

1 ELLISON FOLK (State Bar No. 149232)
LAURA D. BEATON (State Bar No. 294466)
2 SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
3 San Francisco, California 94102
Telephone: (415) 552-7272
4 Facsimile: (415) 552-5816
Folk@smwlaw.com
5 Beaton@smwlaw.com

6 Attorneys for Plaintiff
AS YOU SOW

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

10
11 AS YOU SOW, a California Non-Profit
Public Benefit Corporation,

12 Plaintiff,

13 v.

14 HORMEL FOODS CORPORATION,
15 MEGAMEX FOODS, LLC, and DOES 1
through 10, inclusive,

16 Defendants.

Case No. CGC-14-542879

CONSENT JUDGMENT

Action Filed: November 24, 2014

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

1 **CONSENT JUDGMENT**

2 This Consent Judgment is entered into by and between AS YOU SOW (“AYS”), on
3 behalf of AYS and the general public, and HORMEL FOODS CORPORATION and
4 MEGAMEX FOODS, LLC (collectively “MEGAMEX”), to resolve all claims raised in AYS’s
5 August 30, 2013, Notice of Violation letter to MEGAMEX (“Notice”). This Consent Judgment
6 shall be effective upon entry.

7 **1. INTRODUCTION**

8 1.1 AYS is a non-profit corporation dedicated to, among other causes, the protection
9 of the environment, the promotion of human health, the improvement of worker and consumer
10 rights, environmental education, and corporate accountability. AYS is based in Oakland,
11 California and is incorporated under the laws of the State of California.

12 1.2 MEGAMEX manufactures, distributes, markets and/or sells Búfalo® hot sauce
13 and salsa products including, but not limited to, Búfalo® brand Picante Búfalo® – Salsa
14 Picante Clasica; Búfalo® brand Picante Bufalo – Salsa Chipotle; and Búfalo® Jalapeño Rojo
15 (collectively, the Búfalo® hot sauce and salsa products manufactured, distributed, marketed
16 and/or sold by MEGAMEX are the “Covered Products”), each of which are alleged to contain
17 lead, a chemical regulated by the State of California as known to cause cancer and reproductive
18 harm pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition
19 65”), California Health and Safety Code section 25249.5 *et seq.*

20 1.3 On August 30, 2013, AYS sent a 60-day Notice of Violation to MEGAMEX and
21 to public enforcers as required by Health and Safety Code section 25249.7, alleging that it
22 violated Proposition 65 by failing to provide clear and reasonable warning before exposing users
23 to lead in the Covered Products.

24 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court
25 has jurisdiction over MEGAMEX as to the allegations contained in the Complaint, that venue is
26 proper in San Francisco County, that this Court has jurisdiction to enter this Consent Judgment
27
28

1 as a resolution of all claims that were alleged in the Complaint and that the Court shall retain
2 jurisdiction to implement the Consent Judgment.

3 1.5 For the purpose of avoiding prolonged and costly litigation, the Parties enter into
4 this Consent Judgment as a full settlement of the claims alleged in the Notice and the claims that
5 were raised in the Complaint based on the facts alleged therein. By executing and complying
6 with this agreement, neither Party admits any facts or conclusions of law including, but not
7 limited to, any facts or conclusions of law regarding any alleged violations of Proposition 65 or
8 any other statutory, common law, or equitable claim or requirement relating to or arising from
9 the sale of Covered Products in California. Nothing in this Consent Judgment shall prejudice,
10 waive, or impair any right, remedy, or defense that Parties may have in any other or in future
11 legal proceedings unrelated to these proceedings. However, this paragraph shall not diminish or
12 otherwise affect the obligation, responsibilities, and duties of the Parties under this Consent
13 Judgment.

14 1.6 The term "Effective Date" means the date of entry of this Consent Judgment.

15 **2. INJUNCTIVE RELIEF**

16 2.1 MEGAMEX agrees that it will:

17 (1) change the serving size on the Covered Products' labels from 1 tablespoon to 1
18 teaspoon, to the extent it has not done so already; and

19 (2) source chilies only from suppliers that (a) use good agricultural and manufacturing
20 practices and (b) employ quality control measures, as those terms are used in Title 21, Code of
21 Federal Regulations, section 110.110, subdivision (c) and section 110.80, to reduce
22 contamination by lead to the lowest level currently feasible;

23 2.2 MEGAMEX further agrees that it will not market, sell, or distribute any Covered
24 Product in California that has a lead concentration in excess of 0.06 parts per million
25 ("Maximum Lead Level"), unless such Covered Product carries the warning set forth below in
26 this paragraph 2.2. This concentration is dependent upon the serving size set forth in paragraph
27 2.1(1) above; unless required by applicable federal or state law, the serving size may not be
28

1 changed without agreement by the parties. Should any product sold in California contain
2 concentrations of lead above this level, the product shall carry the following warning:

3 “WARNING: This product contains chemicals known to the State of California to
4 cause birth defects or other reproductive harm.”

5 If the level of lead in the product sold in California will result in an exposure in excess of the
6 “no significant risk level” established under Proposition 65 for lead, MEGAMEX shall use
7 the following warning:

8 “WARNING: This product contains chemicals known to the State of California to
9 cause cancer, birth defects, or other reproductive harm.”

10 **3. NON-ADMISSION OF LIABILITY**

11 3.1 It is understood and agreed between the Parties that this Consent Judgment is a
12 compromise of a disputed claim and that it will not be construed as an admission by any of the
13 Parties that any of them has acted wrongfully or has violated the law.

14 **4. MONETARY PAYMENTS**

15 4.1 Within 15 days of the Effective Date, MEGAMEX shall pay \$ \$48,000 (forty-
16 eight thousand dollars) in the form of a check made payable to the Shute, Mihaly & Weinberger
17 LLP trust account as reimbursement for AYS’s attorneys’ fees, investigative costs, and other
18 reasonable litigation costs and expenses.

19 4.2 Within 15 days of the Effective Date, MEGAMEX shall pay \$26,000 (twenty-six
20 thousand dollars) in the form of a check made payable to As You Sow as a civil penalty
21 pursuant to Health and Safety Code section 25249.7(b). AYS shall remit 75% of this amount to
22 the State of California pursuant to Health and Safety Code section 25249.12(b).

23 4.3 Additionally, within 15 days of the Effective Date, MEGAMEX shall pay
24 \$26,000 (twenty-six thousand dollars) in the form of a check made payable to As You Sow as a
25 payment in lieu of additional civil penalties, with this amount to be used by AYS for grants to
26 California non-profit organizations and by the AYS Environmental Enforcement Fund. These
27 funds shall be used to reduce or remediate exposures to toxic chemicals and to increase
28

1 consumer, worker, and community awareness of the health hazards posed by toxic chemicals in
2 California via AYS's program work. In deciding among grantee proposals, the AYS Board of
3 Directors ("Board") takes into consideration a number of important factors, including: (1) the
4 nexus between the harm done in the underlying case and the grant program work; (2) the
5 potential for toxics reduction, prevention, remediation, or education benefits to California
6 citizens from the proposal; (3) the budget requirements of the proposed grantee and the alternate
7 funding sources available to it for its project; and (4) the Board's assessment of the grantee's
8 chances for success in its program work. AYS shall ensure that all funds will be disbursed and
9 used in accordance with AYS's mission statement, articles of incorporation, and bylaws and
10 applicable state and federal laws and regulations.

11 4.4 Except as provided in Section 5.1 below, the payments made pursuant to Section
12 4.1 through 4.3 shall be the only monetary obligation of MEGAMEX with respect to this
13 Consent Judgment, including as to any fees, costs, or expenses AYS has incurred.

14 **5. ENFORCEMENT OF CONSENT JUDGMENT**

15 5.1 The Parties may, by motion or order to show cause before the Superior Court of
16 the County of San Francisco, enforce the terms and conditions of this Consent Judgment. In the
17 event that a dispute arises with respect to any of the provisions of this Consent Judgment, the
18 Parties shall meet and confer within 10 days after either Party receives written notice of an
19 alleged violation of this Consent Judgment. The prevailing Party in any dispute regarding
20 compliance with the terms of this Consent Judgment shall be awarded any fines, costs, penalties,
21 or remedies provided by law for any failure to comply with California Health and Safety Code
22 25249.5 *et seq.* Additionally, the prevailing Party shall be awarded its reasonable attorneys'
23 fees and costs consistent with the provisions of California Code of Civil Procedure section
24 1021.5.

25 5.2 So long as MEGAMEX complies and remains in compliance with the
26 requirements of Sections 2.1 and 2.2 for each of its Covered Products, the Parties agree that each
27 such Covered Product shall be deemed to comply with Proposition 65 with respect to lead
28

1 beginning immediately upon entry of the Consent Judgment.

2 **6. CLAIMS COVERED AND RELEASE**

3 6.1 As to the Covered Products manufactured and distributed by MEGAMEX, this
4 Consent Judgment is a full, final, and binding resolution between AYS, on its behalf and in the
5 public interest, and MEGAMEX and its parents, shareholders, divisions, subdivisions,
6 subsidiaries, partners, sister companies, and their successors and assigns for any alleged failure
7 to warn, within the meaning of Proposition 65, for exposures to lead in the Covered Products on
8 or before the Effective Date of this Consent Judgment.

9 6.2 In further consideration of the promises and agreements herein contained, and for
10 the payment to be made pursuant to Section 4, AYS, on behalf of itself and in the public interest,
11 its past and current agents, representatives, attorneys, successors and/or assignees, hereby
12 waives all rights to institute or participate in, directly or indirectly, any form of legal action
13 addressing all claims occurring on or before the entry of this Consent Judgment, and releases all
14 claims arising under Proposition 65 occurring on or before the entry of this Consent Judgment,
15 including, without limitation, all liabilities, demands, obligations, damages, costs, fines,
16 penalties, losses or expenses, including, but not limited to, investigation fees, expert fees
17 and attorneys' fees of any nature whatsoever, whether known or unknown, fixed or contingent
18 against MEGAMEX and its past, present and future owners, direct and indirect parent
19 companies, corporate affiliates, joint-venturers (including, but not limited to, Hormel Foods
20 Corporation and its subsidiaries), subsidiaries, upstream and downstream suppliers, distributors,
21 manufacturers or customers, direct and indirect retailers (including, but not limited to Renwood
22 Andronico Lending 1, LLC, dba Andronico's Community Markets), clients, and each of their
23 respective officers, directors, attorneys, representatives, shareholders, agents, insurers,
24 employees successors and assigns arising under Proposition 65 related to the alleged
25 failure to warn about exposures to or identification of lead contained in the Covered Products
26 manufactured, packaged, distributed, marketed, or sold by MEGAMEX.

1 In addition, AYS, on behalf of itself, its attorneys and its agents, waives all rights to
2 institute or participate in, directly or indirectly, any form of legal action addressing all claims
3 occurring on or before the entry of this Consent Judgment, and releases all claims occurring on
4 or before the entry of this Consent Judgment against MEGAMEX, arising under Proposition 65,
5 related to MEGAMEX'S alleged failure to warn about exposures to or identification of lead
6 contained in the Covered Products and for all actions or statements regarding the alleged failures
7 to warn about exposures to or identification of lead contained in the Covered Products
8 made by MEGAMEX or its attorneys or representatives in the course of responding to
9 those alleged violations of Proposition 65 as alleged in the Complaint.

10 6.3 Defendant hereby releases Plaintiff from and waives any claims against Plaintiff,
11 its officers, directors, attorneys, representatives, agents, insurers, employees, successors and
12 assigns for injunctive relief or damages, penalties, fines, sanctions, mitigation, fees (including
13 fees of attorneys, experts, and others), costs, expenses, or any other sum incurred or claimed or
14 which could have been claimed for matters related to the Action or the Notice.

15 6.4 Upon entry of the Consent Judgment, the Parties waive their respective rights to a
16 hearing or trial on the allegations of the Complaint.

17 6.5 This Consent Judgment shall apply to and be binding upon the Parties hereto and,
18 to the extent allowable by law, on the general public.

19 **7. GOVERNING LAW AND CONSTRUCTION**

20 7.1 This agreement shall be governed by, and construed in accordance with, the laws
21 of the State of California.

22 7.2 The Parties, including their counsel, have participated in the preparation of this
23 Consent Judgment, and this Consent Judgment is the result of the joint efforts of the Parties.
24 This Consent Judgment was subject to revision and modification by the Parties and has been
25 accepted and approved as to its final form by all Parties and their counsel. Accordingly, any
26 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
27 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
28

1 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are
2 to be resolved against the drafting Party should not be employed in the interpretation of this
3 Consent Judgment and, in this regard, the Parties hereby waive California Civil Code section
4 1654.

5 **8. MODIFICATION OF CONSENT JUDGMENT**

6 This Consent Judgment may be modified only upon written agreement of the Parties,
7 with approval of the Court, or pursuant to court order issued upon noticed motion of a Party for
8 good cause shown, and upon entry of a modified Consent Judgment by this Court. Any Party
9 seeking to modify this Consent Judgment shall meet and confer with all affected Parties prior to
10 filing a motion to modify the Consent Judgment in a good faith to attempt to resolve any
11 differences. The Attorney General shall be served with notice of any proposed modification to
12 this Consent Judgment at least 15 days in advance of its consideration by the Court.

13 **9. COURT APPROVAL**

14 9.1 The Court shall either approve or disapprove of this Consent Judgment in its
15 entirety, without alteration, deletion or amendment, unless otherwise so stipulated by the Parties
16 and their counsel. Defendant agrees not to oppose this Consent Judgment.

17 9.2 In the event that the Court fails to approve and order entry of the Consent
18 Judgment without any change whatsoever (unless otherwise so stipulated by the Parties), this
19 Consent Judgment shall become null and void upon the election of either Party and upon written
20 notice to all of the Parties to the Action pursuant to the notice provisions herein, and shall not be
21 introduced into evidence or otherwise used in any proceeding for any purpose.

22 **10. NO RELIANCE**

23 In negotiating this Consent Judgment, each Party has made various statements and
24 representations to the other Party. Nevertheless, except as expressly stated in this Consent
25 Judgment, the Parties represent and acknowledge that in executing this Consent Judgment, they
26 do not rely upon any representation or statement not set forth herein that may have been made
27
28

1 by the Parties' agents, representatives, or attorneys with regard to the subject matter, basis, or
2 effect of this Consent Judgment, or otherwise.

3 **11. ENTIRE AGREEMENT**

4 The Parties declare and represent that no promise, inducement, or other agreement has
5 been made conferring any benefit upon any Party except those contained herein and that this
6 agreement contains the entire agreement pertaining to the subject matter hereof.

7 **12. APPLICATION OF CONSENT JUDGMENT**

8 This Consent Judgment shall apply to and be binding upon the Parties hereto; their
9 divisions, subdivisions, and subsidiaries; and the successors or assigns of any of them.

10 **13. ATTORNEYS' FEES**

11 Except as specifically provided in this Consent Judgment, each Party shall bear its own
12 attorneys' fees and costs incurred in connection with the 60-day Notice.

13 **14. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7**

14 AYS shall comply with the reporting requirements referred to in Health and Safety Code
15 section 25249.7(f) (and established in Title 11 of the California Code of Regulations sections
16 3000-3008), and shall move for approval of this Consent Judgment pursuant to the terms
17 thereof.

18 **15. PROVISION OF NOTICE**

19 All correspondence and notices required by this Consent Judgment to the Parties shall be
20 sent:

21 To: As You Sow

22 As You Sow Foundation
23 Attn: Danielle Fugere
24 1611 Telegraph Ave., Suite 1450
25 Oakland, CA 94612

21 With a copy to:

22 Ellison Folk
23 Shute, Mihaly & Weinberger LLP
24 396 Hayes St.
25 San Francisco, CA 94102
26 Tel: (415) 552-7272
27 E-mail: folk@smwlaw.com

27 To: MegaMex

28 MegaMex Foods, LLC
333 S. Anita Dr.. Ste. 1000

27 With a copy to:

28 Steven Tekosky

1 **17. AUTHORIZATION**

2 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the
3 Party he or she represents to stipulate to this Consent Judgment and to enter into and execute the
4 Consent Judgment on behalf of the Party represented and legally bind that Party. The
5 undersigned have read, understand, and agree to all of the terms and conditions of this Consent
6 Judgment.

7 **18. SEVERABILITY**

8 Except as otherwise provided in Section 18, in the event that any of the provisions of this
9 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
10 provisions shall not be adversely affected.

11 IT IS SO STIPULATED:

12 Dated:

AS YOU SOW

13 By: 

14 Andrew Behar
15 Chief Executive Officer

16 Dated:

HORMEL FOODS CORPORATION

17 By: _____
18 Name _____
19 Title _____

20 Dated:

MEGAMEX FOODS, LLC

21 By: _____
22 Name _____
23 Title _____

24 641823.1

25
26
27
28

1 **17. AUTHORIZATION**

2 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the
3 Party he or she represents to stipulate to this Consent Judgment and to enter into and execute the
4 Consent Judgment on behalf of the Party represented and legally bind that Party. The
5 undersigned have read, understand, and agree to all of the terms and conditions of this Consent
6 Judgment.

7 **18. SEVERABILITY**

8 Except as otherwise provided in Section 18, in the event that any of the provisions of this
9 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
10 provisions shall not be adversely affected.

11 IT IS SO STIPULATED:

12 Dated:

AS YOU SOW

13 By: _____
14 Andrew Behar
15 Chief Executive Officer

16 Dated:

HORMEL FOODS CORPORATION

17 By: _____
18 Name Law J. Marco
19 Title VP & GC



20 Dated:

MEGAMEX FOODS, LLC

21 By: _____
22 Name JEFFREY R. FRANK
23 Title PRESIDENT & CEO

24 641823.1

25

26

27

28