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

CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG-13-677800
)
Plaintiff,) **[PROPOSED] CONSENT JUDGMENT**
) **AS TO ANNIE’S HOMEGROWN, INC.,**
v.) **AND ANNIE’S, INC.**
)
MONDELEZ INTERNATIONAL, INC., *et al.*,)
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Defendants.)
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1. INTRODUCTION

1.1 The Parties to this Consent Judgment are the Center For Environmental Health, a California non-profit corporation (“CEH”), and Annie’s Inc. and its affiliate Annie’s Homegrown, Inc. (together “Settling Defendant”). The Parties enter into this Consent Judgment to settle certain claims asserted by CEH against Settling Defendant as set forth in the operative complaint (“Complaint”) in the above-captioned matter. This Consent Judgment covers the lead content of cookies containing molasses, ginger, or both molasses and ginger (“Covered Products”) sold,

1 distributed, or offered for sale by Settling Defendant or that has been or will be sold or offered for
2 sale in the State of California.

3 1.2 On September 4, 2013, CEH provided a 60-day Notice of Violation of Proposition
4 65 to the California Attorney General, the District Attorneys of every county in California, the
5 City Attorneys of every California city with a population greater than 750,000 and to Settling
6 Defendant, alleging that Settling Defendant violated Proposition 65 by exposing persons to lead
7 and lead compounds (“Lead”) contained in Covered Products without first providing a clear and
8 reasonable Proposition 65 warning.

9 1.3 Each Settling Defendant is a corporation or other business entity that manufactures,
10 distributes, sells or offers for sale Covered Products that are sold in the State of California or has
11 done so in the past.

12 1.4 On May 1, 2013, CEH filed the Complaint in the above-captioned matter. On
13 December 6, 2013 each Settling Defendant was added to the case as a named defendant.

14 1.5 For purposes of this Consent Judgment only, CEH and Settling Defendant (the
15 “Parties”) stipulate that this Court has jurisdiction over the allegations of violations contained in
16 the Complaint and personal jurisdiction over Settling Defendant as to the acts alleged in the
17 Complaint, that venue is proper in the County of Alameda, and that this Court has jurisdiction to
18 enter this Consent Judgment as a full and final resolution of all claims which were or could have
19 been raised in the Complaint based on the facts alleged therein with respect to Covered Products
20 manufactured, distributed, and/or sold by Settling Defendant.

21 1.6 Nothing in this Consent Judgment is or shall be construed as an admission by the
22 Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with
23 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
24 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
25 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
26 other pending or future legal proceedings. This Consent Judgment is the product of negotiation
27 and compromise and is accepted by the Parties solely for purposes of settling, compromising, and
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1 resolving issues disputed in this Action.

2 **2. INJUNCTIVE RELIEF**

3 2.1 **Specification Compliance Date.** To the extent it has not already done so, no more
4 than thirty (30) days after the date of entry of this Consent Judgment, to the extent Settling
5 Defendant’s Covered Products are manufactured by or supplied by a third party, Settling
6 Defendant shall provide the reformulation specification set in Section 2.2 to each of such Covered
7 Products suppliers and shall instruct each such Covered Products supplier to provide it with
8 Covered Products that comply with the reformulation specification set forth in Section 2.2. If in
9 the future Settling Defendant’s Covered Products are manufactured by or supplied by a new third
10 party that it has not previously provided with instructions regarding the reformulation
11 specification set forth in Section 2.2, Settling Defendant shall provide the reformulation
12 specification set forth in Section 2.2 prior to placing an initial order for Covered Products and
13 instruct the new Covered Products supplier to provide it with Covered Products that comply with
14 the reformulation specification set forth in Section 2.2. Settling Defendant shall retain records of
15 communications sent to and received from suppliers that are related to the requirement of this
16 Section 2.1 for a period of three (3) years from the date of entry of this Consent Judgment (the
17 “Effective Date”).

18 2.2 **Reformulation of Covered Products.** As of the Effective Date, Settling
19 Defendant shall not purchase, manufacture, ship, sell or offer for sale Covered Products that will
20 be sold or offered for sale in California that contain a concentration of more than thirty (30) parts
21 per billion (“ppb”) Lead by weight (the “Reformulation Level”), such concentration to be
22 determined by use of a test performed by an accredited laboratory using inductively coupled
23 plasma mass spectrometry (ICP-MS) equipment with a level of detection of at least ten (10) ppb
24 that meets standard laboratory QA/QC requirements.

25 2.3 **Testing.** After the Effective Date, to ensure compliance with Section 2.2,
26 Defendant shall conduct random testing of Covered Products and take the follow-up actions
27 described in this section (“Validation Testing”).

28

1 2.3.1 Covered Products To Be Tested: The products to be tested shall be
2 selected at random from different production lots of the Covered Products that will be offered for
3 sale in California. Testing to assess compliance with the Reformulation Level (“Validation
4 Testing”) shall be based on testing of either: (a) an aggregate sample of an entire retail package of
5 a Covered Product; or (b) aggregate samples of not less than eight (8) ounces from a single
6 production lot of a Covered Product. At Settling Defendant’s option, a single sample of either (a)
7 or (b), above, or the average test results of up to three (3) samples from the aggregate samples of
8 either (a) or (b), above, can be utilized.

9 2.3.2 Frequency Of Testing: Following the Effective Date, Settling Defendant
10 shall conduct Validation Testing on the Covered Products selected as set forth in Section 2.3.1
11 pursuant to the Test Protocol¹ in the frequency set forth in this Section. The number of Validation
12 Tests performed during each calendar quarter starting on the Effective Date shall be based on the
13 number of production lots of Covered Products that are manufactured during each such calendar
14 quarter and that will be offered for sale in California.

15 2.3.2.1 If more than six (6) production lots of Covered Products that will be
16 offered for sale in California are manufactured in a given calendar quarter, Settling Defendant
17 shall conduct one Validation Test from each of up to six different production lots. In such a case,
18 Settling Defendant shall ensure maximum possible dispersion of the testing among different
19 Covered Products and different production lots of each Covered Product with no more than one
20 Validation Test per production lot as set forth in Section 2.3.1. If there are fewer than six (6)
21 production lots of Covered Products manufactured in a single calendar quarter that will be offered
22 for sale in California, then Settling Defendant shall only be required to conduct one Validation
23 Test per production lot manufactured in that calendar quarter, provided that Settling Defendant
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25 ¹ The Test Protocol as used herein is as follows: testing shall be performed by an accredited
26 laboratory using inductively coupled plasma mass spectrometry (ICP-MS) equipment with a level
27 of detection of at least ten (10) ppb that meets standard laboratory QA/QC requirements and using
28 sample preparation method as set out in FDA Elemental Analysis Manual section 4.7 or similar
for testing of lead in food.

1 conduct a minimum of three (3) Validation Tests in such calendar quarter. If there are less than
2 three (3) production lots manufactured in a particular calendar quarter, Settling Defendant shall
3 ensure maximum possible dispersion of the testing among different Covered Products and
4 different production lots of each Covered Product. If there are no Covered Products manufactured
5 in a given calendar quarter that will be offered for sale in California, Defendant is not required to
6 conduct Validation Testing in that calendar quarter.

7 2.3.2.2 In the event that the Validation Testing demonstrates eight (8)
8 calendar quarters of continuous compliance with the Reformulation Level, Settling Defendant may
9 send written notice to CEH and thereafter reduce the frequency of Validation Testing starting in
10 the calendar quarter following the provision of notice to CEH to up to three (3) tests per calendar
11 quarter. If there are fewer than three (3) production lots of Covered Products manufactured in a
12 single calendar quarter that will be offered for sale in California, then Settling Defendant shall
13 only be required to conduct one (1) Validation Test per production lot manufactured in that
14 calendar quarter. If there are no Covered Products manufactured in a given calendar quarter that
15 will be offered for sale in California, Defendant is not required to conduct Validation Testing in
16 that quarter.

17 2.3.2.3 In the event that the Validation Testing demonstrates an additional
18 eight (8) calendar quarters of continuous compliance with the Reformulation Level, Settling
19 Defendant may send written notice to CEH and thereafter shall no longer be required to conduct
20 the Validation Testing.

21 2.3.3 Covered Products That Exceed Reformulation Level: If the Validation
22 Testing results indicate that a production lot of a Covered Product exceeds the Reformulation
23 Level, Defendant shall: (a) stop selling or offering for sale in California all Covered Products from
24 the same production lot as that of the Covered Product that exceeded the Reformulation Level (the
25 “Non-Compliant Products”); (b) send instructions to any of the stores and/or customers that offer
26 the Non-Compliant Products for sale in California to cease offering the Non-Compliant Products
27 for sale in California and, for Non-Compliant Products offered for sale in California, to either
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1 return all of the Non-Compliant Products to Settling Defendant for destruction, or to directly
2 destroy such Non-Compliant Products; and (c) provide CEH with the test result and records and
3 correspondence documenting compliance with this Section. If there is a dispute over the
4 corrective action related to any Non-Compliant Products, the Parties shall meet and confer before
5 seeking any remedy in court.

6 2.3.4 The results, QA/QC and related documentation regarding the Validation
7 Testing performed pursuant to this Consent Judgment shall be retained by Defendant for three (3)
8 years and made available to CEH upon reasonable request.

9 2.3.5 The Parties agree that the Annie's Cinnamon Grahams and Annie's Honey
10 Grahams products do not contain actionable levels of Lead. Accordingly, Settling Defendant shall
11 not be obligated under this Section to conduct any testing on the Annie's Cinnamon Grahams and
12 Annie's Honey Grahams products.

13 2.4 **Good Faith Commitment to Pursue Further Lead Reduction.** Settling
14 Defendant shall continue to take, or cause to be taken, good faith and commercially reasonable
15 efforts to further reduce the Lead content of its Covered Products with a goal of Covered Products
16 having a consistent Lead content of seventeen (17) ppb or less. These efforts shall include, at a
17 minimum, efforts to further adjust recipes and formulas that will reduce Lead content in Covered
18 Products and attempts to secure Covered Product ingredients such as molasses and ginger with
19 lower Lead content. Within fifteen (15) days of the Effective Date, and annually thereafter for two
20 more years, Settling Defendant shall submit to CEH a written report of the activities it has
21 undertaken to effectuate its good faith commitment under this paragraph. If Settling Defendant
22 has test results demonstrating that all of its Covered Products have a consistent Lead content of
23 seventeen (17) ppb or less and it provides such documentation to CEH, or if CEH and Settling
24 Defendant otherwise agree in writing, then Settling Defendant need not submit any subsequent
25 annual report to CEH pursuant to this paragraph.

26 **3. ENFORCEMENT**

27 3.1 **Enforcement Procedures.** Prior to bringing any motion or order to show cause to
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1 enforce the terms of this Consent Judgment, a Party seeking to enforce the Consent Judgment shall
2 provide the violating party thirty (30) days advance written notice of the alleged violation. The
3 Parties shall meet and confer during such thirty (30) day period in an effort to try to reach
4 agreement on an appropriate cure for the alleged violation. After such thirty (30) day period, the
5 Party seeking to enforce may, by new action, motion or order to show cause before the Superior
6 Court of Alameda, seek to enforce the terms and conditions contained in this Consent Judgment.

7 **4. PAYMENTS**

8 4.1 **Payments by Settling Defendant.** Within five (5) days of the entry of this
9 Consent Judgment, Settling Defendant shall pay the total sum of \$42,000 as a settlement payment
10 as further set forth in this Section and on Exhibit A.

11 4.2 **Allocation of Payments.** The total settlement amount for Settling Defendant shall
12 be paid in four separate checks in the amounts specified on Exhibit A and delivered as set forth
13 below. Any failure by Settling Defendant to comply with the payment terms herein shall be
14 subject to a stipulated late fee in the amount of \$100 for each day after the delivery date the
15 payment is received. The late fees required under this Section shall be recoverable, together with
16 reasonable attorneys' fees, in an enforcement proceeding brought pursuant to Section 3 of this
17 Consent Judgment. The funds paid by Settling Defendant shall be allocated as set forth on Exhibit
18 A between the following categories and made payable as follows:

19 4.2.1 A civil penalty pursuant to Health & Safety Code § 25249.7(b). The civil
20 penalty payment shall be apportioned in accordance with Health & Safety Code § 25249.12 (25%
21 to CEH and 75% to the State of California's Office of Environmental Health Hazard Assessment
22 ("OEHHA")). Accordingly, the OEHHA portion of the civil penalty payment for the amount
23 designated for Settling Defendant on Exhibit A as "Civil Penalty OEHHA Portion" shall be made
24 payable to OEHHA and associated with taxpayer identification number 68-0284486. This
25 payment shall be delivered as follows:
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For United States Postal Service Delivery:
Attn: Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010, MS #19B
Sacramento, CA 95812-4010

For Non-United States Postal Service Delivery:
Attn: Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street, MS #19B
Sacramento, CA 95814

The CEH portion of the civil penalty payment for the amount designated for Settling Defendant on Exhibit A as “Civil Penalty CEH Portion” shall be made payable to the Center For Environmental Health and associated with taxpayer identification number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

4.2.2 A payment in lieu of civil penalty to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH shall use such funds to continue its work educating and protecting people from exposures to toxic chemicals, including heavy metals. In addition, as part of its Community Environmental Action and Justice Fund, CEH will use four percent of such funds to award grants to grassroots environmental justice groups working to educate and protect people from exposures to toxic chemicals. The method of selection of such groups can be found at the CEH web site at www.ceh.org/justicefund. The payment pursuant to this Section shall be made payable to the Center For Environmental Health and associated with taxpayer identification number 94-3251981.

4.2.3 A reimbursement of a portion of CEH’s reasonable attorneys’ fees and costs. The attorneys’ fees and cost reimbursement check shall be made payable to the Lexington Law Group and associated with taxpayer identification number 94-3317175. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

1 **5. MODIFICATION AND DISPUTE RESOLUTION**

2 5.1 **Modification.** This Consent Judgment may be modified from time to time by
3 express written agreement of the Parties, with the approval of the Court, or by an order of this
4 Court upon motion and in accordance with law.

5 5.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
6 shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
7 modify the Consent Judgment.

8 **6. CLAIMS COVERED AND RELEASE**

9 6.1 This Consent Judgment is a full, final and binding resolution between CEH on
10 behalf of itself and the public interest and Settling Defendant and their parents, subsidiaries,
11 affiliated entities that are under common ownership, directors, officers, employees, agents,
12 shareholders, successors, assigns, and attorneys (“Defendant Releasees”), and all entities other
13 than those listed in Exhibit B, to which Settling Defendant distributes or sells Covered Products,
14 including but not limited to distributors, wholesalers, customers, retailers, franchisees, licensors
15 and licensees (“Downstream Defendant Releasees”), of any violation of Proposition 65 based on
16 failure to warn about alleged exposure to Lead contained in Covered Products that were sold,
17 distributed or offered for sale by Settling Defendant prior to the Effective Date.

18 6.2 CEH, for itself, its agents, successors and assigns, releases, waives, and forever
19 discharges any and all claims against Settling Defendant, Defendant Releasees, and Downstream
20 Defendant Releasees arising from any violation of Proposition 65 or any other statutory or
21 common law claims that have been or could have been asserted by CEH individually or in the
22 public interest regarding the failure to warn about exposure to Lead arising in connection with
23 Covered Products manufactured, distributed or sold by Settling Defendant prior to the Effective
24 Date.

25 6.3 Compliance with the terms of this Consent Judgment by Settling Defendant and
26 Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant,
27 Defendant Releasees and Downstream Defendant Releasees with respect to any alleged failure to
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1 warn about Lead in Covered Products manufactured, distributed or sold by Settling Defendant
2 after the Effective Date.

3 **7. PROVISION OF NOTICE**

4 7.1 When CEH is entitled to receive any notice under this Consent Judgment, the
5 notice shall be sent by first class and electronic mail to:

6 Eric S. Somers
7 Lexington Law Group
8 503 Divisadero Street
9 San Francisco, CA 94117
esomers@lexlawgroup.com

10 7.2 When Settling Defendant is entitled to receive any notice under this Consent
11 Judgment, the notice shall be sent by first class and electronic mail to:

12 Primary Contact:

13 David Biderman
14 Perkins Coie LLP
15 1888 Century Park East, Suite 1700
Los Angeles, CA 90067
dbiderman@perkinscoie.com

16 Secondary Contact:

17 Trenton H. Norris
18 Arnold & Porter LLP
19 Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
trent.norris@aporter.com

20 7.3 Any Party may modify the person and/or address to whom the notice is to be sent
21 by sending the other Party notice by first class and electronic mail.

22 **8. COURT APPROVAL**

23 8.1 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
25 Motion for Approval of this Consent Judgment and Settling Defendant shall support approval of
26 such Motion.

27 8.2 If this Consent Judgment is not entered by the Court, it shall be of no force or effect

1 and shall not be introduced into evidence or otherwise used in any proceeding for any purpose.

2 **9. GOVERNING LAW AND CONSTRUCTION**

3 9.1 The terms of this Consent Judgment shall be governed by the laws of the State of
4 California.

5 **10. ATTORNEYS' FEES**

6 10.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
7 Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs
8 unless the unsuccessful Party has acted with substantial justification. For purposes of this Consent
9 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
10 Discovery Act of 1986, Code of Civil Procedure §§2016.010, *et seq.*

11 10.2 Notwithstanding Section 11.1, a Party who prevails in a contested enforcement
12 action brought pursuant to Section 3 may seek an award of attorneys' fees pursuant to Code of
13 Civil Procedure §1021.5 against a Party that acted with substantial justification. The Party
14 seeking such an award shall bear the burden of meeting all of the elements of §1021.5, and this
15 provision shall not be construed as altering any procedural or substantive requirements for
16 obtaining such an award.

17 10.3 Nothing in this Section 11 shall preclude a party from seeking an award of
18 sanctions pursuant to law.

19 **11. ENTIRE AGREEMENT**

20 11.1 This Consent Judgment contains the sole and entire agreement and understanding
21 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
22 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
23 and therein. There are no warranties, representations, or other agreements between the Parties
24 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
25 other than those specifically referred to in this Consent Judgment have been made by any Party
26 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
27 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
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1 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
2 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
3 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
4 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
5 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
6 whether or not similar, nor shall such waiver constitute a continuing waiver.

7 **12. RETENTION OF JURISDICTION**

8 12.1 This Court shall retain jurisdiction of this matter to implement or modify the
9 Consent Judgment.

10 **13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

11 13.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
12 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
13 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

14 **14. NO EFFECT ON OTHER SETTLEMENTS**

15 14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
16 against an entity that is not Settling Defendant on terms that are different than those contained in
17 this Consent Judgment.

18 **15. EXECUTION IN COUNTERPARTS**

19 15.1 The stipulations to this Consent Judgment may be executed in counterparts and by
20 means of facsimile or portable document format (pdf), which taken together shall be deemed to
21 constitute one document.

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

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Dated: _____


Judge of the Superior Court

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IT IS SO STIPULATED:

Dated: <u>May 19</u> , 2015	CENTER FOR ENVIRONMENTAL HEALTH  _____ Signature <u>CHARLIE PIZZANO</u> _____ Printed Name <u>Associate Director</u> _____ Title
Dated: _____, 2015	ANNIE'S, INC. _____ Signature _____ Printed Name _____ Title

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IT IS SO STIPULATED:

Dated: _____, 2015	CENTER FOR ENVIRONMENTAL HEALTH _____ Signature _____ Printed Name _____ Title
Dated: <u>June 10</u> , 2015	ANNIE'S, INC.  _____ Signature <u>Christopher A. Rausch</u> Printed Name <u>Asst. Secretary</u> Title

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Dated: June 10, 2015

ANNIE'S HOMEGROWN, INC.

Christopher A. Rausch

Signature

Christopher A. Rausch

Printed Name

Asst. Secretary

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EXHIBIT A
Settling Defendant

Settling Defendant: Annie's, Inc. and its affiliate Annie's Homegrown, Inc.

1. Defendant's Settlement Payment Dates, Amounts and Allocation:

Total Payment	\$ 42,000
Total Penalty	\$ 5,500
Civil Penalty to OEHHA (75%)	\$ 4,125
Civil Penalty to CEH (25%)	\$ 1,375
Payment in Lieu of Civil Penalty	\$ 8,250
Attorneys' Fees and Costs	\$ 28,250

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**EXHIBIT B
(LIST OF ENTITIES NOT SUBJECT
TO DOWNSTREAM DEFENDANT RELEASE)**

Barbara's Bakery, Inc.

Borzillo Bakery Inc.

Commercial Bakeries Corp.

Fantasy Cookie Corporation

Fehr Foods, Inc.

J & J Snack Foods Corp. of California

J & J Snack Foods Sales Corp.

Lovin Oven, LLC

Mondelez International, Inc.

Ralcorp Holdings, Inc. (ConAgra)

Sweetzel's Foods, LLC

Sweetzel, Inc.

Three J's Distributing, Inc.

Topco Associates, LLC

Trader Joe's Company

The Weetabix Company, Inc.

United States Bakery