

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the “Agreement”) is between the Center for Environmental Health (“CEH”) and Popchips, Inc. (“Popchips”) (together, the “Parties”). The effective date of this Agreement is the date on which it is fully executed by the Parties (the “Effective Date”).

1. INTRODUCTION

1.1. On March 25, 2016, CEH, a non-profit corporation acting in the public interest, provided a “Notice of Violation of Proposition 65” (the “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 Popchips regarding the presence of acrylamide in vegetable chips manufactured, distributed, or sold by Popchips. For purposes of this Agreement, the products covered in this Agreement are listed in Exhibit A hereto (“Covered Products”).

1.2. The Notice alleges that the Covered Products contain acrylamide, a chemical known to the State of California to cause cancer. The Notice alleges that the Covered Products expose consumers of the Covered Products to acrylamide without first providing clear and reasonable warning to such persons regarding the carcinogenic toxicity of acrylamide. The Notice alleges that such conduct violates Health & Safety Code § 25249.6, the warning provision of Proposition 65.

1.3. The Parties enter into this Agreement for the purpose of avoiding prolonged and costly litigation regarding Covered Products manufactured, distributed, and/or sold by Popchips. By executing this Agreement, the Parties do not admit any facts or conclusions of law. Nothing in this Agreement 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 this or any other or future legal proceedings.

2. INJUNCTIVE RELIEF

2.1. Reformulation of Covered Products. After the Effective Date, Popchips shall not manufacture, ship, sell or offer for sale any Covered Products that will be sold or offered for sale in California that contain a concentration of more than 490 parts per billion (“ppb”) acrylamide by weight (the “Reformulation Level”), such concentration to be determined by use of a test performed by an accredited laboratory using either GC/MS (Gas Chromatograph/Mass Spectrometry), LC-MS/MS (Liquid Chromatograph-Mass Spectrometry), or any other testing method agreed upon by the Parties.

3. ENFORCEMENT OF SETTLEMENT AGREEMENT

3.1. General Enforcement Provisions.

3.1.1. The Parties agree that any action based on a violation of this Agreement shall be brought in the Superior Court of California in Alameda County. For purposes of this Agreement, notwithstanding Section 1.3 above, 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. Any action to enforce alleged violations of Section 2.1 by Popchips shall be brought exclusively pursuant to Section 3.2, and be subject to the meet and confer requirement of Section 3.2.4, if applicable.

3.1.2. Should a Party to this Agreement prevail on any action to enforce this Agreement, it shall be entitled to reasonable attorneys' fees and costs associated with such enforcement.

3.2. Enforcement of Reformulation Commitment.

3.2.1. Notice of Violation. In the event that CEH identifies a Covered Product that was sold or offered for sale to California consumers with a best-by or sell-by (or equivalent) date or other code that reflects that the Covered Product was manufactured on or after the Effective Date, and for which CEH has laboratory test results showing that the Covered Product has an acrylamide level exceeding the Reformulation Level, CEH may issue a Notice of Violation pursuant to this Section.

3.2.2. Service of Notice of Violation and Supporting Documentation.

3.2.2.1. Subject to Section 3.2.1, the Notice of Violation shall be sent to the person(s) identified in Section 9.1 to receive notices for Popchips, and must be served within sixty (60) days of the later of the date the Covered Products at issue were purchased or otherwise acquired by CEH or the date that CEH can reasonably determine that the Covered Products at issue were manufactured, shipped, sold, or offered for sale by Popchips, provided, however, that CEH may have up to an additional sixty (60) days to send the Notice of Violation if, notwithstanding CEH's good faith efforts, the test data required by Section 3.2.2.2 below cannot be obtained by CEH from its laboratory before expiration of the initial sixty (60) day period.

3.2.2.2. The Notice of Violation shall, at a minimum, set forth:
(a) the date the alleged violation was observed; (b) the location at which the Covered Products were offered for sale; (c) a description of the Covered Products giving rise to the alleged

violation, including the name and address of the retail entity from which the sample was obtained and, if available, information that identifies the product lot; and (d) all test data obtained by CEH regarding the Covered Products and supporting documentation sufficient for validation of the test results, including any laboratory reports, quality assurance reports, and quality control reports associated with testing of the Covered Products.

3.2.3. Notice of Election of Response. No more than thirty (30) days after effectuation of service of a Notice of Violation, Popchips shall provide written notice to CEH whether it elects to contest the allegations contained in a Notice of Violation (“Notice of Election”). Failure to provide a Notice of Election within thirty (30) days of effectuation of service of a Notice of Violation shall be deemed an election to contest the Notice of Violation.

3.2.3.1. If a Notice of Violation is contested, the Notice of Election shall include all then-available documentary evidence regarding the alleged violation, including all test data, if any is available. If Popchips or CEH later acquires additional test or other data regarding the alleged violation, it shall notify the other Party and promptly provide all such data or information to the Party.

3.2.4. Meet and Confer. If a Notice of Violation is contested, CEH and Popchips shall meet and confer to attempt to resolve their dispute. Within thirty (30) days of serving a Notice of Election contesting a Notice of Violation, Popchips may withdraw the original Notice of Election contesting the violation and serve a new Notice of Election to not contest the violation, provided, however, that in this circumstance Popchips shall pay \$2,500 in addition to any payment required under this Agreement. At any time, CEH may withdraw a Notice of Violation, in which case for purposes of this Section 3.2 the result shall be as if CEH never issued any such Notice of Violation. If no informal resolution of a Notice of Violation

results within thirty (30) days of a Notice of Election to contest, CEH may file an enforcement action pursuant to Section 3.1. In any such proceeding, CEH may seek whatever fines, costs, penalties, attorneys' fees, or other remedies are provided by law for failure to comply with the Agreement.

3.2.5. Non-Contested Notices. If Popchips elects to not contest the allegations in a Notice of Violation, it shall identify on a confidential basis to CEH (by proper name, address of principal place of business, and telephone number) the person or entity that sold the Covered Products to Popchips and the manufacturer or ingredient suppliers and other entities in the upstream chain of distribution of the Covered Product, provided that such information is reasonably available. In addition, Popchips shall undertake corrective action(s) and make payments, if any, as set forth below.

3.2.5.1. Popchips shall include in its Notice of Election a detailed description with supporting documentation of the corrective action(s) that it has undertaken or proposes to undertake to address the alleged violation. Any such correction shall, at a minimum, provide reasonable assurance that Popchips has stopped selling or offering for sale in California all Covered Products having the same lot number as that of the Covered Product identified in CEH's Notice of Violation. Popchips shall keep and make available to CEH for inspection and copying records any correspondence regarding the corrective action taken under Section 3.2.5. Notwithstanding the forgoing, no such corrective action shall be required for the first Notice of Violation. If there is a dispute over the corrective action, Popchips and CEH shall meet and confer before seeking any remedy in court.

3.2.5.2. If the Notice of Violation is the first, second, third, or fourth Notice of Violation received by Popchips under Section 3.2.1 that was not successfully contested

or withdrawn, then Popchips shall pay \$10,000 for each Notice of Violation. If Popchips has received more than four (4) Notices of Violation under Section 3.2.2 that were not successfully contested or withdrawn, then Popchips shall pay \$15,000 for each Notice of Violation.

Notwithstanding the forgoing, if Popchips produces with its Notice of Election test data for the Covered Product that: (i) was conducted prior to the date CEH purchased the Covered Product that is the subject of the Notice of Violation; (ii) was conducted on the same or same type of Covered Product; and (iii) demonstrates acrylamide levels below the Reformulation Level, then any payment under this Section shall be reduced by 100 percent (100%) for the first Notice of Violation, by seventy-five percent (75%) for the second Notice of Violation, and by fifty percent (50%) for any subsequent Notice of Violation. If Popchips produces with its Notice of Election test data for the Covered Product that meet the foregoing criteria, and if it is the first Notice of Violation Popchips has received for that manufacturing lot of that type of Covered Product that was not successfully contested or withdrawn, then no corrective action under Section 3.2.5.2 shall be required. In no case shall Popchips be obligated to pay more than \$75,000 for uncontested Notices of Violation in any calendar year irrespective of the total number of Notices of Violation issued. In no case shall Popchips be obligated to make more than one payment for uncontested Notices of Violation for any one manufacturing lot of a type of Covered Product.

3.2.6. Payments. Any payments under Section 3.2 shall be made by check payable to the “Lexington Law Group” and shall be paid within thirty (30) days of service of a Notice of Election triggering a payment and which shall be used as reimbursement for costs for investigating, preparing, sending, and prosecuting Notices of Violation, and to reimburse attorneys’ fees and costs incurred in connection with these activities.

3.3. Repeat Violations. If Popchips has received four (4) or more Notices of Violation concerning the same type of Covered Product that were not successfully contested or withdrawn in any two (2) year period then, at CEH's option, CEH may seek whatever fines, costs, penalties, attorneys' fees, or other remedies that are provided by law for failure to comply with the Agreement. Prior to seeking such relief, CEH shall meet and confer with Popchips for at least thirty (30) days to determine if Popchips and CEH can agree on measures that Popchips can undertake to prevent future violations.

4. SETTLEMENT PAYMENTS

4.1. In consideration of the mutual covenants and releases provided in this Agreement, within ten (10) days of the Effective Date, Popchips shall pay a total of \$77,500 as a settlement payment. This total shall be paid in five (5) separate checks in the amounts specified below and delivered as set forth below. Any failure by Popchips to comply with the payment terms herein shall be subject to a stipulated late fee to be paid by Popchips in the amount of \$100 for each day the full payment is not received after the applicable payment due date set forth in Section 4.1. The late fees required under this Section shall be recoverable, together with reasonable attorneys' fees, in an enforcement proceeding brought pursuant to Section 3.1 of this Agreement. The funds paid by Popchips shall be allocated as set forth below between the following categories and made payable as follows:

4.2. Civil Penalty. Popchips shall pay \$7,240 as a 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% to CEH and 75% to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of

the civil penalty payment for \$5,430 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 for \$1,810 shall be made payable to the Center for Environmental Health and associated with taxpayer identification number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

4.3. Monetary Payment in Lieu of Civil Penalty. Popchips shall pay \$10,860 as payment to CEH in lieu of civil penalty pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11 § 3203(b). CEH will use such funds to continue its work educating and protecting people from exposures to toxic chemicals. In addition, as part of its *Community Environmental Action and Justice Fund*, CEH will use four percent (4%) 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. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

4.4. Attorneys' Fees and Costs. Popchips shall pay \$59,400 to reimburse CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any other costs incurred as a result of investigating the alleged violations, bringing this matter to Popchips's attention, and negotiating a settlement in the public interest. The attorneys' fees and cost reimbursement shall be made in two separate checks as follows: (a) \$50,265 payable to the Lexington Law Group and associated with taxpayer identification number 94-3317175; and (b) \$9,135 payable to the Center For Environmental Health and associated with taxpayer identification number 94-3251981. These payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

5. MODIFICATION OF SETTLEMENT AGREEMENT

5.1. This Agreement may be modified only by written agreement of the Parties.

6. APPLICATION OF SETTLEMENT AGREEMENT

6.1. This Agreement shall apply to and be binding upon the Parties hereto, their divisions, subdivisions, and subsidiaries, and the successors or assigns of any of them.

7. CLAIMS COVERED

7.1. CEH on behalf of itself and its successors and assigns discharges, waives, and releases Popchips and its parent (Sonora Mills Foods, Inc.), subsidiaries, affiliated entities that are under common ownership, directors, officers, employees, and agents (collectively, the "Settling Defendant Releasees"), and all entities to whom they directly or indirectly distribute or sell Covered Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (collectively, the "Downstream Releasees") from all claims under Proposition 65 or any other statutory or common law regarding the failure

to warn about exposures to acrylamide arising in connection with Covered Products manufactured, distributed, or sold by Popchips on or before the Effective Date.

7.2. Compliance with the terms of this Agreement by Popchips constitutes compliance with Proposition 65 by Popchips, Settling Defendant Releasees, and Downstream Releasees for purposes of exposures to acrylamide from the Covered Products manufactured, distributed, or sold by Popchips after the Effective Date.

8. SPECIFIC PERFORMANCE

8.1. The Parties expressly recognize that Popchips's obligations under this Agreement are unique. In the event that Popchips is found to be in breach of this Agreement for failure to comply with the provisions of Section 2.1 hereto, 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 Popchips expressly waives the defense that a remedy in damages will be adequate.

9. GOVERNING LAW

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

10. PROVISION OF NOTICE

10.1. All notices required pursuant to this Agreement and correspondence shall be sent by first class and electronic mail to the following:

For CEH:

Howard Hirsch
Lexington Law Group
503 Divisadero Street
San Francisco, CA 94117

hhirsch@lexlawgroup.com

For Popchips:

Sarah Esmaili
Arnold & Porter LLP
3 Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
Sarah.Esmaili@aporter.com

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.

11. ENTIRE AGREEMENT

11.1. 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. 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.

12. NO EFFECT ON OTHER SETTLEMENTS

12.1. Nothing in this Agreement shall preclude CEH from resolving any claim against any entity that is not Popchips on terms that are different from those contained in this Agreement, except as provided in the release in Section 7.

13. EXECUTION IN COUNTERPARTS

13.1. The stipulations to 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.

14. AUTHORIZATION

14.1. Each signatory to this Agreement certifies that he or she is fully authorized by the Party he or she represents to stipulate to this Agreement and to enter into and execute the Agreement on behalf of the Party represented and legally bind that Party. The undersigned have read, understand, and agree to all of the terms and conditions of this Agreement. Except as explicitly provided herein, each Party is to bear its own fees and costs.

AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH



Charlie Pizarro
Associate Director

Dated: _____



POPCHIPS, INC.

David Ritterbush

Dated: 9-28-16

David Ritterbush
Name

CEO
Title

EXHIBIT A

LIST OF COVERED PRODUCTS

Popchips Sweet Potato Chips (flavor and SKU):

| | |
|-----------------------|-----------------|
| Sweet Potato | 0 82666 70990 9 |
| Sweet Potato | 0 82666 70000 5 |
| Sweet Potato | 0 82666 70099 9 |
| Sweet Potato | 0 82666 80030 9 |
| Sweet Potato | 0 82666 20005 5 |
| Cinnamon Twist | 0 82666 80210 5 |
| Sweet Potato | 0 82666 50030 8 |
| Autumn Spice | 0 82666 80211 2 |
| Sweet Potato | 0 82666 18100 2 |
| Brown Sugar and Spice | 0 82666 18200 9 |

Popchips Veggie Chips (flavor and SKU):

| | |
|--------------------|-----------------|
| Olive Oil | 0 82666 40026 4 |
| Sea Salt | 0 82666 40024 0 |
| Olive Oil | 0 82666 40001 1 |
| Sea Salt | 0 82666 40000 4 |
| Tuscan Herb | 0 82666 40002 8 |
| Mediterranean Herb | 0 82666 40003 5 |
| Olive Oil | 0 82666 40016 5 |
| Mediterranean Herb | 0 82666 40062 2 |