN FOODS USA, INC.  _____ Signature <u>William Neider</u> Printed Name <u>VP Retail Sales US</u> Title

1 17.2 Within ten (10) days of receiving the payments required by Section 5, CEH shall file
2 a request for dismissal without prejudice as to Defendant Aldi, Inc. from this action, and Aldi, Inc.
3 shall waive all costs in this action.

4 **18. EXECUTION IN COUNTERPARTS**

5 18.1 The stipulations to this Consent Judgment may be executed in counterparts and by
6 means of facsimile or portable document format (pdf), which taken together shall be deemed to
7 constitute one document.

8 **IT IS SO STIPULATED:**

10 Dated: <u>September 28</u> , 2020	11 CENTER FOR ENVIRONMENTAL HEALTH 12  13 _____ 14 Signature 15 Michael Green 16 _____ 17 Printed Name 18 CEO 19 _____ 20 Title
21 Dated: _____, 2020	22 MCCAIN FOODS USA, INC. 23 _____ 24 Signature 25 _____ 26 Printed Name 27 _____ 28 Title

1 IT IS SO ORDERED, ADJUDGED,
2 AND DECREED

3 Dated: December 22, 2020 Shirley J. Amis
4 Judge of the Superior Court

EXHIBIT A
Sampling and Testing Methodology – Oven Baked Products

Note: where more than one preparation method is included in addition to the conventional oven preparation method, the product should be tested using the conventional oven method.

- I. Sample
 - a. A single retail package, as prepared under Section IV below.
- II. Sampling Frequency and Mathematical Averaging for “Average Level” Analysis
 - a. Collect and prepare, per the instructions below, at least 1 sample each from 5 or more different lots of a particular SKU of Covered Product (or the maximum number of lots available for testing if fewer than 5). A product lot is defined as a 24-hour production period.
 - b. As provided in Section 3.1.1 of the consent judgment, average the results of all samples to determine the “Average Level” for the specific product identified in the Notice of Violation. The mean and standard deviation shall be calculated using the sampling data. Any data points that are more than three standard deviations outside the mean shall be discarded once, and the mean and standard deviation recalculated using the remaining data points. The mean determined in accordance with this procedure shall be deemed the “Average Level.”
- III. Equipment Preparation

A conventional household 30 inch electric standard size oven should be used to prepare all samples for acrylamide analysis.

 - a. Oven Calibration
 - i. The oven is to be preheated to the baking temperature specified in the cooking instruction for the product, and then calibrated through three heating cycles. The midpoint of the heating cycle should be the recommended preparation temperature. The oven’s heating cycles range must not exceed 50°F. The ovens must be calibrated monthly.
 - ii. Thermometers used to calibrate ovens should be calibrated prior to use according to a standard ice point and boiling point method.
 - b. Preheat a calibrated oven for at least 30 minutes prior to preparing products.
 - c. Use 17” x 11” baking sheet and follow all cooking instructions provided on the packaging for the product being tested.
 - d. Use oven rack in the middle of the oven.
 - e. Allow oven to return to baking temperature 10 minutes after removing prior sample product from oven prior to baking next sample
- IV. Product Preparation
 - a. Record temperature of product prior to cooking. All products must be between 0°F and 15°F when preparation is begun.

- b. Distribute the product evenly on the baking tray.
- c. Remove any fragments from the baking tray.
 - i. Fragments are defined as:
 - 1. French fries - a strip that is < 2" in length, or any strips less than half of a full cut dimension.
 - 2. Formed products, if applicable – units not exhibiting the full shape dimensions shown on the product packaging.
- d. Bake according to the cooking instructions for the specific quantity of product selected. If a label's recommended method includes a range of cooking temperatures or times, the midpoint of those ranges shall be used.
- e. When cooking time expires, immediately remove product from oven, and transfer from the baking sheet to a container that is at room temperature. Cool product 5 minutes at room conditions and then place uncovered in a freezer.
- f. Once product is frozen, if the sample is to be transported to a laboratory, transfer to an appropriately labeled, sealed container and keep frozen until analyzed for acrylamide.
- g. The directions to the testing laboratory shall provide for the sample to be homogenized prior to analysis.

The Unit Level or levels in samples grouped for Average-Level computation shall be determined based on a representative, composite sample taken from each unit tested.