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11
12 SUPERIOR COURT OF CALIFORNIA
13 COUNTY OF SAN DIEGO
14

15 ROBERT WILKINSON, individually,
16 Plaintiff,

17 v.

18 HOMESTAT FARM, LTD., an Ohio Limited
19 Liability Company, and Does 1 through 10,
inclusive,
20 Defendants.

Case No. GIC864017

[PROPOSED] CONSENT JUDGMENT

21
22 1. INTRODUCTION

23 1.1 On or about December 6, 2005, plaintiff ROBERT WILKINSON (“Wilkinson”),
24 provided a 60-day notice of violation (“Notice”) to the California Attorney General, the District
25 Attorneys of every county in California, the City Attorneys of every California city with a
26 population greater than 750,000, and defendant HOMESTAT FARM, LTD. (“Homestat”),
27 alleging that Homestat, through sales in California of its Wheatena brand cereal (“Covered
28 Product”), was in violation of certain provisions of the Safe Drinking Water and Toxic



1 Enforcement Act of 1986, Health and Safety Code sections 25249.5, et seq. (“Proposition 65”),
2 by knowingly and intentionally exposing persons to acrylamide, a chemical known to the State of
3 California to cause cancer, without first providing a clear and reasonable warning.

4 1.2 On or about April 7, 2006, Wilkinson, acting in the public interest pursuant to
5 Health and Safety Code section 25249.7(d), filed a Complaint for Civil Penalties, Statutory,
6 Equitable and Injunctive Relief in San Diego County Superior Court, Case No. GIC864017
7 (“Complaint”) against Homestat based on the allegations contained in the Notice.

8 1.3 For purposes of this Consent Judgment, Wilkinson and Homestat stipulate that this
9 Court has jurisdiction over the allegations of violations contained in the Complaint and personal
10 jurisdiction over Homestat as to the acts alleged in the Complaint, that venue is proper in the
11 County of San Diego and that this Court has jurisdiction to enter this Consent Judgment as a full
12 and final settlement and resolution of the allegations contained in the Complaint and of all claims
13 which were or could have been raised based on the facts alleged therein or arising therefrom.

14 1.4 Wilkinson and Homestat enter into this Consent Judgment pursuant to a full and
15 final settlement of disputed claims between the parties for the purpose of avoiding prolonged
16 litigation. This Consent Judgment shall not constitute an admission with respect to any allegation
17 made in the Notice or the Complaint, each and every allegation of which Homestat denies, nor
18 may this Consent Judgment or compliance with it be used as evidence of any wrongdoing,
19 misconduct, culpability or liability on the part of Homestat.

20 2. INJUNCTIVE RELIEF: WARNING; WITHDRAWAL FROM CALIFORNIA

21 2.1 Compliance Date. For purposes of this Consent Judgment, the “Compliance
22 Date” shall be the earliest of the following dates:

- 23 (a) the date Proposition 65 is preempted by federal law with respect to
24 warnings concerning the presence of acrylamide in the Covered Product,
25 or Proposition 65 warnings concerning the presence of acrylamide in the
26 Covered Product are determined to be in conflict with mandatory federal
27 food labeling requirements whether by statute, regulation, executive
28 action, or judicial decision (“Preemption”);



- 1 (b) the date a “no significant risk level” (“NSRL”) applicable to acrylamide in
2 the Covered Product that is different from the NSRL now published at
3 Title 22, California Code of Regulations section 12705(c)(2), is
4 promulgated by statute, final regulatory action, or final judicial decision
5 (“Alternative NSRL Promulgation”), thereby allowing for a determination
6 as to whether the Covered Product is exempt from a Proposition 65
7 warning (“Warning Exempt”) pursuant to the Alternative NSRL
8 Promulgation and Health and Safety Code section 25249.10;
9 (c) December 31, 2007 (“Default Date”).

10 2.2 Compliance Obligation.

- 11 (a) If the Compliance Date is determined under Paragraph 2.1 either:
12 (1) as a result of Preemption, or
13 (2) as a result of Alternative NSRL Promulgation, and the Covered
14 Product is Warning Exempt,
15 then the remainder of Paragraph 2 shall not apply to the Covered Product,
16 and Homestat shall be deemed in compliance with Proposition 65 with
17 respect to the Covered Product.
18 (b) If the Compliance Date is determined under Paragraph 2.1 either:
19 (1) to be the Default Date, or
20 (2) as a result of Alternative NSRL Promulgation, and the Covered
21 Product is not Warning Exempt,
22 then the remainder of Paragraph 2, including the warning requirement of
23 Paragraph 2.3, shall be applicable to the Covered Product.

24 2.3 Content of Warning. If required under Paragraph 2.2, the following warning
25 (“Acrylamide Warning”) shall accompany the Covered Product in California unless Homestat
26 takes the Withdrawal Actions specified in paragraph 2.4:

27 **WARNING:** Because Wheatena is made of toasted wheat, it
28 contains acrylamide, a chemical known to the State of California to



1 cause cancer. Acrylamide is formed when starchy food, including
2 wheat, is baked, toasted, roasted, or fried. Wheatena, as well as many
3 other cereals and other foods, contains acrylamide. Given what is
4 currently known about exposures to acrylamide in foods, the U.S.
5 Food and Drug Administration (FDA) advises consumers to continue
6 to eat a balanced diet, choosing a variety of foods that are low in trans
7 and saturated fat and rich in high-fiber grains, fruits and vegetables.
8 For more information, visit the following websites:
9 WWW.OEHHA.CA.GOV OR WWW.FDA.GOV

10 The word "WARNING" shall be in capital letters and bold typeface. The warning shall be
11 affixed to or printed on the back of the package of the Covered Product, in typeface equal to the
12 typeface of other product information on the label so as to render the warning easily read and
13 understood by an ordinary individual under customary conditions of purchase or use. Such
14 warnings shall accompany the Covered Product sold into California beginning no later than six
15 (6) weeks after the Compliance Date, and shall continue to accompany the Covered Product as
16 long as the Covered Product is sold to consumers in California, subject to the modifications
17 specified in Paragraph 2.5.

18 2.4 Withdrawal Alternative. If Homestat declines to provide the Acrylamide Warning
19 to the extent required by Paragraphs 2.2 and 2.3, Homestat shall instead take the following
20 actions ("Withdrawal Actions") within six (6) weeks of the Compliance Date:

- 21 (a) Cease shipping the Covered Product to retailers and other vendors in
22 California; and
23 (b) Issue a notice to each of Homestat's retailers and other vendors in
24 California, that the Covered Product will not be sold into California.

25 Homestat shall notify Wilkinson, and shall also notify the Office of the Attorney General (mailed
26 care of Deputy Attorney General Edward G. Weil, California Department of Justice, 1515 Clay
27 Street, 20th Floor, Oakland, CA 94612) of any decision to take the Withdrawal Actions no later
28 than four (4) weeks after the Compliance Date.

1 2.5 Removal of Warning. Homestat shall no longer be required to provide the
2 Acrylamide Warning pursuant to Paragraphs 2.2 and 2.3, to the extent that any of the following
3 events occur after the Compliance Date:

4 (a) Proposition 65 is preempted by federal law, or determined to conflict with
5 mandatory federal food labeling requirements, with respect to warnings
6 concerning the presence of acrylamide in the Covered Product, whether by
7 statute, final regulatory action, executive action, or final judicial decision in
8 which case the Covered Product must comply with applicable federal labeling
9 requirements;

10 (b) a state or federal court permanently enjoins or otherwise bars California from
11 enforcing Proposition 65 warning requirements concerning the presence of
12 acrylamide in the Covered Product;

13 (c) an alternative NSRL for acrylamide in the Covered Product is promulgated
14 (or, if following a prior Alternative NSRL Promulgation, revised) by statute,
15 final regulatory action, or final judicial decision, and Homestat demonstrates
16 that the Covered Product meets the new or revised NSRL for purposes of
17 Health and Safety Code section 25249.10 pursuant to the procedures stated in
18 Section 2.6(a) below;

19 (d) an alternative warning standard or requirement for acrylamide in the Covered
20 Product, for the purpose of compliance with Health and Safety Code section
21 25249.6, is promulgated by statute, final regulatory action, or final judicial
22 decision.

23 2.6 NSRL Compliance (“Warning Exempt”) Determination. If Homestat asserts that
24 the Covered Product is Warning Exempt under an Alternative NSRL Determination and Health
25 and Safety Code section 25249.10, but Wilkinson or the California Attorney General dispute this
26 assertion, then the following procedures shall govern:

27 (a) *Determination of Covered Product Level.* If Wilkinson or the California
28 Attorney General cannot reach an agreement with Homestat as to the level



1 of acrylamide contained in the Covered Product (“Covered Product
2 Level”) for the purpose of determining whether the Covered Product Level
3 is below the NSRL set by the Alternative NSRL Determination, then the
4 Covered Product Level shall be determined via testing by Medallion
5 Laboratories, based on the serving size and preparation method specified
6 on the packaging of the Covered Product. Homestat shall pay the costs of
7 this testing.

8 (b) *Determination of Other Issues.* If Wilkinson and/or the California
9 Attorney General cannot reach an agreement with Homestat as to whether
10 the Covered Product is Warning Exempt for reasons other than the
11 Covered Product Level, any party may request that this Court determine
12 the issue, subject to the terms of this Consent Judgment.

13 3. ATTORNEYS’ FEES

14 3.1 Within thirty (30) days after entry of this Consent Judgment, Homestat shall pay
15 fifty thousand dollars (\$50,000) in lieu of civil penalties to Ross, Dixon & Bell, LLP to cover
16 Wilkinson’s attorneys’ fees and costs. The above payment shall be delivered via mail or
17 overnight service to Ross, Dixon & Bell, LLP c/o Jason Hartley, Esq., Ross, Dixon & Bell, LLP,
18 550 West B Street, Suite 400, San Diego, California 92101-3599.

19 3.2 Except as specifically provided in this Consent Judgment, Wilkinson and
20 Homestat shall bear their own costs and attorneys’ fees.

21 4. ENFORCEMENT OF JUDGMENT/STIPULATED REMEDIES

22 4.1 The terms of this Consent Judgment are enforceable by and among the parties
23 hereto and, with respect to the injunctive relief provided for herein, by the California Attorney
24 General.

25 5. MATTERS COVERED BY THIS CONSENT JUDGMENT

26 5.1 This Consent Judgment is a full, final and binding resolution between Wilkinson,
27 acting on his own behalf and in the public interest pursuant to Health and Safety Code section
28 25249.7(d), and Homestat concerning (a) any violation of Proposition 65 related to any claims



1 made, or which could have been made, in the Notice and/or the Complaint, and (b) any other
2 statutory or common law claim that could have been asserted against Homestat and/or its
3 affiliates, divisions, predecessors, successors, officers, directors, assigns, distributors, retailers,
4 and/or customers for failure to provide clear, reasonable, and lawful warnings of exposure to
5 acrylamide contained in or otherwise associated with the Covered Product. Compliance with the
6 terms of this Consent Judgment resolves any issue, now and in the future, concerning compliance
7 by Homestat and/or its affiliates, divisions, predecessors, successors, officers, directors, assigns,
8 distributors, retailers, and/or customers with the requirements of Proposition 65 with respect to
9 acrylamide contained in or otherwise associated with the Covered Product.

10 5.2 As to any claims, violations (except violations of this Consent Judgment), actions,
11 damages, costs, penalties or causes of action which may arise or have arisen after the original
12 date of entry of this Consent Judgment, compliance by Homestat with the terms of this Consent
13 Judgment shall be deemed to be full and complete compliance with Proposition 65 as to claims
14 regarding exposure to acrylamide in the Covered Product.

15 5.3 In furtherance of the foregoing, Wilkinson hereby waives any and all rights and
16 benefits which he now has, or in the future may have, conferred upon him with respect to the
17 Covered Product by virtue of the provisions of Section 1542 of the California Civil Code, which
18 provides as follows:

19 "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
20 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
21 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
22 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
23 THE DEBTOR."

24 Wilkinson understands and acknowledges that the significance and consequence of this waiver of
25 California Civil Code Section 1542 is that even if Wilkinson suffers future damages arising out
26 of or resulting from, or related directly or indirectly to, in whole or in part, the Covered Product,
27 he will not be able to make any claim for those damages against Homestat, or its affiliates,
28 divisions, predecessors, successors, officers, directors, or assigns, or any of its customers,

1 distributors, wholesalers, retailers or any other person in the course of doing business who may
2 manufacture, use, maintain, distribute, market or sell the Covered Product. Furthermore,
3 Wilkinson acknowledges that he intends these consequences for any such claims which may exist
4 as of the date of this release but which Wilkinson does not know exist, and which, if known,
5 would materially affect his decision to enter into this Consent Judgment, regardless of whether
6 his lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

7 6. SERVICE ON THE CALIFORNIA ATTORNEY GENERAL

8 6.1 Within five days of the date that this Consent Judgment is signed by both parties,
9 or concurrently with service of a motion for judicial approval of settlement pursuant to Health &
10 Safety Code Section 25249.(7)(f)(4), whichever is sooner, Wilkinson will serve a report of
11 settlement on the California Attorney General pursuant to 11 California Code of Regulations
12 (“CCR”) §3003. The motion for approval of this Consent Judgment shall be served on the
13 Attorney General no later than 45 days prior to the date set for hearing on the motion.

14 7. APPLICATION OF JUDGMENT

15 7.1 The obligations of this Consent Judgment shall apply to and be binding upon
16 Wilkinson, any and all plaintiffs acting in the public interest pursuant to Health and Safety Code
17 section 25249.7(d), Homestat, and the successors or assigns of any of them.

18 8. MODIFICATION OF JUDGMENT

19 8.1 This Consent Judgment may be modified only upon written agreement of the
20 parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
21 any party as provided by law and upon entry of a modified Consent Judgment by the Court.

22 9. NOTICE

23 9.1 When a party is entitled to receive any notice or communication under this
24 Consent Judgment, the notice shall be sent by U.S. mail or overnight delivery service as follows:

25 (a) *For Wilkinson:* Jason Hartley, Esq., Ross, Dixon & Bell, LLP, 550 West
26 B Street, Suite 400, San Diego, California 92101-3599; and

27 (b) *For Homestat:* Bill Stadtlander, Homestat Farm Ltd., 6065 Frantz Road,
28 Suite 206, Dublin, Ohio 43017, with a copy to Richard C. Coffin, Barg



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Coffin Lewis & Trapp, LLP, One Market, Steuart Tower, Suite 2700, San Francisco, California 94105.

9.2 Wilkinson or Homestat may modify the person and address to whom notice is to be sent by sending the other party notice in accordance with this Paragraph.

10. AUTHORITY TO STIPULATE

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

11. RETENTION OF JURISDICTION

11.1 This Court shall retain jurisdiction over the matters covered herein and the enforcement and/or application of this Consent Judgment.

12. DISMISSAL OF ACTION

12.1 Subject to the reservation of jurisdiction in Paragraph 11.1, the Complaint, the legal action arising from the Complaint, and all claims therein are dismissed with prejudice.

13. ENTIRE AGREEMENT

13.1 This Consent Judgment contains the sole and entire agreement and understanding of the parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the parties.

14. GOVERNING LAW

14.1 The validity, construction and performance of this Consent Judgment shall be governed by the laws of the State of California.

15. ENFORCEMENT

15.1 The prevailing party in any dispute arising out of, relating to, or in connection with this Consent Judgment shall recover its reasonable costs and attorney's fees, except that this Consent Judgment shall not be interpreted to authorize an award of such costs or fees against the



1 California Attorney General, unless such an award is also authorized by existing California or
2 federal law.

3 16. COURT APPROVAL

4 16.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
5 effect, and cannot be used in any proceeding for any purpose.

6 **IT IS SO STIPULATED:**

7
8 DATED: 11-21-06

By: *Paul Hey*

9
10 Position: Attorney

11 For Plaintiff Robert Wilkinson

12
13 DATED: 11/20/06

By: *W. B. Stadtherr Jr*

14
15 Position: PRESIDENT

16 For Defendant Homestat Farm, Ltd..

17
18 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

19
20 Dated: _____

JUDGE OF THE SUPERIOR COURT

