

SETTLEMENT AGREEMENT & RELEASE

This Settlement Agreement and Release (“Agreement”) is between the Center for Environmental Health (“CEH”) and Dancing Deer Baking Company, LLC, successor in interest to Dancing Deer Baking Company, Inc. (“Dancing Deer”). CEH and Dancing Deer are referred to collectively as the “Parties” and individually as a “Party.”

1. INTRODUCTION

1.1 On March 7, 2014, CEH provided a 60-day Notice of Violation of Proposition 65 (“Notice”) to the California Attorney General, the District Attorneys of every county in California, the City Attorneys of every California city with a population greater than 750,000, and to Dancing Deer, alleging that Dancing Deer violated Proposition 65 by exposing persons to lead and lead compounds (“Lead”) contained in Covered Products (as defined in Section 1.2) without first providing a clear and reasonable Proposition 65 warning. Dancing Deer denies CEH’s claim in the Notice that the Covered Products require warnings under Proposition 65.

1.2 The products covered in this Agreement are baking mix products containing molasses, ginger, or both molasses and ginger sold, distributed, or offered for sale by Dancing Deer or that have been or will be sold or offered for sale in the State of California (“Covered Products”).

1.3 Dancing Deer is a corporation with more than 10 employees that manufactures, distributes, sells or offers for sale Covered Products in the State of California or has done so in the past.

1.4 The Parties agree that any action based on an alleged violation of this Agreement shall be brought in the Superior Court of California in Alameda County. For purposes of this Agreement, the Parties agree that the Superior Court of California in Alameda County has subject matter jurisdiction over any disputes arising from this Agreement and personal jurisdiction over each of the Parties, and that venue is proper in the County of Alameda.

1.5 Nothing in this Agreement is or shall be construed as an admission by the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the Agreement constitute or be construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law. Nothing in this Agreement shall prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any other pending or future legal proceedings. This Agreement is the product of negotiation and compromise and is accepted by the Parties solely for purposes of settling, compromising, and resolving issues disputed by the Parties concerning the claims asserted in the Notice.

1.6 The “Effective Date” of this Agreement is the date on which it is fully executed by the Parties.

2. INJUNCTIVE RELIEF

2.1 **Specification Compliance Date.** To the extent it has not already done so, no more than thirty (30) days after the Effective Date, to the extent Dancing Deer’s Covered Products are manufactured by or supplied by a third party, Dancing Deer shall provide the reformulation specification set in Section 2.2 to each of such Covered Products suppliers and shall instruct each such Covered Products supplier to provide Dancing Deer with Covered Products that comply with the reformulation specification set forth in Section 2.2. If in the future Dancing Deer’s Covered Products are manufactured by or supplied by a new third party that it has not previously provided with instructions regarding the reformulation specification set forth in Section 2.2, Dancing Deer shall provide the reformulation specification set forth in Section 2.2 prior to placing an initial order for Covered Products and instruct the new Covered Products supplier to provide it with Covered Products that comply with the reformulation specification set forth in Section 2.2. Dancing Deer shall retain records of communications sent to and received from suppliers that are related to the requirement of this Section 2.1 for a period of three (3) years from the Effective Date.

2.2 **Reformulation of Covered Products.** After January 1, 2015 (the “Reformulation Date”), Dancing Deer shall not purchase, manufacture, ship, sell or offer for sale Covered Products

that will be sold or offered for sale in California that contain a concentration of more than twenty (20) parts per billion (“ppb”) Lead by weight (the “Reformulation Level”), such concentration to be determined by use of a test performed by an accredited laboratory using inductively coupled plasma mass spectrometry (ICP-MS) equipment with a level of detection of at least ten (10) ppb that meets standard laboratory QA/QC requirements using sample preparation method as set out in FDA Elemental Analysis Manual section 4.7 or similar for testing of lead in food (the “Test Protocol”).

2.3 **Testing.** To ensure compliance with Section 2.2 for any Covered Products that Defendant sells that will be offered for sale in California after the Reformulation Date, Defendant shall conduct random testing of such Covered Products using the Test Protocol described in this section (“Validation Testing”) and take the follow-up actions described in this section.

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

2.3.2 Frequency Of Testing: Following the Reformulation Date, Dancing Deer shall conduct Validation Testing on the Covered Products selected as set forth in Section 2.3.1 pursuant to the Test Protocol in the frequency set forth in this Section. The number of Validation Tests performed during each calendar quarter starting on the Reformulation Date shall be based on the number of production lots of Covered Products that are manufactured during each such calendar quarter and that will be offered for sale in California.

2.3.2.1 If more than six (6) production lots of Covered Products that will be offered for sale in California are manufactured in a given calendar quarter, Dancing Deer shall conduct one Validation Test from each of up to six different production lots. In such a case, Dancing Deer shall ensure maximum possible dispersion of the testing among different Covered Products and different production lots of each Covered Product with no more than one Validation Test per production lot as set forth in Section 2.3.1. If there are fewer than six (6) production lots of Covered Products manufactured in a single calendar quarter that will be offered for sale in California, then Dancing Deer shall only be required to conduct one Validation Test per production lot manufactured in that calendar quarter, provided that Dancing Deer conduct a minimum of three (3) Validation Tests in such calendar quarter. If there are less than three (3) production lots manufactured in a particular calendar quarter, Dancing Deer shall ensure maximum possible dispersion of the testing among different Covered Products and different production lots of each Covered Product. If there are no Covered Products manufactured in a given calendar quarter that will be offered for sale in California, Defendant is not required to conduct Validation Testing in that calendar quarter.

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

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

2.3.3 Covered Products That Exceed Reformulation Level: If the Validation Testing results indicate that a production lot of a Covered Product exceeds the Reformulation Level, Defendant shall: (a) stop selling or offering for sale in California all Covered Products from the same production lot as that of the Covered Product that exceeded the Reformulation Level (the “Non-Compliant Products”); (b) send instructions to any of the stores and/or customers that offer the Non-Compliant Products for sale in California to cease offering the Non-Compliant Products for sale in California and, for Non-Compliant Products offered for sale in California, to either return all of the Non-Compliant Products to Dancing Deer for destruction, or to directly destroy such Non-Compliant Products; and (c) provide CEH with the test result and records and correspondence documenting compliance with this Section within fifteen (15) days of written request by CEH. If there is a dispute over the corrective action related to any Non-Compliant Products, the Parties shall meet and confer before seeking any remedy in court.

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

3. ENFORCEMENT

3.1 **Enforcement Procedures.** Prior to bringing any action to enforce the terms of this Agreement, a Party seeking to enforce the Agreement shall provide the other Party thirty (30) days advance written notice of the alleged violation. The Parties shall meet and confer during such thirty (30) day period in an effort to try to reach agreement on an appropriate cure for the alleged violation. After such thirty (30) day period, the Party seeking to enforce may initiate an action in

the Superior Court of Alameda to seek to enforce the terms and conditions contained in this Agreement.

4. PAYMENTS

4.1 **Payments by Dancing Deer.** Within fifteen (15) days after the Effective Date, Dancing Deer shall pay the total sum of \$23,000 as a settlement payment.

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

4.2.1 Dancing Deer shall pay the sum of \$3,000 as a civil penalty pursuant to Health & Safety Code § 25249.7(b). The civil penalty payment shall be apportioned in accordance with Health & Safety Code § 25249.12 (25% which is \$750 to CEH and 75% which is \$2,250 to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA")). Accordingly, the \$2,250 OEHHA portion of the civil penalty payment shall be made payable to OEHHA and associated with taxpayer identification number 68-0284486. This payment shall be delivered as follows:

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 (\$750) shall be made payable to the Center For Environmental Health Group 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 Dancing Deer shall pay the sum of \$4,500 as 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 (4) 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 Dancing Deer shall pay the sum of \$15,500 as reimbursement 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.

5. MODIFICATION

5.1 This Agreement may be modified from time to time by written agreement of the Parties and upon entry of a modified consent judgment.

6. CLAIMS COVERED AND RELEASE

6.1 CEH on behalf of itself and its successors and assigns waives, releases, and discharges Dancing Deer Baking Company, LLC, Dancing Deer Baking Company, Inc., and their parents, subsidiaries, affiliated entities that are under common ownership, directors, officers,

employees, and attorneys (“Defendant Releasees”), and each entity to whom they directly or indirectly distribute or sell Covered Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees, licensors, and licensees (“Downstream Defendant Releasees”) from all claims for any violation of Proposition 65 that were or could have been asserted in the Notice against Dancing Deer, Defendant Releasees, and Downstream Defendant Releasees, based on failure to warn about alleged exposure to Lead contained in Covered Products that were distributed or sold by Dancing Deer prior to the Reformulation Date.

6.2 The Parties agree that compliance with the terms of this Agreement by Dancing Deer shall constitute compliance with Proposition 65 by Dancing Deer, Defendant Releasees, and Downstream Defendant Releasees with respect to any alleged failure to warn about Lead in Covered Products manufactured, distributed, or sold after the Reformulation Date.

7. EFFECT OF SUBSEQUENT SETTLEMENTS

7.1 If there is a settlement or other resolution in which CEH is a party that resolves the Proposition 65 claims regarding failure to warn about Lead in baking mix products in *Center for Environmental Health v. General Mills, Inc., et al.*, Alameda Superior Court Case No. RG-13693015, and that provides a higher Reformulation Level (“Alternative Lead Reformulation Level”) than the Reformulation Level set forth in Section 2.2, then at Dancing Deer’s sole option, it shall notify CEH in writing of its intent to meet and confer to determine whether the Alternative Lead Reformulation Level and any related injunctive terms of the other settlement or resolution should also apply to Dancing Deer in this Agreement. If the Parties agree, they shall amend this Agreement. If the Parties are unable to agree upon a modification to this Agreement after meeting a conferring as set out in this Section 7.1, Dancing Deer may initiate an action to seek judicial relief to apply the Alternative Lead Reformulation Level and any other related injunctive terms of the other settlement or resolution. Dancing Deer shall not initiate any action under this paragraph earlier than thirty (30) days after providing written notice to CEH of its intent to meet and confer.

8. SPECIFIC PERFORMANCE

8.1. The Parties expressly recognize that Dancing Deer's obligations under this Agreement are unique. In the event that Dancing Deer is found to be in breach of this Agreement, the Parties agree that it would be extremely impracticable to measure any resulting damages and that such breach would cause irreparable damage. Accordingly, CEH, in addition to any other available rights or remedies, may sue in equity for specific performance, and Dancing Deer expressly waives the defense that a remedy in damages will be adequate.

9. PROVISION OF NOTICE

9.1 When CEH is entitled to receive any notice under this Agreement, the notice shall be sent by first class and electronic mail to:

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

9.2 When Dancing Deer is entitled to receive any notice under this Agreement, the notice shall be sent by first class and electronic mail to:

Frank Carpenito
President and CEO
Dancing Deer Baking Company, LLC
65 Sprague Street, West A
Boston, MA 02136

With a copy to:

Trenton H. Norris
Arnold & Porter LLP
3 Embarcadero Center, 10th Floor
San Francisco, CA 94111

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

10. GOVERNING LAW AND CONSTRUCTION

10.1 The terms of this Agreement shall be governed by the laws of the State of California.

11. ATTORNEYS' FEES

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

11.2 Notwithstanding Section 10.1, a Party who prevails in a contested enforcement action brought pursuant to Section 3 may seek an award of attorneys' fees pursuant to Code of Civil Procedure §1021.5 against a Party that acted with substantial justification. The Party seeking such an award shall bear the burden of meeting all of the elements of § 1021.5, and this provision shall not be construed as altering any procedural or substantive requirements for obtaining such an award.

11.3 Nothing in this Section 10 shall preclude a Party from seeking an award of sanctions pursuant to law.

12. ENTIRE AGREEMENT

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

thereby. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

13. AUTHORITY

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

14. NO EFFECT ON OTHER SETTLEMENTS

14.1 Nothing in this Agreement shall preclude CEH from resolving any claim against an entity that is not Dancing Deer on terms that are different than those contained in this Agreement.

15. EXECUTION IN COUNTERPARTS

15.1 This Agreement may be executed in counterparts and by means of facsimile or portable document format (pdf), which taken together shall be deemed to constitute one document.

AGREED:

Dated: 11/17/2014

CENTER FOR ENVIRONMENTAL HEALTH

By: 
Name: CHARLIE PIZARRO
Title: ASSOCIATE DIRECTOR

Dated:

DANCING DEER BAKING COMPANY, LLC

By: _____
Name:
Title:

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AGREED:

Dated:

CENTER FOR ENVIRONMENTAL HEALTH

By: _____
Name:
Title:

Dated: *November 13, 2014*

DANCING DEER BAKING COMPANY, LLC

By: *Francis P. Carpenito Jr.*
Name: *Francis P. Carpenito, Jr.*
Title: *President + CEO*