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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

STACY SCIORTINO, *et al.*,

Plaintiffs,

v.

PEPSICO, INC.,

Defendant.

Case No. 14-CV-478-EMC, *consolidated for pretrial purposes with Case Nos. 14-713, 14-1099, 14-1105, 14-1192, 14-1193, 14-1316, 14-2023*

CLASS ACTION SETTLEMENT AGREEMENT

1 This Class Action Settlement Agreement (the “Settlement Agreement”) is made and entered
2 into by and between Plaintiff Mary Hall (“Plaintiff”) on behalf of herself and the Settlement Class
3 defined herein, and Defendant PepsiCo, Inc. (“PepsiCo”) to settle, resolve, and discharge the
4 Released Claims, as defined below, in consideration for and subject to the promises, terms, and
5 conditions contained herein, subject to Court approval pursuant to Rule 23 of the Federal Rules of
6 Civil Procedure.

7 **RECITALS**

8 WHEREAS, on January 23, 2014, the Center for Environmental Health (“CEH”) filed the
9 first lawsuit on behalf of all California consumers that raised Proposition 65 challenges to the levels
10 of 4-methylimidazole (“4-MEI”) in certain PepsiCo beverages and sought civil penalties as well as
11 injunctive relief. *Ctr. for Env'tl. Health v. Pepsi Beverages Co.*, No. RG14-11020 (Alameda Super.
12 Ct. Jan. 23, 2014) (hereinafter the “CEH action”).

13 WHEREAS, several plaintiffs filed nine separate putative class action lawsuits in federal
14 courts throughout California, each alleging that certain PepsiCo beverages contained 4-MEI at levels
15 that violated California’s Safe Drinking Water and Toxic Enforcement Act of 1986, Health and
16 Safety Code section 25249.6 *et seq.* (“Proposition 65”) and that PepsiCo should have warned
17 consumers about the presence of 4-MEI in its products.

18 WHEREAS, eight of the putative class actions were consolidated into one action and assigned
19 to Judge Edward M. Chen, and the ninth (*Riva v. PepsiCo, Inc.*, No. 14-cv-2020-EMC) was
20 dismissed with prejudice.

21 WHEREAS, the plaintiffs in these consolidated actions, captioned *Sciortino v. PepsiCo, Inc.*,
22 Case No. 14-cv-00478-EMC (N.D. Cal.), filed a Consolidated Amended Complaint (“CAC”) in the
23 Northern District of California on August 25, 2014, alleging claims on behalf of a putative statewide
24 class of California consumers who purchased PepsiCo beverages after January 23, 2010, based on
25 violations of Proposition 65, the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*;
26 “UCL”), and the Consumers Legal Remedies Act (Cal. Civ. Code § 1750 *et seq.*; “CLRA”), and
27 seeking civil penalties, damages, restitution, injunctive relief, and attorneys’ fees and costs.

28 WHEREAS, on October 24, 2014, PepsiCo filed a motion to dismiss, which plaintiffs

1 opposed, and which was granted in part and denied in part by the Court on June 5, 2015.

2 WHEREAS, on September 17, 2015, CEH and PepsiCo finalized a binding consent judgment,
3 resolving the *CEH* action, in which PepsiCo, while maintaining that it fully complied with
4 Proposition 65 at all relevant times, agreed to the following injunctive relief, effective on or after
5 January 1, 2016: (1) ensuring its caramel coloring suppliers meet certain 4-MEI levels in products
6 shipped for sale in California; (2) ensuring the 4-MEI levels in PepsiCo products shipped for sale in
7 California will not exceed the level of 100 parts per billion; and (3) conducting testing of its products
8 pursuant to an agreed protocol.

9 WHEREAS, following the Court's order on PepsiCo's Motion to Dismiss and preliminary
10 discovery, the parties met in person to discuss PepsiCo's compliance with Proposition 65, including
11 data that PepsiCo maintains establishes its compliance throughout the relevant time period. The
12 parties were assisted in these discussions by their respective experts, and had several follow-up
13 settlement discussions.

14 WHEREAS, following these substantive in-person discussions, the parties engaged in arms-
15 length settlement negotiations supervised by Judge Ronald M. Sabraw (Ret.) serving as mediator.

16 WHEREAS, throughout their settlement discussions, the parties engaged in an extensive
17 evaluation of the relevant facts and law, including PepsiCo's stated compliance with Proposition 65,
18 the issues surrounding consumers' consumption of 4-MEI, as well as the settlement of the *CEH*
19 action, and the parties carefully considered the risks and uncertainties of continued litigation and all
20 factors bearing on the merits of settlement.

21 **NOW THEREFORE**, subject to the final approval of the Court as required herein and by
22 applicable law and rules, the parties hereby agree, in consideration of the mutual promises and
23 covenants contained herein, and for other good and valuable consideration, the sufficiency of which
24 is hereby acknowledged, that any and all claims for injunctive and/or declaratory relief of any kind or
25 character, at law or in equity, based on or relating in any way to the alleged presence of, or labeling
26 for, 4-MEI and/or caramel color in any PepsiCo product shall be settled, compromised and forever
27 released upon the following terms and conditions.

28

TERMS AND CONDITIONS OF THE SETTLEMENT

1. DEFINITIONS

As used herein, the following terms have the meanings set forth below:

1.1 “Action” means the consolidated action *Sciortino v. PepsiCo, Inc.*, No. 3:14-cv-00478-EMC (N.D. Cal.), which includes and encompasses the following lawsuits:

- *Cortina v. PepsiCo, Inc.*, No. 14-cv-00168-H-JMA (S.D. Cal. Jan. 23, 2014);
 - *Langley v. PepsiCo, Inc.*, No. 14-cv-00713-EMC (N.D. Cal. Feb. 14, 2014);
 - *Aourout v. PepsiCo, Inc.*, No. 14-cv-01289-RGK (C.D. Cal. Feb. 20, 2014);
 - *Ree v. PepsiCo, Inc.*, No. 14-cv-00328-DOC-AN (C.D. Cal. Mar. 4, 2014);
 - *Hall v. PepsiCo, Inc.*, No. 14-cv-01099-EMC (N.D. Cal. Mar. 7, 2014);
 - *Ibusuki v. PepsiCo, Inc.*, No. 14-cv-01724-MWF-PJW (C.D. Cal. Mar. 7, 2014);
- and
- *Granados v. PepsiCo, Inc.*, No. 14-cv-01917-BRO (C.D. Cal. Mar. 13, 2014).

1.2 “Attorneys’ Fees and Expenses” means such funds as may be awarded by the Court to Class Counsel to compensate Class Counsel for their fees and expenses in connection with the Action, as described in Paragraphs 11.1-11.6 of this Settlement Agreement.

1.3 “Class Counsel” means Plaintiff’s Interim Co-Lead Counsel in the Action, the law firms of Pearson, Simon & Warshaw, LLP, and Glancy, Prongay & Murray LLP.

1.4 “Class Period” means January 23, 2010, until the Effective Date defined in Paragraph 1.7.

1.5 “Court” means the United States District Court for the Northern District of California, Judge Edward M. Chen.

1.6 “Defense Counsel” means PepsiCo’s counsel of record, Gibson, Dunn & Crutcher LLP and Arnold & Porter LLP.

1.7 “Effective Date” means the date by which the Judgment entered pursuant to this Settlement Agreement becomes Final.

1.8 “Fairness Hearing” means a hearing scheduled by the Court to determine the final fairness, reasonableness, and adequacy of the settlement embodied in this Settlement Agreement,

1 provided that it grants preliminary approval.

2 1.9 “Final” means, with respect to any judicial ruling or order, that: (1) if no appeal,
3 motion for reargument, motion for rehearing, petition for writ of certiorari, or other writ has been
4 filed, the time has expired to file such an appeal, motion for reargument, motion for rehearing,
5 petition for writ of certiorari, or other writ; or (2) if an appeal, motion for reargument, motion for
6 rehearing, petition for a writ of certiorari, or other writ has been filed, the judicial ruling or order has
7 been affirmed with no further right of review, or such appeal, motion, petition, or writ has been
8 denied or dismissed with no further right of review. Any proceeding or order, or any appeal or
9 petition for a writ of certiorari pertaining solely to any application for attorneys’ fees or expenses will
10 not in any way delay or preclude the Judgment from becoming Final.

11 1.10 “Final Judgment and Order” means the order finally approving the terms of this
12 Settlement Agreement and a separate judgment to be entered by the Court, pursuant to Federal Rule
13 of Civil Procedure 58(a), dismissing the Action with prejudice, substantially in the form attached
14 hereto as Exhibit “A.”

15 1.11 “Parties” means Plaintiff and Defendant PepsiCo.

16 1.12 “Plaintiff” means the named plaintiff in this Action, Mary Hall.

17 1.13 “Preliminary Approval Order” means an order, providing for, among other things,
18 preliminary approval of the Settlement.

19 1.14 “Products” or “Covered Products” means carbonated soft drinks containing caramel
20 coloring manufactured, distributed, and/or sold by PepsiCo and its subsidiaries (including, but not
21 limited to, Pepsi, Pepsi One, and Diet Pepsi) both prior to and following the Effective Date. Each
22 flavor or variety of carbonated soft drink containing caramel color shall be considered an Individual
23 Covered Product. Group I shall mean those Individual Covered Products that are not reduced calorie,
24 while Group II shall mean those Individual Covered Products that are reduced calorie.

25 1.15 “Release” means the release and waiver set forth in Section 8 of this Settlement
26 Agreement.

27 1.16 “Released Claims” means any and all claims for injunctive and/or declaratory relief of
28 any kind or character—whether matured or unmatured, now known or unknown, liquidated or

1 unliquidated, preliminary or final, at law or in equity, whether before a local, state, or federal court,
2 or state or federal administrative agency, commission, arbitrator(s) or otherwise—that the Settlement
3 Class Members now have or may have, from the beginning of the Class Period up until and including
4 the Effective Date, based on or relating in any way to the alleged presence of, or labeling for, 4-MEI
5 and/or caramel color in any Products.

6 1.17 “Released Persons” means PepsiCo, its parents, divisions, affiliates, subsidiary
7 companies, joint venturers, directors, officers, employees, and attorneys, and each entity to which
8 they directly or indirectly distribute or sell Products, including but not limited to distributors,
9 wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees.

10 1.18 “Sampling Methodology” means the testing of representative samples of each of the
11 ten units of Individual Covered Products for purposes of demonstrating compliance with the Target
12 Level as set forth in Paragraph 1.26. This testing must be taken daily over no less than a ten-day (10)
13 period from such Covered Products produced at locations that supply such Covered Products in the
14 United States or purchased from ten (10) different locations spread over at least five different zip
15 codes nationwide.

16 1.19 “Settlement” means the settlement set forth and reflected in this Settlement
17 Agreement.

18 1.20 “Settlement Agreement” means this agreement and its Exhibit, attached hereto and
19 incorporated herein, including all subsequent amendments agreed to in writing by the Parties and any
20 exhibits to such amendments.

21 1.21 “Settlement Class” has the meaning set forth in Paragraph 4.3 of this Settlement
22 Agreement.

23 1.22 “Settlement Class Member(s)” means any person who falls within the definition of the
24 Settlement Class set forth in Paragraph 4.3.

25 1.23 “Settling Parties” means, collectively, PepsiCo, Plaintiff, and all Settlement Class
26 Members and Released Persons.

27 1.24 “Shipped for sale in the United States” means Covered Products that PepsiCo
28 manufactures and either directly ships in the United States for sale in the United States, or sells to a

1 distributor who PepsiCo knows will sell the Covered Products to consumers in the United States.

2 1.25 “Target Date” means one-hundred and eighty (180) days from the Effective Date.
3 Upon the Target Date, the level of 4-MEI in the Covered Products shipped for sale in the United
4 States will be no more than the level of 100 parts per billion, measured by the weighted average
5 pursuant to the protocol described in Paragraph 5.1.3.

6 1.26 “Target Level” means 100 parts per billion, measured by the weighted average
7 pursuant to the protocol described in Paragraph 5.1.3.

8 1.27 The plural of any defined term includes the singular, and the singular of any defined
9 term includes the plural, as the case may be.

10 **2. DENIAL OF WRONGDOING AND LIABILITY**

11 2.1 PepsiCo denies the material factual allegations and legal claims asserted by the
12 Plaintiff in the Action, including any and all charges of wrongdoing or liability arising out of any of
13 the conduct, statements, acts or omissions alleged, or that could have been alleged, in the Action.
14 Similarly, this Settlement Agreement provides for no admission of wrongdoing or liability by any of
15 the Released Persons. This Settlement is entered into solely to eliminate the uncertainties, burdens,
16 and expenses of protracted litigation.

17 2.2 The Parties further recognize that:

18 2.2.1 4-MEI is formed as a byproduct when certain foods, beverages, and
19 ingredients, such as the caramel color used as an ingredient in the Products, are heated or otherwise
20 processed; and

21 2.2.2 Variations in levels of 4-MEI formation are due to a wide variety of factors in
22 the raw material and may vary significantly from batch to batch.

23 2.3 PepsiCo further notes that:

24 2.3.1 As of the date of this Settlement Agreement, the U.S. Food & Drug
25 Administration’s current position on 4-MEI is as follows: “Based on the available information, FDA
26 has no reason to believe that there is any immediate or short-term danger presented by 4-MEI at the
27 levels expected in food from the use of caramel coloring.”; and

28 2.3.2 As of the date of this Settlement Agreement, the European Food Safety

1 Authority (EFSA) has concluded that it has no concerns about Europeans being exposed to 4-MEI
2 from the use of caramel coloring in food.

3 **3. THE BENEFITS OF SETTLEMENT**

4 3.1 Class Counsel believes that the proposed settlement set forth in this Settlement
5 Agreement confers substantial benefits upon the Settlement Class.

6 3.2 Class Counsel and Plaintiff recognize and acknowledge the expense and length of
7 continued proceedings necessary to prosecute the Action against Defendant through trial and appeals.

8 3.3 Class Counsel also has taken into account the uncertain outcome and the risk of any
9 litigation, especially in complex actions such as this Action, as well as the difficulties and delays
10 inherent in such litigation. Class Counsel is mindful of possible defenses related to the claims
11 asserted in the Action under both Rule 23(b)(2) and Rule 23(b)(3). Based on their evaluation of all of
12 these factors, Plaintiff and Class Counsel have determined that the Settlement Agreement is in the
13 best interests of Plaintiff and the Settlement Class.

14 3.4 PepsiCo further asserts that: (1) provisional approval of a Rule 23(b)(3) damages
15 class would not be appropriate given the likely difficulty in maintaining a damages class under
16 Rule 23(b)(3); (2) were Plaintiff to seek certification of a Rule 23(b)(3) damages class, she would
17 face challenges that include, but are not limited to, the difficulties caused by the fact that individual
18 consumption of PepsiCo products varies, the difficulty in establishing a violation of Proposition 65,
19 the difficulty of proving economic injury on a class-wide basis, and the difficulties created by the
20 absence of any affirmative statements by PepsiCo on the Products containing 4-MEI during the Class
21 Period; and (3) Plaintiff cannot establish any statutory violation because PepsiCo complies with
22 Proposition 65.

23 **4. SETTLEMENT CLASS CERTIFICATION**

24 4.1 For purposes of settlement only, the Parties agree to seek provisional certification of
25 the Settlement Class, pursuant to Federal Rule of Civil Procedure 23(b)(2).

26 4.2 The Parties further agree that the Court should make preliminary findings and enter
27 the Preliminary Approval Order granting provisional certification of the Settlement Class subject to
28 the final findings and approval in the Final Judgment and Order, and appointing Plaintiff as the

1 representative of the Settlement Class and Class Counsel as counsel for the Settlement Class.

2 4.3 For purposes of the provisional certification, and consistent with the Amended
3 Consolidated Complaint Plaintiff shall seek leave to file concurrently with her motion for preliminary
4 approval of the Settlement Agreement, the Settlement Class shall be defined as follows:

5 All individuals in the United States and all U.S. territories (including, but not
6 limited to, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam,
7 American Samoa, the Northern Mariana Islands, and the other territories and
8 possessions of the United States), who purchased one or more of the Products
from January 23, 2010, until the date of the preliminary approval of the
settlement of this litigation.

9 4.4 Excluded from the Settlement Class are: (a) persons or entities who purchased the
10 Products for the purpose of resale or distribution; (b) persons who are employees, directors, officers,
11 and agents of Defendant or its parent or subsidiary companies; (c) governmental entities; and (d) any
12 judicial officer hearing this Action, as well as their immediate family members and employees.

13 4.5 PepsiCo does not consent to certification of the Settlement Class (or to the propriety of
14 class treatment) for any purpose other than to effectuate the settlement of this Action. PepsiCo's
15 agreement to provisional certification does not constitute an admission of wrongdoing, fault, liability,
16 or damage of any kind to Plaintiff or any of the provisional Settlement Class Members.

17 4.6 If this Settlement Agreement is terminated pursuant to its terms, disapproved by any
18 court (including any appellate court), and/or not consummated for any reason, or the Effective Date
19 for any reason does not occur, the order certifying the Settlement Class for purposes of effectuating
20 the Settlement, and all preliminary and/or final findings regarding that class certification order, shall
21 be automatically vacated upon notice of the same to the Court, the Action shall proceed as though the
22 Settlement Class had never been certified pursuant to this Settlement Agreement and such findings
23 had never been made, and the Action shall return to the procedural posture on December 21, 2015, in
24 accordance with this paragraph. Neither party nor counsel shall refer to or invoke the vacated
25 findings and/or order relating to class settlement or Rule 23 of the Federal Rules of Civil Procedure if
26 this Settlement Agreement is not consummated and the Action is later litigated and contested by
27 Defendant under Rule 23 of the Federal Rules of Civil Procedure.

1 **5. SETTLEMENT CONSIDERATION AND INJUNCTIVE RELIEF**

2 5.1 PepsiCo will provide the Settlement Class with mandatory, non-opt-out, nationwide
3 injunctive relief pursuant to Federal Rule of Civil Procedure 23(b)(2) by way of modification of the
4 ingredients for the Products as set forth in this Settlement Agreement. In consideration for the
5 releases provided in this Settlement Agreement, PepsiCo will implement the following injunctive
6 relief:

7 5.1.1 Specification Levels: On or before May 5, 2016, PepsiCo shall ensure that the
8 specifications it provides to its supplier(s) of caramel coloring require that, in order for any individual
9 shipment to be accepted by PepsiCo for use in the Covered Products shipped for sale in the United
10 States on or after July 5, 2016, the level of 4-MEI in the caramel coloring must fall within a minimum
11 and maximum range such that the midpoint of that range shall be a level of 4-MEI that—taking into
12 account the caramel color content in the formulation of each Individual Covered Product—results in
13 a 4-MEI concentration of no more than 81 parts per billion for all Covered Products, measured by the
14 weighted average pursuant to the protocol described below in Paragraph 5.1.3. PepsiCo shall
15 continue its program of research, development, and implementation of technologies and methods
16 intended to reduce the presence of 4-MEI in the Covered Products shipped for sale in the United
17 States.

18 5.1.2 Target Level and Target Date: PepsiCo shall ensure that the level of 4-MEI in
19 its Covered Products shipped for sale in the United States on or after the Target Date is no more than
20 the level of 100 parts per billion, measured by the weighted average pursuant to the protocol
21 described below in Paragraph 5.1.3. PepsiCo shall not be considered to have achieved the Target
22 Level if, as of the Target Date:

- 23 a) The weighted average (pursuant to the protocol described in Paragraph
24 5.1.3(e)) of the 4-MEI in Group I of the Covered Products exceeds the
25 Target Level; or
26 b) The weighted average (pursuant to the protocol described in Paragraph
27 5.1.3(e)) of the 4-MEI in Group II of the Covered Products exceeds the
28 Target Level; or

- c) The average of the 4-MEI concentration in any Individual Covered Product, as determined in accordance with the protocol described in Paragraph 5.1.3, exceeds the Target Level by more than 15 percent; or
- d) The 4-MEI concentration in any single unit of any Individual Covered Product exceeds the Target Level by more than 50 percent.

5.1.3 Testing:

- a) Testing for 4-MEI shall be performed using High-Performance Liquid Chromatography coupled with Tandem Mass Spectrometry (HPLC-MS/MS). To compensate for matrix effects, the test method shall use deuterated 4-MEI surrogate, solid phase extraction (SPE) to isolate 4-MEI and the deuterated surrogate from the carbonated soft drink matrix, and standard addition calibration. The parties agree that the test methodology described in “Simultaneous Quantitation of 2-Acetyl-4-tetrahydroxybutylimidazole, 2- and 4-Methylimidazoles, and 5-Hydroxymethylfurfural in Beverages by Ultrahigh-Performance Liquid Chromatography-Tandem Mass Spectrometry” by Jinyuan Wang and William C. Schnute (60 J. Agric. Food Chem. 917-921 (2012)) is satisfactory under this Settlement Agreement.
- b) Representative samples of each of the ten units of Individual Covered Products to be tested for purposes of demonstrating compliance with the Target Level must be taken pursuant to the Sampling Methodology.
- c) The weighted average for all Covered Products is to be calculated by the following formula: Multiply the unweighted average of the 4-MEI concentration (established by the Sampling Methodology) of all Individual Covered Products within a Group by that Group’s fraction of total sales volume (net of returns) for both Groups to be included in the weighted average of the Covered Products, and thereafter sum the two adjusted concentrations for both.

- 1 d) The weighted average for a Group of Covered Products is to be
2 calculated by the following formula: Multiply the average of the 4-
3 MEI concentration (established by the Sampling Methodology) of each
4 Individual Covered Product within a Group by that Individual Covered
5 Product's fraction of the total sales volume (net of returns) for all
6 Individual Covered Products within the Group, and thereafter sum the
7 adjusted concentrations for each Individual Covered Product.
- 8 e) The average for an Individual Covered Product is to be calculated by
9 the following formula: Sum the 4-MEI concentration (established by
10 the Sampling Methodology) of each sample of the Individual Covered
11 Product and divide by the number of samples.
- 12 f) For purposes of determining the concentration in a single unit of any
13 Individual Covered Product, the testing protocol set forth in Paragraph
14 5.1.3 shall be used on one single-size can or bottle in a case containing
15 24 such units, with the remaining 23 units in such case retained for no
16 less than 60 days following communication of the test result to the
17 opposing Party so that, should a dispute arise concerning the validity of
18 the testing, the opposing Party, on request, may test up to 12 of such
19 units at its own expense.
- 20 g) For the purposes of computing weighted averages, sales volume for
21 each Group and for total sales volume for the Covered Products shall
22 be based upon the most current 52-week IRI InfoScan data (in dollars,
23 net of returns) for the United States available to PepsiCo as of the date
24 of sampling.
- 25 h) All specifications, formulations, and test results of 4-MEI
26 concentrations, including sales volumes of any or all of the Covered
27 Products, shall be considered confidential information that is
28 proprietary to PepsiCo and not subject to public disclosure.

1 i) Testing of Covered Products to demonstrate compliance with this
2 Paragraph shall be conducted and/or supervised by either (i) a third
3 party under contract to and paid by PepsiCo, or (ii) PepsiCo itself under
4 a protocol previously agreed upon by the Parties.

5 j) A weighted average of the samples that is at or below the Target Level
6 with a 95% confidence level, i.e., $p < 0.05$, using stratified random
7 sampling, shall be deemed in compliance with the terms of this
8 Settlement Agreement.

9 5.1.4 Extension of Target Date: PepsiCo shall endeavor in good faith, using
10 commercially and technologically reasonable efforts to achieve the Target Level in the Products
11 shipped for sale in the United States by the Target Date. However, at least 60 days prior to the Target
12 Date, PepsiCo may initiate a meet and confer session with Class Counsel and Plaintiff regarding a
13 possible extension of the Target Date. Upon timely application to the Court prior to the passing of
14 the Target Date, and for good cause shown based on PepsiCo's diligence and good faith efforts as
15 well as reported progress to date, this Settlement Agreement shall be then modified to extend the
16 Target Date by no more than two (2) months.

17 5.2 Nothing in this Settlement Agreement shall prevent PepsiCo from implementing the
18 changes referenced in Paragraph 5.1 (or other product changes) prior to the Effective Date. The
19 terms and requirements of the injunctive relief described in Paragraph 5.1 shall expire on the earliest
20 of the following dates: (a) five (5) years after the Effective Date; or (b) the date upon which there are
21 changes to any state and/or federal statute, regulation, policy, and/or code in the future that would
22 impose other, further, different and/or conflicting obligations or duties on PepsiCo with respect to the
23 Products.

24 5.3 Plaintiff and Class Counsel agree, on behalf of themselves and all Settlement Class
25 Members, that this Settlement Agreement does not preclude PepsiCo from making further changes to
26 its products: (a) that PepsiCo reasonably believes are necessary to comply with any statute,
27 regulation, or other law of any kind; and/or (b) that are necessitated by product and/or ingredient
28 changes, and/or that are necessary to ensure that PepsiCo provides accurate descriptions of its

1 products.

2 5.4 Within 60 days following the Target Date, PepsiCo shall provide Class Counsel with a
3 verification that PepsiCo has achieved the Target Level for the Products by the Target Date. During
4 the remaining term of this Settlement Agreement (as provided in Paragraph 5.2), Class Counsel shall
5 have the right to request two (2) additional verifications that PepsiCo has complied with its
6 obligations to meet the Target Level for the Products.

7 **6. JURISDICTION**

8 6.1 The Parties consent to exclusive jurisdiction and venue for any claim relating to this
9 Settlement Agreement (including all claims for enforcement of this Settlement Agreement and/or all
10 claims arising out of a breach of this Settlement Agreement) as well as any future claims by any
11 Settlement Class Member relating in any way to the Released Claims, in the U.S. District Court for
12 the Northern District of California, before the Hon. Edward M. Chen.

13 **7. SUBMISSION OF THE SETTLEMENT TO THE COURT FOR REVIEW AND**
14 **APPROVAL**

15 7.1 As soon as practicable but no later than fourteen (14) days following the signing of
16 this Settlement Agreement, Class Counsel shall apply to the Court for entry of the Preliminary
17 Approval Order. The Preliminary Approval Order shall, among other things:

18 7.1.1 Find that the requirements for provisional certification of the Settlement Class
19 have been satisfied, appointing Plaintiff as the representative of the provisional Settlement Class and
20 Class Counsel as counsel for the provisional Settlement Class;

21 7.1.2 Find that the Court will retain jurisdiction over all claims based on or relating
22 in any way to the alleged presence of, or labeling for, 4-MEI and/or caramel color in any PepsiCo
23 product, including those not covered under the Settlement Agreement;

24 7.1.3 Schedule the Fairness Hearing on a date ordered by the Court, provided in the
25 Preliminary Approval Order, and in compliance with applicable law, to determine whether the
26 Settlement should be approved as fair, reasonable, adequate, and to determine whether a Final
27 Judgment and Order should be entered dismissing the Action with prejudice;

28 7.1.4 Provide that all Settlement Class Members will be bound by the Final

1 Judgment and Order dismissing the Action with prejudice;

2 7.1.5 Establish dates by which the Parties shall file and serve all papers in support of
3 the application for final approval of the Settlement; and

4 7.1.6 Pending the Fairness Hearing, stay all proceedings in the Action, other than the
5 proceedings necessary to carry out or enforce the terms and conditions of this Settlement Agreement
6 and Preliminary Approval Order.

7 7.2 At the Fairness Hearing, the Parties shall seek to obtain from the Court the Final
8 Judgment and Order in the form substantially similar to Exhibit "A." The Final Judgment and Order
9 shall, among other things:

10 7.2.1 Find that the Court has personal jurisdiction over all Settlement Class
11 Members, that the Court has subject matter jurisdiction over the claims asserted in the Action, and
12 that the venue is proper;

13 7.2.2 Finally approve this Settlement Agreement and the Settlement pursuant to Rule
14 23 of the Federal Rules of Civil Procedure;

15 7.2.3 Certify the Settlement Class under Federal Rule of Civil Procedure 23(b)(2) for
16 purposes of settlement only;

17 7.2.4 Find that notice to the Rule 23(b)(2) class is not necessary;

18 7.2.5 Incorporate the Releases set forth in this Settlement Agreement and make the
19 Releases effective as of the Effective Date;

20 7.2.6 Issue the injunctive relief described in Paragraph 5 of this Settlement
21 Agreement;

22 7.2.7 Authorize the Parties to implement the terms of the Settlement;

23 7.2.8 Dismiss the Action with prejudice and enter a separate judgment pursuant to
24 Rule 58 of the Federal Rules of Civil Procedure;

25 7.2.9 Retain exclusive jurisdiction over the Parties and anyone giving or receiving a
26 release under the Settlement for all matters relating to the Settlement, including the administration,
27 interpretation, effectuation or enforcement of the Settlement. The Parties and Settlement Class
28 Members and their counsel submit to the jurisdiction of the Court for the purposes of implementing

1 and enforcing the Settlement, as well as for consideration of any future claims not covered under the
2 Settlement Agreement as provided in Paragraph 6.1; and

3 7.2.10 Find that there are inherent risks in certifying a Rule 23(b)(3) damages class
4 and that were Plaintiff to seek certification of a Rule 23(b)(3) damages class, she would face
5 challenges that include, but are not limited to, the difficulties caused by individual variances in the
6 consumption of PepsiCo products, proving a violation of Proposition 65 on a class-wide basis,
7 proving economic injury on a class-wide basis, and the absence of any affirmative statements by
8 PepsiCo on the Product labels about 4-MEI during the Class Period.

9 **8. RELEASES AND DISMISSAL OF ACTION**

10 8.1 Releases are a material part of the settlement for PepsiCo. The Releases will be in
11 favor of PepsiCo and its parents, divisions, subsidiaries, affiliates, directors, officers, employees, and
12 attorneys, and each entity to whom they directly or indirectly distribute or sell Products, including but
13 not limited to distributors, wholesalers, customers, retailers, franchisees, cooperative members,
14 licensors, and licensees (the “Released Persons”). The Released Claims shall be construed as broadly
15 as possible to effect complete finality over this Action involving claims based on or relating in any
16 way to the alleged presence of, or labeling for, 4-MEI and/or caramel color in any Products.

17 8.2 Upon the Effective Date, Plaintiff will be deemed to have, and by operation of the
18 Final Judgment and Order will have fully, finally, and forever released any and all claims, including
19 personal injury and damages, known and unknown, as well as provided a waiver under California
20 Civil Code Section 1542. Plaintiff is forever enjoined from taking any action seeking injunctive
21 and/or declaratory relief against PepsiCo based on the Released Claims.

22 8.3 Upon the Effective Date, the Settlement Class Members will be deemed to have, and
23 by operation of the Final Judgment and Order will have fully, finally, and forever released any and all
24 claims for injunctive and/or declaratory relief of any kind or character, at law or equity, known or
25 unknown, preliminary or final, under Federal Rule of Civil Procedure 23(b)(2) or any other federal or
26 state law or rule of procedure, from the beginning of the Class Period until and including the
27 Effective Date, based on or relating in any way to the alleged presence of, or labeling for, 4-MEI
28 and/or caramel color in any Products.

1 8.3.1 Settlement Class Members will not release claims for personal injury, wrongful
2 death, or damages, and for that reason no notice or opt-out right is required.

3 8.3.2 Settlement Class Members are forever enjoined from taking any action seeking
4 injunctive and/or declaratory relief against PepsiCo based on the Released Claims.

5 8.4 PepsiCo will release, waive, and discharge, on the Effective Date, all legal claims,
6 causes of action, cross-claims, or counter-claims against Plaintiff, the Settlement Class Members,
7 Class Counsel, and the attorneys of record in any of the actions consolidated in the Action, arising
8 from or related to the Products and claims at issue in the Action, or in any of the actions consolidated
9 into the Action.

10 8.5 After entering into this Settlement Agreement, the Parties may discover facts other
11 than, different from, or in addition to, those that they know or believe to be true with respect to the
12 claims released by this Settlement Agreement, but they intend to release fully, finally and forever the
13 Released Claims, and in furtherance of such intention, the Releases will remain in effect
14 notwithstanding the discovery or existence of any such additional or different facts. With respect to
15 the Released Claims, Plaintiff (on behalf of herself and the Settlement Class Members), through her
16 counsel, expressly, knowingly, and voluntarily waives any and all provisions, rights, and benefits
17 conferred by California Civil Code Section 1542 and any statute, rule, and legal doctrine similar,
18 comparable, or equivalent to California Civil Code Section 1542, which reads as follows:

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

23 8.6 Notwithstanding the preceding paragraph, Settlement Class Members are not releasing
24 any known or unknown claims for personal injury, wrongful death, or damages. The Parties
25 acknowledge, and by operation of law shall be deemed to have acknowledged, that the waiver of the
26 provisions of Section 1542 of the California Civil Code (and any similar State laws) with respect to
27 the claims released by this Settlement Agreement was separately bargained for and was a key element
28 of the Settlement.

 8.7 For the avoidance of doubt, the mutual releases above in this section include only

1 claims related to the Products.

2 8.8 By operation of the Final Judgment and Order, the Action will be dismissed with
3 prejudice.

4 8.9 Upon the Effective Date: (a) this Settlement Agreement shall be the exclusive remedy
5 for any and all Released Claims of Plaintiff and Settlement Class Members; and (b) Plaintiff and
6 Settlement Class Members stipulate to be and shall be permanently barred and enjoined by Court
7 order from initiating, asserting, or prosecuting against Released Persons in any federal or state court
8 or tribunal any and all Released Claims.

9 **9. ACKNOWLEDGEMENT AND STATEMENT OF NO PENDING CLAIMS**

10 9.1 As inducement to PepsiCo to enter into this Agreement, Class Counsel, including the
11 undersigned law firms of Pearson, Simon & Warshaw, LLP, and Glancy, Prongay & Murray LLP,
12 represent and warrant that they do not presently have clients who are intending to advance any other
13 charges, lawsuits, or claims of any kind against the Released Persons based on the same or similar
14 issues as those presented in the Action, or that otherwise relate to the alleged presence of, or labeling
15 for, 4-MEI and/or caramel color in any PepsiCo product. Further, Class Counsel represent and
16 warrant that they are aware of no person or entity (other than Plaintiff) who has currently expressed
17 intent to assert or file claims based on the Released Claims or that otherwise relate to the alleged
18 presence of, or labeling for, 4-MEI and/or caramel color in any PepsiCo product.

19 **10. NOTICE**

20 10.1 The Parties also agree that notice would be cost prohibitive. Further, pursuant to
21 Federal Rule of Civil Procedure 23(c)(2), notice is discretionary for a settlement class certified under
22 Federal Rule of Civil Procedure 23(b)(2) that provides for injunctive relief only and includes no
23 damages release. *See, e.g., Lilly v. Jamba Juice Co.*, No. 13-cv-02998-JST, 2015 WL 1248027, at *9
24 (N.D. Cal. Mar. 18, 2015); *Kim v. Space Pencil, Inc.*, No. 11-cv-03796-LB, 2012 WL 5948951, at *4
25 (N.D. Cal. Nov. 28, 2012).

26 10.2 In the event that there is any order requiring notice (either by the Court or by any other
27 court of competent jurisdiction), each Party shall have the unilateral option to withdraw from this
28 Settlement Agreement, without prejudice, within thirty (30) days of such order. Upon withdrawal,

1 the Settlement proposed herein shall become null and void and shall have no force or effect, the
2 Parties shall not be bound by this Settlement Agreement, and the Parties will be returned to their
3 respective positions existing on December 21, 2015.

4 10.3 PepsiCo shall serve notice of the Settlement Agreement that meets the requirements of
5 28 U.S.C. § 1715, on the appropriate federal and state officials no later than ten (10) days following
6 the filing of this Settlement Agreement with the Court.

7 **11. ATTORNEYS' FEES AND EXPENSES**

8 11.1 In accord with Federal Rule of Civil Procedure 23(h) and relevant case law, Plaintiff
9 will petition the Court for Attorneys' Fees and Expenses in the amount of \$500,000. PepsiCo agrees
10 to pay the amount of Attorneys' Fees and Expenses (if any) determined by the Court. The amount
11 ordered by the Court (if any) shall be the sole monetary obligation paid by PepsiCo pursuant to this
12 Settlement Agreement.

13 11.2 Upon a Court order so providing, any attorneys' fees and costs awarded to Class
14 Counsel by the Court shall be paid by PepsiCo within the later of (a) thirty (30) calendar days of the
15 Effective Date, or (b) ten (10) business days after Class Counsel, following the Effective Date, has
16 transmitted to PepsiCo instructions for payment.

17 11.3 PepsiCo shall bear its own attorneys' fees and costs.

18 11.4 Class Counsel shall have the sole and absolute discretion to allocate the Attorneys'
19 Fees and Expenses amongst Class Counsel and any other attorneys for Plaintiff. PepsiCo shall have
20 no liability or other responsibility for allocation of any such Attorneys' Fees and Expenses awarded,
21 and, in the event that any dispute arises amongst Class Counsel and any other attorneys for Plaintiff
22 relating to the allocation of fees, Class Counsel agree to hold PepsiCo harmless from any and all such
23 liabilities, costs, and expenses of such dispute.

24 11.5 The Parties agree that Plaintiff may apply to the Court for a monetary payment (not to
25 exceed \$4,000) for Plaintiff's services as class representative, and the Parties agree that the decision
26 whether or not to award any such payment, and the amount of that payment, rests in the exclusive
27 discretion of the Court. PepsiCo agrees to pay the amount (if any) determined by the Court. Plaintiff
28 understands and acknowledges that she may receive no monetary payment, and her agreement to the

1 Settlement is not conditioned on the possibility of receiving monetary payment. Any payment
2 ordered by the Court shall be payable by PepsiCo to Class Counsel by delivery of check(s) or by
3 ACH wire transfer(s) within the later of (a) ten (10) business days after the Effective Date, or (b) ten
4 (10) business days after Class Counsel, following the Effective Date, has transmitted to PepsiCo
5 instructions for payment.

6 11.6 The procedure for and the allowance or disallowance by the Court of any application
7 for attorneys' fees, costs, expenses, and/or reimbursement to be paid to Class Counsel, and the
8 procedure for any payment to Plaintiff, are not part of the settlement of the Released Claims as set
9 forth in this Settlement Agreement, and are to be considered by the Court separately from the Court's
10 consideration of the fairness, reasonableness, and adequacy of the settlement of the Released Claims
11 as set forth in this Settlement Agreement. Any such separate order, finding, ruling, holding, or
12 proceeding relating to any such applications for Attorneys' Fees and Expenses and/or payment to
13 Plaintiff, or any separate appeal from any separate order, finding, ruling, holding, or proceeding
14 relating to them or reversal or modification of them, shall not operate to terminate or cancel this
15 Settlement Agreement or otherwise affect or delay the finality of the Final Judgment and Order
16 approving the Settlement. The Parties did not negotiate the Attorneys' Fees and Expenses to be
17 sought by Class Counsel and/or the procedure for requesting a payment to Plaintiff until after
18 reaching an agreement upon the relief provided to the Settlement Class.

19 **12. MODIFICATION OR TERMINATION OF THE SETTLEMENT**

20 12.1 This Settlement Agreement may be amended or modified only by a written instrument
21 signed by or on behalf of all Parties or their respective successors-in-interest and approval of the
22 Court; provided, however that, after entry of the Final Judgment and Order, the Parties may by
23 written agreement effect such amendments, modifications, or expansions of this Settlement
24 Agreement and its implementing documents (including all exhibits hereto) without further notice to
25 the Settlement Class or approval by the Court if such changes are consistent with the Court's Final
26 Judgment and Order and do not materially alter, reduce, or limit the rights of Settlement Class
27 Members under this Settlement Agreement.

28 12.2 This Settlement Agreement and any Exhibits attached hereto constitute the entire

1 agreement among the Parties, and no representations, warranties, or inducements have been made to
2 any Party concerning this Settlement Agreement or its Exhibits other than the representations,
3 warranties, and covenants covered and memorialized in such documents. Except as otherwise
4 provided herein, the Parties will bear their own respective fees and costs.

5 12.3 In the event the terms or conditions of this Settlement Agreement are modified by any
6 court, either party in its sole discretion to be exercised within thirty (30) days after such modification
7 may declare this Settlement Agreement null and void. For purposes of this paragraph, modifications
8 include but are not limited to any modifications to the definitions of the Settlement Class, Settlement
9 Class Members, Released Persons, or Released Claims, any modifications to the terms of the
10 settlement consideration described in Paragraphs 5.1-5.4, and/or any requirement of notice to the
11 Settlement Class.

12 12.4 In the event that a party exercises his/her/its option to withdraw from and terminate
13 this Settlement Agreement, then the Settlement proposed herein shall become null and void and shall
14 have no force or effect, the Parties shall not be bound by this Settlement Agreement, and the Parties
15 will be returned to their respective positions existing on December 21, 2015.

16 12.5 If this Settlement Agreement is not approved by the Court or the Settlement
17 Agreement is terminated or fails to become effective in accordance with the terms of this Settlement
18 Agreement, the Parties will be restored to their respective positions in the Action on December 21,
19 2015. In such event, the terms and provisions of this Settlement Agreement and the preliminary term
20 sheet will have no further force and effect with respect to the Parties and will not be used in this
21 Action or in any other proceeding for any purpose, and any Judgment or order entered by the Court in
22 accordance with the terms of this Settlement Agreement will be treated as vacated.

23 12.6 Any application by Class Counsel for attorneys' fees, costs, and expenses is to be
24 considered by the Court separately and apart from its consideration of the fairness, reasonableness,
25 and adequacy of the Settlement, and any order or proceeding relating to the award of fees and
26 expenses, or any appeal of any order or proceeding relating to the award of Attorneys' Fees and
27 Expenses, or any appeal of any order relating thereto, shall not be grounds, or operate, to terminate or
28 cancel this Settlement Agreement.

1 **13. MISCELLANEOUS PROVISIONS**

2 13.1 The Parties acknowledge that it is their intent to consummate this Settlement
3 Agreement, and they agree to cooperate to the extent reasonably necessary to effectuate and
4 implement all terms and conditions of this Settlement Agreement and to exercise their best efforts to
5 accomplish the foregoing terms and conditions of this Settlement Agreement.

6 13.2 The Parties intend the Settlement Agreement to be a final and complete resolution of
7 all disputes between them with respect to the Action. The Settlement Agreement compromises
8 claims that are contested and will not be deemed an admission by PepsiCo or Plaintiff as to the merits
9 of any claim or defense.

10 13.3 The Parties agree that the consideration provided to the Settlement Class and the other
11 terms of the Settlement Agreement were negotiated at arm's length, in good faith by the Parties, and
12 reflect a settlement that was reached voluntarily, after consultation with competent legal counsel, and
13 with the assistance of an independent, neutral mediator, former California state court Judge Ronald
14 M. Sabraw. This Settlement Agreement is entered into solely to eliminate the uncertainties, burdens,
15 and expenses of protracted litigation.

16 13.4 Neither this Settlement Agreement, nor any act performed or document executed
17 pursuant to or in furtherance of this Settlement Agreement is, or may be deemed to be, or may be
18 used as, an admission or evidence of the validity of any Released Claims, or of any wrongdoing or
19 liability of PepsiCo or any other Released Person; or is or may be deemed to be or may be used as an
20 admission or evidence of, any presumption, concession, or admission by a Party of the truth of any
21 fact alleged by Plaintiff or defense asserted by PepsiCo, or any fault or omission of PepsiCo or any
22 other Released Person in any civil, criminal, or administrative proceeding in any court, administrative
23 agency or other tribunal; or is or may be deemed to be or may be offered or received by or against
24 any Party as evidence of a presumption, concession, or admission with respect to a decision by any
25 court regarding the certification of a class, or construed as an admission or concession by Plaintiff,
26 the Settlement Class, or PepsiCo that the consideration to be given in this Settlement Agreement
27 represents the relief that could or would have been obtained through trial in the Action.

28 13.5 Any party to this Action or any other Released Person may file this Settlement

1 Agreement in any action that may be brought against it in order to support any defense or
2 counterclaim, including without limitation those based on principles of res judicata, collateral
3 estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim
4 preclusion or issue preclusion or similar defense or counterclaim.

5 13.6 All agreements made and orders entered during the course of the Action relating to the
6 confidentiality of information will survive this Settlement Agreement.

7 13.7 Any and all Exhibits to this Settlement Agreement, which are identified in the
8 Settlement Agreement and attached hereto, are material and integral parts hereof and are fully
9 incorporated herein by this reference.

10 13.8 This Settlement Agreement and its accompanying Exhibits set forth the entire
11 understanding of the Parties. No change or termination of this Settlement Agreement shall be
12 effective unless in writing and signed by Class Counsel and Defense Counsel. No extrinsic evidence
13 or parol evidence shall be used to interpret this Settlement Agreement. Any and all previous
14 agreements and understandings between or among the Parties regarding the subject matter of this
15 Settlement Agreement, whether written or oral, are superseded and hereby revoked by this Settlement
16 Agreement. The Parties expressly agree that the terms and conditions of this Settlement Agreement
17 will control over any other written or oral agreements.

18 13.9 Each Counsel or other person executing this Settlement Agreement or any of its
19 Exhibits on behalf of any Party hereby warrants that such person has the full authority to do so. Class
20 Counsel, on behalf of the Settlement Class, is expressly authorized by Plaintiff to take all appropriate
21 action required or permitted to be taken by the Settlement Class pursuant to this Settlement
22 Agreement to effectuate its terms, and is expressly authorized to enter into any modifications or
23 amendments to this Settlement Agreement on behalf of the Settlement Class that Class Counsel
24 deems appropriate.

25 13.10 All of the Parties warrant and represent that they are agreeing to the terms of this
26 Settlement Agreement based upon the legal advice of their respective attorneys, that they have been
27 afforded the opportunity to discuss the contents of this Settlement Agreement with their attorneys and
28 that the terms and conditions of this document are fully understood and voluntarily accepted.

1 13.11 This Settlement Agreement may be executed in one or more counterparts. All
2 executed counterparts and each of them will be deemed to be one and the same instrument. A
3 complete set of original counterparts will be filed with the Court.

4 13.12 This Settlement Agreement will be binding upon, and inure to the benefit of, the
5 successors and assigns of the Parties.

6 13.13 None of the Parties, or their respective counsel, shall be deemed the drafter of this
7 Settlement Agreement or its Exhibits for purposes of construing the provisions thereof. The language
8 in all parts of this Settlement Agreement and its Exhibits will be interpreted according to its fair
9 meaning and will not be interpreted for or against any of the Parties as the drafter thereof.

10 13.14 Except in connection with any legal proceeding or court filing, Plaintiff and Class
11 Counsel will not issue any press release or communicate with the media regarding the Settlement or
12 the Action without the prior approval of PepsiCo. However, if Plaintiff or Class Counsel receive an
13 inquiry from any third party (excluding Settlement Class Members who identify themselves as such),
14 they may decline to comment, refer to the complaint, make accurate statements regarding the status
15 of the settlement approval process, or defer to the Court file.

16 13.15 The provisions of the confidentiality agreement entered into with respect to the
17 mediation process concerning this matter are waived for the limited purpose of permitting the Parties
18 to confirm that they participated in the mediation, the identity of the mediator, and that the mediation
19 process was successful.

20 IN WITNESS WHEREOF, the Parties have executed and caused this Settlement Agreement
21 to be executed, dated as of April 19, 2016.

22 By: Mary Hall
23 PLAINIFF MARY HALL

24
25 By: _____
26 *On Behalf of Defendant PepsiCo, Inc.*

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PEARSON, SIMON & WARSHAW, LLP

By: _____
DANIEL L. WARSHAW

Interim Co-Lead Counsel for Plaintiff and the Proposed Class

GLANCY PRONGAY & MURRAY LLP

By: _____
MARC L. GODINO

Interim Co-Lead Counsel for Plaintiff and the Proposed Class

GIBSON, DUNN & CRUTCHER LLP

By:  _____
CHRISTOPHER CHORBA

On Behalf of Defendant PepsiCo, Inc.

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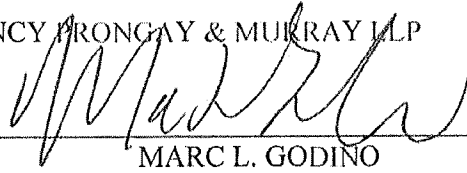
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PEARSON, SIMON & WARSHAW, LLP

By: 
DANIEL L. WARSHAW

Interim Co-Lead Counsel for Plaintiff and the Proposed Class

GLANCY PRONGAY & MURRAY LLP

By: 
MARC L. GODINO

Interim Co-Lead Counsel for Plaintiff and the Proposed Class

GIBSON, DUNN & CRUTCHER LLP

By: _____
CHRISTOPHER CHORBA

On Behalf of Defendant PepsiCo, Inc.

102054610.28

EXHIBIT A

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

STACY SCIORTINO, *et al.*,

Plaintiffs,

v.

PEPSICO, INC.,

Defendant.

Case No. 14-CV-478-EMC, *consolidated for pretrial purposes with Case Nos. 14-713, 14-1099, 14-1105, 14-1192, 14-1193, 14-1316, 14-2023*

**[PROPOSED] ORDER GRANTING
FINAL APPROVAL TO CLASS ACTION
SETTLEMENT**

1 The Court has considered the Class Action Settlement Agreement (“Settlement Agreement”),
2 dated April __, 2016, the Parties’ motion for an order finally approving the Settlement Agreement,
3 the record in this Action, the arguments and recommendations made by counsel, and the requirements
4 of the law. The Court finds and orders as follows:

5 **I. FINAL APPROVAL OF THE SETTLEMENT AGREEMENT**

6 1. The Settlement Agreement is approved under Rule 23 of the Federal Rules of Civil
7 Procedure. The Court finds that the Settlement Agreement and the Settlement it incorporates appear
8 fair, reasonable, and adequate, and its terms are within the range of reasonableness. The Settlement
9 Agreement was entered into at arm’s-length by experienced counsel after extensive negotiations
10 spanning months, including with the assistance of a third-party mediator, the Hon. Ronald M. Sabraw
11 (Ret.). The Court finds that the Settlement Agreement is not the result of collusion.

12 **II. DEFINED TERMS**

13 2. For purposes of this Final Judgment and Order (“Order”), the Court adopts all defined
14 terms as set forth in the Settlement Agreement.

15 **III. NO ADMISSIONS**

16 3. Neither this Order nor the Settlement Agreement constitutes or shall be used as an
17 admission of wrongdoing by any of the Released Persons or to establish a violation of any law or
18 duty, nor shall it constitute an admission that the 4-methylimidazole (“4-MEI”) in the Covered
19 Products (or in other foods or beverages) poses any risk to human health or requires any disclosure or
20 warning to consumers.

21 **IV. JURISDICTION**

22 4. For purposes of the Settlement of the Action, the Court finds it has subject matter and
23 personal jurisdiction over the Parties, including all Settlement Class Members, and venue is proper.

24 **V. CLASS CERTIFICATION OF RULE 23(B)(2) CLASS FOR SETTLEMENT**
25 **PURPOSES ONLY**

26 5. The Court finds and concludes that, for the purposes of approving this Settlement
27 only, the proposed Rule 23(b)(2) Settlement Class meets the requirements for certification under Rule
28 23 of the Federal Rules of Civil Procedure: (a) the Settlement Class is so numerous that joinder of all

1 members is impracticable; (b) there are questions of law or fact common to the Settlement Class;
2 (c) the claims or defenses of Plaintiff are typical of the claims or defenses of the Settlement Class;
3 (d) Plaintiff and Class Counsel will fairly and adequately protect the interests of the Settlement Class
4 because Plaintiff has no interests antagonistic to the Settlement Class, and has retained counsel who
5 are experienced and competent to prosecute this matter on behalf of the Settlement Class; and (e) the
6 Defendant has acted on grounds that apply generally to the Settlement Class, so that final injunctive
7 relief is appropriate respecting the Settlement Class as a whole.

8 6. The Settlement Agreement was reached after extensive investigation and motion
9 practice in the Action, and was the result of protracted negotiations conducted by the Parties, over the
10 course of several months, including with the assistance of a mediator, the Hon. Ronald M. Sabraw
11 (Ret.). Plaintiff and Class Counsel maintain that the Action and the claims asserted therein are
12 meritorious and that Plaintiff and the Class would have prevailed at trial. Defendant denies the
13 material factual allegations and legal claims asserted by Plaintiff in this Action, maintains that a class
14 would not be certifiable under any Rule, and that Plaintiff would not prevail at trial. Notwithstanding
15 the foregoing, the Parties have agreed to settle the Action pursuant to the provisions of the Settlement
16 Agreement, after considering, among other things: (a) the substantial benefits to Plaintiff and the
17 Settlement Class under the terms of the Settlement Agreement; (b) the uncertainty of being able to
18 prevail at trial; (c) the uncertainty relating to Defendant's defenses and the expense of additional
19 motion practice in connection therewith; (d) the issues relating to proving damages on an individual
20 Class Member basis; (e) the attendant risks of litigation, especially in complex actions such as this, as
21 well as the difficulties and delays inherent in such litigation; and (f) the desirability of consummating
22 the Settlement promptly in order to provide effective relief to Plaintiff and the Settlement Class.

23 7. The Court accordingly certifies, for settlement purposes only, a Class under Rule
24 23(b)(2), consisting of all individuals in the United States and all U.S. territories (including, but not
25 limited to, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the
26 Northern Mariana Islands, and the other territories and possessions of the United States), who
27 purchased one or more of the Covered Products from January 23, 2010, until the date of the
28 preliminary approval of the settlement of this litigation. Excluded from the Class are: (a) persons or

1 entities who purchased the Covered Products for the purpose of resale or distribution; (b) persons
2 who are employees, directors, officers, and agents of Defendant or its parent or subsidiary companies;
3 (c) governmental entities; and (d) any judicial officer hearing this Action, as well as their immediate
4 family members and employees.

5 8. Additionally, the Court finds that there are inherent risks in certifying a Rule 23(b)(3)
6 damages class and that were Plaintiff to seek certification of a Rule 23(b)(3) damages class, she
7 would face challenges that include, but are not limited to, the difficulties caused by individual
8 variances in the consumption of PepsiCo products, proving a violation of Proposition 65 on a class-
9 wide basis, proving economic injury on a class-wide basis, and the absence of any affirmative
10 statements by PepsiCo on the Product labels about 4-MEI during the Class Period.

11 VI. NOTICE

12 9. Because the provision of notice is discretionary for a settlement class certified under
13 Rule 23(b)(2) and because Settlement Class Members are not releasing claims for personal injury,
14 wrongful death, or damages, no notice is required for the Class. *See, e.g., Lilly v. Jamba Juice Co.*,
15 No. 13-cv-02998-JST, 2015 WL 1248027, at *9 (N.D. Cal. Mar. 18, 2015); *Kim v. Space Pencil, Inc.*,
16 No. 11-cv-03796-LB, 2012 WL 5948951, at *4 (N.D. Cal. Nov. 28, 2012).

17 VII. CLAIMS COVERED AND RELEASES

18 10. This Order constitutes a full, final and binding resolution between Plaintiff on behalf
19 of herself and the Settlement Class Members and PepsiCo, and its parents, subsidiaries, affiliates,
20 joint venturers, directors, officers, employees, and attorneys and each entity to whom they directly or
21 indirectly distribute or sell the Covered Products, including but not limited to distributors,
22 wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees
23 (together, "Released Persons") of any claims based on or relating in any way to the alleged presence
24 of, or labeling for, 4-MEI and/or caramel color in any Covered Products that could have been brought
25 prior to the Effective Date. This Release shall be applied to the maximum extent permitted by law.

26 11. Upon the Effective Date and by operation of this Order, Plaintiff will fully, finally,
27 and forever release any and all claims, including personal injury and damages, known and unknown,
28 as well as provide a waiver under California Civil Code Section 1542. Plaintiff is forever enjoined

1 from taking any action seeking injunctive and/or declaratory relief against PepsiCo based on the
2 Released Claims.

3 12. Upon the Effective Date and by operation of this Order, the Settlement Class Members
4 will fully, finally, and forever release any and all claims for injunctive and/or declaratory relief of any
5 kind or character, at law or equity, known or unknown, preliminary or final, under Federal Rule of
6 Civil Procedure 23(b)(2) or any other federal or state law or rule of procedure, from the beginning of
7 the Class Period until and including the Effective Date, based on or relating in any way to the alleged
8 presence of, or labeling for, 4-MEI and/or caramel color in any Covered Products. Settlement Class
9 Members do not release claims for personal injury, wrongful death, or damages.

10 13. Upon the Effective Date and by operation of this Order, PepsiCo will release, waive,
11 and discharge all legal claims, causes of action, cross-claims, or counter-claims against Plaintiff, the
12 Settlement Class Members, Class Counsel, the attorneys of record in any of the actions consolidated
13 in the Action, arising from or related to the Covered Products and claims at issue in the Action or in
14 any of the actions consolidated into the Action.

15 14. Compliance with the terms of this Order, including the Target Levels, resolves any
16 issue during the Class Period concerning compliance by the Released Persons with any law relating
17 in any way to the alleged presence of, or labeling for, 4-MEI and/or caramel color in any Covered
18 Products. The Settlement Agreement and this Order shall be the exclusive remedy for any and all
19 Released Claims of Plaintiff and Settlement Class Members. Accordingly, Settlement Class
20 Members shall be forever enjoined by this Order from initiating, asserting, or prosecuting against
21 Released Persons in any federal or state court or tribunal any and all Released Claims.

22 **VIII. INJUNCTIVE RELIEF**

23 15. Specification Levels. On or before May 5, 2016, PepsiCo shall ensure that the
24 specifications it provides to its supplier(s) of caramel coloring require that, in order for any individual
25 shipment to be accepted by PepsiCo for use in the Covered Products shipped for sale in the United
26 States on or after July 5, 2016, the level of 4-MEI in the caramel coloring must fall within a minimum
27 and maximum range such that the midpoint of that range shall be a level of 4-MEI that—taking into
28 account the caramel color content in the formulation of each Individual Covered Product—results in

1 a 4-MEI concentration of no more than 81 parts per billion for all Covered Products, measured by the
2 weighted average pursuant to the protocol described below in paragraph 17. PepsiCo shall continue
3 its program of research, development, and implementation of technologies and methods intended to
4 reduce the presence of 4-MEI in the Covered Products shipped for sale in the United States.

5 16. Target Level and Target Date. Specifically, PepsiCo shall ensure that the level of
6 4-MEI in its Covered Products shipped for sale in the United States on or after the Target Date is no
7 more than the level of 100 parts per billion, measured by the weighted average pursuant to the
8 protocol described below in paragraph 17. PepsiCo shall not be considered to have achieved the
9 Target Level if, as of the Target Date:

10 (a) The weighted average (pursuant to the protocol described in paragraph 17(e))
11 of the 4-MEI in Group I of the Covered Products exceeds the Target Level; or

12 (b) The weighted average (pursuant to the protocol described in paragraph 17(e))
13 of the 4-MEI in Group II of the Covered Products exceeds the Target Level; or

14 (c) The average of the 4-MEI concentration in any Individual Covered Product, as
15 determined in accordance with the protocol described in paragraph 17, exceeds the Target
16 Level by more than 15 percent; or

17 (d) The 4-MEI concentration in any single unit of any Individual Covered Product
18 exceeds the Target Level by more than 50 percent.

19 17. Testing.

20 (a) Testing for 4-MEI shall be performed using High-Performance Liquid
21 Chromatography coupled with Tandem Mass Spectrometry (HPLC-MS/MS). To compensate
22 for matrix effects, the test method shall use deuterated 4-MEI surrogate, solid phase extraction
23 (SPE) to isolate 4-MEI and the deuterated surrogate from the carbonated soft drink matrix,
24 and standard addition calibration. PepsiCo shall utilize the test methodology described in
25 “Simultaneous Quantitation of 2-Acetyl-4-tetrahydroxybutylimidazole, 2- and
26 4-Methylimidazoles, and 5-Hydroxymethylfurfural in Beverages by Ultrahigh-Performance
27 Liquid Chromatography-Tandem Mass Spectrometry” by Jinyuan Wang and William C.
28 Schnute (60 J. Agric. Food Chem. 917-921 (2012)).

1 (b) Representative samples of each of the ten units of Individual Covered Products
2 to be tested for purposes of demonstrating compliance with the Target Level shall be taken
3 pursuant to the Sampling Methodology.

4 (c) The weighted average for all Covered Products shall be calculated by the
5 following formula: Multiply the unweighted average of the 4-MEI concentration (established
6 by the Sampling Methodology) of all Individual Covered Products within a Group by that
7 Group's fraction of total sales volume (net of returns) for both Groups to be included in the
8 weighted average of the Covered Products, and thereafter sum the two adjusted concentrations
9 for both.

10 (d) The weighted average for a Group of Covered Products shall be calculated by
11 the following formula: Multiply the average of the 4-MEI concentration (established by the
12 Sampling Methodology) of each Individual Covered Product within a Group by that
13 Individual Covered Product's fraction of the total sales volume (net of returns) for all
14 Individual Covered Products within the Group, and thereafter sum the adjusted concentrations
15 for each Individual Covered Product.

16 (e) The average for an Individual Covered Product shall be calculated by the
17 following formula: Sum the 4-MEI concentration (established by the Sampling Methodology)
18 of each sample of the Individual Covered Product and divide by the number of samples.

19 (f) For purposes of determining the concentration in a single unit of any
20 Individual Covered Product, the testing protocol set forth in this paragraph 17 shall be used on
21 one single-size can or bottle in a case containing 24 such units, with the remaining 23 units in
22 such case retained for no less than 60 days following communication of the test result to the
23 opposing Party so that, should a dispute arise concerning the validity of the testing, the
24 opposing Party, on request, may test up to 12 of such units at its own expense.

25 (g) For the purposes of computing weighted averages, sales volume for each
26 Group and for total sales volume for the Covered Products shall be based upon the most
27 current 52-week IRI InfoScan data (in dollars, net of returns) for the United States available to
28 PepsiCo as of the date of sampling.

1 (h) All specifications, formulations, and test results of 4-MEI concentrations,
2 including sales volumes of any or all of the Covered Products, shall be considered
3 confidential information that is proprietary to PepsiCo and not subject to public disclosure.

4 (i) Testing of Covered Products to demonstrate compliance with this Paragraph
5 shall be conducted and/or supervised by either (i) a third party under contract to and paid by
6 PepsiCo, or (ii) PepsiCo itself under a protocol previously agreed upon by the Parties.

7 (j) A weighted average of the samples that is at or below the Target Level with a
8 95% confidence level, i.e., $p < 0.05$, using stratified random sampling, shall be deemed in
9 compliance with the terms of this Order.

10 18. Extension of Target Date. PepsiCo shall endeavor in good faith, using commercially
11 and technologically reasonable efforts to achieve the Target Level in the Covered Products shipped
12 for sale in the United States by the Target Date. However, at least 60 days prior to the Target Date,
13 PepsiCo may initiate a meet and confer session with Class Counsel and Plaintiff regarding a possible
14 extension of the Target Date. Upon timely application to the Court prior to the passing of the Target
15 Date, and for good cause shown based on PepsiCo's diligence and good faith efforts as well as
16 reported progress to date, the Settlement Agreement shall be then modified to extend the Target Date
17 by no more than 2 months.

18 19. Duration of Injunction. Nothing in this Order shall prevent PepsiCo from
19 implementing the changes referenced in paragraphs 15-17 of this Order (or other product changes)
20 prior to the Effective Date. The terms and requirements of the injunctive relief described in
21 paragraphs 15-17 of this Order shall expire on the earliest of the following dates: (a) five (5) years
22 after the Effective Date; or (b) the date upon which there are changes to any state and/or federal
23 statute, regulation, policy, and/or code in the future that would impose other, further, different and/or
24 conflicting obligations or duties on PepsiCo with respect to the Covered Products.

25 20. Additional Changes to Covered Products. This Order shall not preclude PepsiCo from
26 making further changes to the Covered Products: (a) that PepsiCo reasonably believes are necessary
27 to comply with any statute, regulation, or other law of any kind; and/or (b) that are necessitated by
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1 product and/or ingredient changes, and/or that are necessary to ensure that PepsiCo provides accurate
2 descriptions of its products.

3 21. Verification. Within 60 days following the Target Date, PepsiCo shall provide Class
4 Counsel with a verification that PepsiCo has achieved the Target Level for the Covered Products by
5 the Target Date. During the remaining term of this injunction as provided in Paragraph 19, Class
6 Counsel shall have the right to request two (2) additional verifications that PepsiCo has complied
7 with its obligations to meet the Target Level for the Covered Products.

8 **IX. ATTORNEYS' FEES AND EXPENSES**

9 22. The Court's decision regarding the payment of attorneys' fees and expenses to Class
10 Counsel is addressed in a separate order.

11 **X. AUTHORIZATION TO PARTIES TO IMPLEMENT AGREEMENT AND**
12 **MODIFICATIONS OF AGREEMENT**

13 23. By this Order, the Parties are hereby authorized to implement the terms of the
14 Settlement Agreement. After the date of entry of this Order, the Parties may by written agreement
15 effect such amendments, modifications, or expansions of the Settlement Agreement and its
16 implementing documents (including all exhibits thereto) without further notice to the Settlement
17 Class or approval by the Court if such changes are consistent with terms of this Order and do not
18 materially alter, reduce, or limit the rights of Settlement Class Members under the Settlement
19 Agreement.

20 **XI. RETENTION OF JURISDICTION**

21 24. The Court shall retain jurisdiction over any claim relating to the Settlement Agreement
22 (including all claims for enforcement of the Settlement Agreement and/or all claims arising out of a
23 breach of the Settlement Agreement) as well as any future claims by any Settlement Class Member
24 relating in any way to the Released Claims.

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1 **XII. FINAL JUDGMENT AND DISMISSAL WITH PREJUDICE**

2 25. By operation of this Order, this Action is hereby dismissed with prejudice. A separate
3 judgment shall be entered pursuant to Rule 58 of the Federal Rules of Civil Procedure.

4 **IT IS SO ORDERED.**

5
6 DATED: _____, 2016

The Honorable Edward M. Chen
UNITED STATES DISTRICT JUDGE