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11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **COUNTY OF SAN FRANCISCO**

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

15 Plaintiff,

16 v.

17 TRADER JOE'S COMPANY, and DOES
18 1 through 10, inclusive,

19 Defendants.
20

Case No. CGC-15-548791

[PROPOSED] CONSENT JUDGMENT

Complaint Filed: November 3, 2015
Trial Date: April 9, 2018

1 **1. INTRODUCTION**

2 1.1 As You Sow (“AYS”) is a non-profit corporation dedicated to, among other
3 causes, the protection of the environment, the promotion of human health, the improvement of
4 worker and consumer rights, environmental education, and corporate accountability. AYS is
5 based in Oakland, California and is incorporated under the laws of the State of California.

6 1.2 Between July 18, 2014 and November 10, 2017, AYS sent Proposition 65
7 (California Health & Safety Code Sections 25249.5, et seq.) 60-day Notices of Violation
8 (“Notices”) to various companies, including all of those companies identified as “Initial Settling
9 Defendants” (as defined in Section 2) that are listed in **Exhibit A**. The Notices were also sent
10 by AYS to all relevant public enforcers, as required by Health & Safety Code Section
11 25249.7(d).

12 1.3 In the Notices, AYS states that that the Chocolate Products manufactured,
13 distributed, and/or sold by the noticed companies, which are offered for sale to California
14 consumers, and/or which are used in products offered for sale to consumers in California, cause
15 exposures to lead and/or cadmium and that such Chocolate Products require warnings under
16 Health and Safety Code Section 25249.6.

17 1.4 After AYS’s October 24, 2017 Notice has run its course, and assuming no
18 authorized public prosecutor has filed a superseding claim, AYS individually and on behalf of
19 the public interest, will amend a Proposition 65 enforcement action concerning lead and
20 cadmium in the Chocolate Products that it had previously filed in the Superior Court of the State
21 of California for the County of San Francisco, Case No. CGC-15-548791 (the “Action”) in
22 contemplation of a motion for approval and entry of this Consent Judgment. The amended
23 complaint filed in the Action asserted a cause of action against each of the Initial Settling
24 Defendants for the alleged failure to warn under Proposition 65 on the basis of the allegations
25 contained in the Notices.

26 1.5 Each Initial Settling Defendant (as defined in Section 2 and listed on **Exhibit A**)
27 employs ten or more employees and manufactures, imports, distributes, sells, and/or directly or
28 indirectly offers for sale in California Chocolate Products or has done so in the past. Each Initial

1 Settling Defendant represents that, as of the date it executes this Consent Judgment, no public
2 enforcer is diligently prosecuting a Proposition 65 action against it related to lead or cadmium in
3 its Chocolate Products.

4 1.6 For the purpose of avoiding prolonged and costly litigation concerning the claims
5 and defenses in this Action, the Parties (as defined in Section 2) enter into this Consent
6 Judgment as a full settlement of all Proposition 65 claims that were raised in the Action, or
7 which could have been raised in the Action, based on the facts alleged therein. By execution of
8 this Consent Judgment, Settling Defendants do not admit any violation of Proposition 65 or any
9 other law. Nothing in this Consent Judgment shall be construed as an admission by the Parties
10 of any fact, finding, conclusion, issue of law, or violation of law. However, this paragraph shall
11 not diminish or affect the responsibilities and duties of the Parties under this Consent Judgment.

12 **2. DEFINITIONS**

13 2.1 “Chocolate Product” means chocolate candy; chocolate bars, pieces, chips,
14 beverages, and chocolate-based confections with or without inclusions; cocoa nibs and cocoa
15 powder; chocolate and cacao-based compounds in any form; and other products derived
16 primarily (i.e., in excess of 50%) from cacao. Chocolate Products include the preceding as sold
17 on a standalone basis and/or as sold to be used as ingredients in other foods into which they are
18 incorporated.

19 2.2 “Compliance Date” means one year following the Effective Date.

20 2.3 “Consensus Basis” means a creative and dynamic way of reaching agreement
21 between all members of a group. Instead of simply voting for an item and having the majority
22 of the group dictate the outcome, a group using consensus is committed to finding solutions that
23 each member of the group actively supports, or at least can live with and that all opinions, ideas
24 and concerns are taken into account. A Consensus Basis does not reflect compromise or
25 unanimity – it aims to go further by weaving together everyone’s best ideas and key concerns. It
26 is an acceptable resolution, one that can be supported, even if not the “favorite” of each
27 individual. Multiple concerns and information shall be shared until the sense of the group is
28 clear. Ideas and solutions belong to the group; no names are recorded. The group as a whole is

1 responsible for the decision and the decision belongs to the group. The goal is unity, not
2 unanimity.

3 2.4 “Covered Product” means a Chocolate Product that is manufactured, imported,
4 distributed, or sold by a Settling Defendant, including, but not limited to, the exemplar
5 Chocolate Product identified in a 60-Day Notice of Violation served on the Settling Defendant
6 by AYS.

7 2.5 “Effective Date” means the date on which this Consent Judgment is entered by the
8 Court.

9 2.6 “Feasible” means capable of being accomplished in a successful manner within a
10 reasonable period of time, taking into account public health, and economic, environmental,
11 social, and technological factors. In considering whether an action or performance level is
12 Feasible, consideration shall be given, among other things, to scaling as to the size and resources
13 of the potential implementing enterprise involved, the implementing enterprise’s place and role
14 within the chain of commerce, the prior demonstration of the viability of the concept or
15 technology at issue at both the research and actual commercial application scale, and the nature
16 of the issue being addressed.

17 2.7 “Lot” means all units of a given Chocolate Product bearing the same lot number,
18 best-by, or sell-by date.

19 2.8 “Opt-In Settling Defendants” refers to Settling Defendants that join into this
20 Consent Judgment pursuant to the procedure established in Section 7.

21 2.9 “Opt-In Stipulation” means a Stipulation for Entry of Judgment in the form
22 attached hereto as **Exhibit B**, for execution by a prospective Opt-In Settling Defendant pursuant
23 to the procedure established in Section 7.

24 2.10 “Parties” means AYS and Settling Defendants taken together; a “Party” means As
25 You Sow or any particular Settling Defendant taken individually.

26 2.11 “Settling Defendant” means a defendant who is a Party to this Consent Judgment
27 at the time it is entered, or who opts in to this Consent Judgment any time after its entry
28 pursuant to the procedure established in Section 7. The former are also specifically referred to

1 herein as “Initial Settling Defendants” (i.e., the companies specifically listed on **Exhibit A**) and
2 the latter are also specifically referred to herein as “Opt-In Settling Defendants.”

3 **3. INVESTIGATION REGARDING SOURCES AND POTENTIAL FOR**
4 **REDUCTION OF LEAD AND CADMIUM IN CHOCOLATE PRODUCTS**

5 3.1 **Overview.** An expert committee (“Committee”) shall be formed to investigate
6 and report on the predominant sources of lead and cadmium in Chocolate Products, and to make
7 findings and recommendations on Feasible measures that may be taken, if any, to meaningfully
8 reduce levels of lead and cadmium found in Chocolate Products. The Committee’s charges
9 include:

10 3.1.1. Researching and identifying the sources of lead and cadmium levels in
11 chocolate products, including both natural and anthropogenic sources (“Root Cause Phase”);

12 3.1.2. Identifying and making recommendations regarding Feasible means to
13 reduce lead and cadmium levels over the nearer and longer term, such as through agricultural
14 practices, manufacturing practices, and handling practices (“Reduction Recommendations
15 Phase”);

16 3.1.3. Evaluating and making recommendations as to whether, and, if so, when,
17 the lead and cadmium concentration levels in Chocolate Products that trigger Proposition 65
18 warnings shall be modified from the “drop down” levels described in Sections 6.2.1 and 6.2.2
19 of this Consent Judgment based on Feasible means to reduce lead and cadmium levels over time
20 (“Warning Trigger Phase”);

21 3.1.4. Preparing and submitting a final report with all Consensus Based
22 Committee findings and recommendations, including an appendix setting forth significant areas
23 where consensus could not be achieved, an appendix setting forth any significant conflicting
24 opinions on aspects of a Consensus Based finding where they exist, and an appendix containing
25 complete citations for all source materials used (“Final Report Phase”); and

26 3.1.5. Providing an oral presentation to the Parties to address follow up questions
27 or inquiries regarding the final report at a Committee member’s discretion.
28

1 **3.2 Formation and Direction of the Committee.** The Committee shall consist of four
2 subject matter experts (“SMEs”) and be supported by a retained project manager (“Project
3 Manager”). Within one hundred and twenty (120) days of the Effective Date, AYS, on the one
4 hand, and the Initial Settling Defendants, on the other hand, shall each appoint a qualified SME
5 to the Committee and shall jointly agree upon and appoint a third and fourth SME to the
6 Committee. These four individuals shall form the Committee.

7 3.2.1. SMEs shall be selected based on the following criteria:

8 (a) One SME selected by the Chocolate Industry with a relevant
9 background and expertise.

10 (b) One SME selected by As You Sow with a relevant background and
11 expertise.

12 (c) One additional SME with potential cadmium and cocoa expertise as
13 mutually identified with relevant backgrounds and expertise.

14 (d) One additional SME with potential lead and cocoa expertise as
15 mutually identified with relevant background and expertise.

16 3.2.2. In addition to the SMEs, one Project Manager shall be mutually identified
17 with relevant project management experience, who will provide administrative and logistical
18 support to the Committee, facilitate discussion among the Committee members, and help
19 manage its budget and keep it organized and on schedule in addressing the requirements and
20 timelines set forth in this Consent Judgment.

21 3.2.3. In the event a member of the Committee can no longer perform their duties,
22 a replacement member shall be appointed by the original nominating Party or Parties. AYS and
23 the Initial Settling Defendants shall jointly agree on the replacement for a member who was
24 originally jointly appointed. The Party or Parties appointing a replacement member shall first
25 confer with the remaining members of the Committee concerning potential replacement
26 nominees and solicit their input on appropriate candidates and qualifications. In the event of a
27 resignation of the retained project manager, AYS and the Initial Settling Defendants shall jointly
28 agree upon and arrange for the prompt retention of a replacement.

1 3.2.4. Within one hundred fifty (150) days of the Effective Date, AYS and the
2 Initial Settling Defendants, or a representative acting on the Initial Settling Defendants'
3 collective behalves, shall hold a kickoff meeting with the Committee and the retained project
4 manager to review the Scope of Work attached hereto as **Exhibit C**, which shall be provided to
5 the Committee members and the Project Manager along with a copy of this Consent Judgment
6 upon the Committee's formation. The Scope of Work shall, following clarifications or
7 modifications agreed upon by AYS and the Initial Settling Defendants made at or after the
8 kickoff meeting, guide the Committee's investigation and be binding on the Parties.

9 **3.3 Operation of Committee.**

10 3.3.1. The Committee shall operate on a Consensus Basis and within the budget
11 agreed upon by the Parties. It shall accept reasonable and relevant input from any willing source
12 available and evaluate its content based on professional standards and judgment consistent with
13 the Committee members' prior experience. The preliminary allocation of this budget to
14 different aspects of the Committee's work is set forth below, but it and the overall level of
15 expenditure will be subject to adjustment by mutual agreement of AYS and the Initial Settling
16 Defendants based on a request received from the Project Manager at or following the kickoff
17 meeting referred to in Section 3.2.4. In no event shall the budget, inclusive of the cost of the
18 Project Manager, exceed the aggregate cap agreed upon by the Parties under Section 8.5 of this
19 Consent Judgment.

20 3.3.2. Approximately three quarters (3/4ths) of the Committee's overall budget
21 shall be devoted to its investigative and assessment activities (including as supported by the
22 Project Manager), and one quarter (1/4th) of the Committee's overall budget shall be devoted to
23 formulating its findings and preparing the final report, unless the Committee determines that
24 another allocation of funds is more appropriate, and the Project Manager informs and obtains the
25 approval of AYS and the Initial Settling Defendants of such a revised allocation. The
26 Committee shall complete the Root Cause Phase within nine (9) months from the date of the
27 kickoff meeting established pursuant to Section 3.2.4; the Committee shall complete the
28 Reduction Recommendations Phase within eighteen (18) months from the date of the kickoff

1 meeting established pursuant to Section 3.2.4. Through the Project Manager, the Committee
2 shall provide AYS and the Initial Settling Defendants with brief quarterly progress reports
3 concerning the status of the relevant investigation and the overall budget and identify any
4 significant obstacles that may have arisen relative to timely completion of the Committee's
5 work. The deadlines set forth in this Section 3.3.2 may be modified with the agreement of both
6 AYS and the Initial Settling Defendants based on a significant obstacle to timely completion that
7 has been identified in a progress report or otherwise presented by Project Manager due to
8 unforeseeable circumstances or other reasonable and justifiable need.

9 3.3.3. Members of the Committee and the Project Manager shall sign a
10 confidentiality agreement concerning their work undertaken pursuant to this Consent Judgment
11 and shall not be subject to deposition concerning such work. Nor shall internal working
12 documents created by members of the Committee or the Project Manager during the course of
13 their work pursuant to this Consent Judgment, such as notes and drafts reflecting their mental
14 impressions, be discoverable or otherwise disclosed. Documents the Committee or its members
15 have obtained from public sources that members of the Committee have relied on to reach the
16 recommendations they provide pursuant to Section 3.3.4 are not subject to the discovery
17 restrictions of this Section. The final report the Committee issues pursuant to Section 3.3.4 shall
18 likewise be subject to disclosure and may be made publically available by any Party, as long as
19 any information that is subject to the requirements of Section 3.4.4 have been redacted from it.

20 3.3.4. No later than one hundred eighty (180) days after the conclusion of the
21 Root Cause Phase and the Reduction Recommendation Phase, the Committee shall complete the
22 Warning Trigger Phase and Final Report Phase and issue its final report to the Parties regarding
23 the findings and recommendations the Committee. Subject to Sections 3.3.3 and 3.4.4, AYS
24 and the Initial Settling Defendants shall have access to review the materials upon which the
25 Committee has relied in performing its work, which the Project Manager shall arrange to
26 preserve for a period of five (5) years.

1 **3.4 Means of Investigation by the Committee.**

2 3.4.1. As described in the Scope of Work, the Committee’s investigation should
3 be based on a number of sources (whether existing or produced at the Committee’s request),
4 including an initial literature review (including peer-reviewed published articles to the extent
5 possible); reviewing test data regarding cocoa beans and Chocolate Products; testing of
6 production equipment, packaging and equipment and materials used in the drying and storage of
7 cocoa beans and testing of cocoa beans and Chocolate Products (including in relation to testing
8 of production equipment, product packaging, and drying and storage methods); travel to cocoa
9 growing areas and processing plants; and interviews with academics, government agencies,
10 chocolate growers, chocolate suppliers, and chocolate manufacturers or others who have
11 relevant expertise on the subject. The Committee may also consult with outside subject matter
12 experts that are necessary to assist in the Committee’s work.

13 3.4.2. To inform the investigation, each Initial Settling Defendant shall make
14 available to the Committee, on a rolling basis and, at most, within one hundred twenty (120)
15 days of the Effective Date, relevant information in its possession regarding lead and cadmium in
16 chocolate, including relevant test data regarding cocoa beans, cocoa butter, and/or Chocolate
17 Products and the results of any prior non-privileged substantive investigations into the sources
18 of lead and cadmium in cocoa beans and/or Chocolate Products.

19 3.4.3. The Committee may, at any time, reasonably request further information
20 (including existing test data) and/or samples of cocoa beans and Chocolate Products from one or
21 more Settling Defendants relevant to the Scope(s) of Work and the relevant Settling Defendants
22 shall make a good-faith effort to provide such requested information to the Committee within
23 thirty (30) days of the Committee’s reasonable request.

24 3.4.4. Any information provided to the Committee may be provided anonymously
25 (i.e., on a blinded basis and through an intermediary entity such as a trade association or law
26 firm) in order to protect proprietary or commercially sensitive business information, and the
27 members of the Committee shall not disclose or disseminate to others any information they
28 receive from a Settling Defendant or, if it has been provided to the Committee through another

1 entity, the source from which the Committee obtained such Settling Defendant-originated
2 information.

3 **4. IMPLEMENTATION OF INVESTIGATION FINDINGS**

4 4.1 Within one hundred twenty (120) days of the issuance of the Committee’s final
5 report pursuant to Section 3.3.4, AYS and the Initial Settling Defendants (or a designated
6 representative thereof) shall begin to meet and confer to determine whether the drop down
7 warning triggers set forth under Sections 6.2.1 and 6.2.2 of the Consent Judgment should be
8 modified based on the final report of the Committee. Such meet and confer period should
9 extend for a period of at least ninety (90) days, unless AYS and the Initial Settling Defendants
10 mutually agree to extend it, including to allow for the involvement of a mediator. Following the
11 conclusion of this meet and confer process, and no earlier than one hundred and twenty (120)
12 days after the commencement of the meet and confer process, AYS and/or the Initial Settling
13 Defendants may, as informed by the Committee’s final report, jointly stipulate to or individually
14 move for a modification of this Consent Judgment pursuant to Section 10, including with respect
15 to any upward or downward adjustments of the drop down lead and cadmium warning triggers
16 set forth under Sections 6.2.1 and 6.2.2. Any Party may oppose such a modification before the
17 Court. If entered by the Court, such a modification shall be binding on and effective as to all
18 Settling Defendants, including Opt-In Settling Defendants, one year following written notice to
19 them of the Court’s action approving of the modification.

20 4.2 If no modification is entered by the Court pursuant to Section 4.1, the “drop
21 down” warning triggers set forth in Sections 6.2.1 and 6.2.2 shall automatically go into effect as
22 scheduled.

23 **5. BEST PRACTICES AND COMPLIANCE VERIFICATION TESTING**

24 5.1 **Required Provisional Efforts to Ensure Lowest Level Currently Feasible.**
25 During the Committee’s investigation and while the resulting meet and confer and any
26 modification process is underway, all Settling Defendants who are cocoa, chocolate, or candy
27 manufacturers (as opposed to retailers or distributors) must certify to AYS annually for five (5)
28 years following the Compliance Date that they have complied with FDA’s applicable Good

1 Manufacturing Practice and Preventive Controls for Human Food requirements (21 C.F.R. Part
2 117) for their Covered Products distributed and sold in the United States as reviewed by a
3 qualified internal or third party food safety auditor.

4 **5.2 Compliance Verification Testing and Enforcement Procedures.** Utilizing the
5 funding provided by the Settling Defendants under Section 8.6, AYS will conduct compliance
6 verification testing after the requirements of Section 6 of this Consent Judgment become
7 effective. Any such testing and the provisions set forth in the remainder of this Section 5 shall
8 govern AYS's enforcement of Section 6 of this Consent Judgment. AYS's compliance
9 verification testing conducted pursuant to this Section 5 shall only utilize Covered Product
10 samples that (a) AYS obtains only from the California market or which are shipped to a
11 California address as the result of a purchase by AYS or its investigators via the internet, (b)
12 have been manufactured following the Compliance Date as identified by the Covered Product's
13 Lot identifier, and (c) do not bear the warning required by Section 6.3.

14 **5.3** In conducting compliance verification testing, AYS shall use a laboratory that
15 employs inductively coupled plasma mass spectrometry ("ICP-MS") utilizing scientifically
16 appropriate adherence to the protocols set forth in AOAC Method 2015.01 with a LOD/LOQ of
17 0.010 ppm or less.

18 **5.4 Outlier Test Results.**

19 5.4.1. Any single test result obtained that exceeds 0.300 ppm of lead for a product
20 with less than 95% cacao content or 0.450 ppm of lead for a product with 95% or greater cacao
21 content; or 0.900 ppm of cadmium for a product with less than 95% cacao content or 1.92 ppm
22 of cadmium for a product with 95% or greater cacao content shall be deemed a potential
23 "Outlier."

24 5.4.2. At a Settling Defendant's option, any single Outlier test result must be
25 subject to validation before it is deemed to be an effective result for purposes of this Consent
26 Judgment. The validation process shall consist of two steps:

27 (a) First, the laboratory from which the test result in question was
28 obtained shall be required to check its equipment, test processes, validation procedures,

1 laboratory contamination, operator error, and any other factors which could have produced an
2 erroneous result. If the result is determined erroneous due to testing error or failure to satisfy
3 quality assurance or quality control procedures, the result shall be discarded and not used for any
4 purpose under this Consent Judgment. The Covered Product may then be re-tested as if such
5 test were the first test.

6 (b) Second, if the steps in Section 5.4.2(a) have not invalidated the
7 result, then the Settling Defendant may, in preparation for the meet and confer process set forth
8 in Section 5.5.4 and no later than sixty (60) days after the notice of violation is sent, collect up to
9 three (3) or more randomly selected samples of the Covered Product from the same Lot as the
10 Covered Product subject to the Notice of Violation. AYS, at its option, can also test up to three
11 (3) more products from the same Lot and have those additional products tested. The arithmetic
12 mean of these test results and the original Outlier test result shall then be determined. That
13 mean result shall be deemed the final result concerning the sample in question and shall
14 constitute the applicable test result for purposes of this Consent Judgment. If, between a
15 Settling Defendant and AYS, less than two (2) additional Covered Product samples from the
16 same Lot remain in either the Settling Defendant's or AYS's control or can reasonably be
17 acquired through purchase, the Settling Defendant and/or AYS may use such randomly selected
18 samples of the Covered Product as produced in the same calendar quarter as is indicated by the
19 Lot identifier of the potential Outlier sample.

20 **5.5 Stipulated Enforcement Process.**

21 5.5.1. Notice of Violation. In the event that AYS obtains qualified laboratory test
22 results showing that the Covered Product exceeds the applicable limit or limits set forth in
23 Section 6.2, it may issue a Notice of Violation pursuant to this Section 5.5. For the purposes of
24 this Consent Judgment, "Notice of Violation" shall mean violations of the Consent Judgment
25 and is not a sixty day notice subject to the requirements of California Code of Regulations Title
26 27 § 25903.

1 5.5.2. Service of Notice of Violation and Supporting Documentation.

2 (a) The Notice of Violation shall be sent to the person(s) identified in
3 Section 19 to receive notices for the Settling Defendant in question, and must be served within
4 sixty (60) days of the later of the date the Covered Product at issue was tested or the test result in
5 question was acquired by AYS, provided, however, that AYS may have up to an additional sixty
6 (60) days to send the Notice of Violation if, notwithstanding AYS's good faith efforts, the test
7 data required by Section 5.4.2(a) cannot be obtained by AYS from the laboratory before
8 expiration of the initial sixty (60) day period.

9 (b) The Notice of Violation shall, at a minimum, set forth: (a) the date
10 the Covered Product was purchased; (b) the location at which the Covered Product was
11 purchased; (c) the name of the Covered Product giving rise to the alleged violation, including
12 the name and address of the retail entity from which the sample was obtained and pictures of the
13 product packaging, which identifies the product's UPC number and lot number/best-by/sell-by
14 date; and (d) all compliance verification test data obtained by AYS regarding the Covered
15 Product, including any laboratory reports, quality assurance reports, and quality control reports
16 associated with testing of the Covered Product.

17 5.5.3. Notice of Election of Response. No more than thirty (30) days after
18 effectuation of service of a Notice of Violation, the Settling Defendant in question shall provide
19 written notice to AYS whether such Settling Defendant elects to contest the allegations
20 contained in a Notice of Violation ("Notice of Election"). Upon notice to AYS, Settling
21 Defendant may have up to an additional thirty (30) days to elect if, notwithstanding Settling
22 Defendant's good faith efforts, a Settling Defendant is unable to verify the test data provided by
23 AYS before expiration of the initial thirty (30) day period.

24 (a) If a Notice of Violation is contested, the Notice of Election shall
25 include all documents upon which the Settling Defendant is relying to contest the alleged
26 violation, including any test data that it wishes to rely on, including any laboratory reports,
27 quality assurance reports, and quality control reports associated with testing of the Covered
28

1 Product. (Such test data may include, but not be limited to, the test results obtained under
2 Section 5.4.2(b), if applicable.)

3 5.5.4. Meet and Confer. If a Notice of Violation is contested, AYS and the
4 Settling Defendant shall meet and confer to attempt to resolve their dispute. Within thirty (30)
5 days of serving a Notice of Election, a Settling Defendant may withdraw the original Notice of
6 Election contesting the violation and serve a new Notice of Election to not contest the violation,
7 provided, however, that, in this circumstance, such Settling Defendant shall pay AYS's actual
8 documented fees and costs up to a cap of \$5,000, in addition to the payments specified in
9 Sections 5.5 and 5.6. for violations of the Consent Judgment. At any time, AYS may withdraw
10 a Notice of Violation, in which case for purposes of Section 5.6, the result shall be as if AYS
11 never issued any such Notice of Violation. If no informal resolution of a Notice of Violation
12 results within thirty (30) days of a Notice of Election to contest, AYS may file an enforcement
13 motion or application pursuant to Section 16. In any such proceeding, AYS may seek whatever
14 fines, costs, penalties, attorneys' fees, or other remedies are provided by law for an alleged
15 failure to comply with Proposition 65 or this Consent Judgment.

16 5.5.5. Non-Contested Notices. If a Settling Defendant elects to not contest the
17 allegations in a Notice of Violation, it shall undertake corrective action and make payments as
18 set forth below.

19 (a) A Settling Defendant electing to not contest shall include in its
20 Notice of Election a detailed description with supporting documentation of the corrective
21 action(s) that it has undertaken or proposes to undertake to address the alleged violation. Any
22 such correction shall provide reasonable assurance that all Covered Products having the same
23 UPC number and Lot identifier as that of the Covered Product identified in AYS's Notice of
24 Violation (the "Noticed Covered Products") will not be thereafter sold in the State of California
25 or offered for sale to California customers by the Settling Defendant without the product
26 warning language specified in Section 6.3 having been provided prior to its sale, and that the
27 Settling Defendant has sent instructions to any retailers or customers that offer the Noticed
28 Covered Products for sale to cease offering the Noticed Covered Products for sale to California

1 consumers unless such product warning language is provided in conjunction with its sale.
2 Settling Defendant shall also document the additional steps, including product testing and/or
3 modification, that it will take to ensure that future Lots of the same Covered Product comply
4 with the requirements of the Consent Judgment. A Settling Defendant shall keep for a period of
5 one year and provide to AYS documentation confirming its implementation regarding the
6 foregoing. If there is a dispute over the corrective action, the Settling Defendant and AYS shall
7 meet and confer before seeking any remedy in court. In no case shall AYS issue to a Settling
8 Defendant more than one Notice of Violation per Covered Product within a calendar quarter.

9 (b) If the Notice of Violation is the first Notice of Violation received by
10 the Settling Defendant for a type of Covered Product (as identified by its UPC code) under
11 Section 5.5.1 that was not successfully contested or withdrawn, then a Settling Defendant as
12 defined by Sections 8.1.1 or 8.1.4 shall pay \$10,000, a Settling Defendant as defined by
13 Sections 8.1.2, 8.1.5, or 8.1.7 shall pay \$7,500, and a Settling Defendant as defined by Sections
14 8.1.3, 8.1.6, or 8.1.8 shall pay \$5,000, for each Notice of Violation. If the Notice of Violation is
15 the second Notice of Violation received by the Settling Defendant for a Covered Product under
16 Section 5.5.1 that was not successfully contested or withdrawn, then a Settling Defendant as
17 defined by Sections 8.1.1 or 8.1.4 shall pay \$15,000, a Settling Defendant as defined by Sections
18 8.1.2, 8.1.5, or 8.1.7 shall pay \$12,500, and a Settling Defendant as defined by Sections 8.1.3,
19 8.1.6, or 8.1.8 shall pay \$10,000, for each Notice of Violation. If the Notice of Violation is the
20 third or fourth Notice of Violation received by the Settling Defendant for a Covered Product
21 under Section 5.5.1 that was not successfully contested or withdrawn, then a Settling Defendant
22 as defined by Sections 8.1.1 or 8.1.4 shall pay \$25,000, a Settling Defendant as defined by
23 Sections 8.1.2, 8.1.5, or 8.1.7 shall pay \$20,000, and a Settling Defendant as defined by Sections
24 8.1.3, 8.1.6, or 8.1.8 shall pay \$15,000, for each Notice of Violation.

25 (c) If a Settling Defendant produces with its Notice of Election test data
26 for the Covered Product (as identified by its UPC code and a best-by or sell-by date falling
27 within the same calendar quarter) that: (i) was obtained prior to the date AYS gave Notice of
28 Violation; (ii) was conducted on the same type of Covered Product (as identified by its UPC

1 code); and (iii) demonstrates levels below the applicable warning triggers set forth in Section
2 6.2.1 and 6.2.2, then any payment under this Section shall be reduced by one hundred percent
3 (100%) for the first Notice of Violation, except that the Settling Defendant shall reimburse AYS
4 for AYS's actual documented fees and costs associated with testing the Covered Product up to
5 limit of \$5,000. Pursuant to Section 5.5.5(a), the Settling Defendant shall also document the
6 measures, including product testing, warnings, and/or modification, that it will take to ensure
7 that future Lots of the same Covered Product comply with the requirements of the Consent
8 Judgment.

9 5.5.6. Payments. Any payments under Section 5.5.5 shall be made by check
10 payable to "As You Sow" and shall be paid within thirty (30) days of service of a Notice of
11 Election triggering a payment and shall be used by AYS as reimbursement for costs for
12 investigating, preparing, sending, and prosecuting Notices of Violation, and to reimburse
13 attorneys' fees and costs incurred in connection with these activities. To the extent such
14 reimbursement exceeds AYS's associated costs, AYS will use these funds to replenish the
15 Compliance Testing Fund established pursuant to Section 8.6 of this Consent Judgment.

16 5.6 **Repeat Violations.** If a Settling Defendant has received more than four (4)
17 Notices of Violation concerning the same Covered Product that were not successfully contested
18 or withdrawn in any two (2) year period then, at AYS's option, AYS may seek whatever fines,
19 costs, penalties, attorneys' fees, or other remedies that are provided by law for failure to comply
20 with Proposition 65. Prior to seeking such relief, AYS shall meet and confer with the Settling
21 Defendant for at least thirty (30) days to determine if the Settling Defendant and AYS can
22 instead agree on measures that the Settling Defendant can undertake to prevent future alleged
23 violations.

24 **6. INJUNCTION GOVERNING COVERED PRODUCT FORMULATIONS AND** 25 **WARNINGS**

26 6.1 **Applicability.** Covered Products subject to this Consent Judgment are subject to
27 the requirements for Proposition 65 warnings set forth in Sections 6.3, 6.4, and 6.5, as
28 applicable, depending on their cacao content (by %) and lead and cadmium levels as further

1 specified in Section 6.2. The requirements set forth in this Section 6 shall apply only to Covered
2 Products: (a) manufactured on or following the Compliance Date, and (b) which are (i) sold or
3 may be offered for sale to California consumers (“consumer products”) or (ii) sold or may be
4 offered for sale as inputs to Covered Products (“non-consumer products”) which are sold or may
5 be offered for sale to California consumers.

6 6.2 Product Warning Triggers.

7 6.2.1. Product Warning Triggers Based on Lead Concentration Levels.

8 (a) For Covered Products with up to 65% cacao content: Product
9 Warnings are required if the Covered Product’s associated lead concentration level exceeds
10 0.100 ppm, provided, however, that as of the sixth anniversary of the Compliance Date, the
11 foregoing lead concentration level shall be deemed to have been reduced to 0.065 ppm unless (i)
12 the Committee has recommended that the 0.100 ppm lead concentration level be continued, a
13 lead concentration level between 0.100 and 0.065 ppm be instituted, or that a lead concentration
14 level less than 0.065 ppm replace the 0.065 ppm level, and (ii) a modification of this Consent
15 Judgment has been entered which reflects the level that shall supersede the drop down to 0.065
16 ppm.

17 (b) For Covered Products with greater than 65% and up to 95% cacao
18 content: Product Warnings are required if the Covered Product’s associated lead concentration
19 level exceeds 0.150 ppm, provided, however, that as of the sixth anniversary of the Compliance
20 Date, the foregoing lead concentration level shall be deemed to have been reduced to 0.100 ppm
21 unless (i) the Committee has recommended that the 0.150 ppm lead concentration level be
22 continued, a lead concentration level between 0.150 and 0.100 ppm be instituted, or that a lead
23 concentration level less than 0.100 ppm replace the 0.100 ppm level, and (ii) a modification of
24 this Consent Judgment has been entered which reflects the level that shall supersede the drop
25 down to 0.100 ppm.

26 (c) For Covered Products with greater than 95% cacao content: Product
27 Warnings are required if the Covered Product’s associated lead concentration level exceeds
28 0.225 ppm, provided, however, that as of the sixth anniversary of the Compliance Date, the

1 foregoing lead concentration level shall be deemed to have been reduced to 0.200 ppm unless (i)
2 the Committee has recommended that the 0.225 ppm lead concentration level be continued, a
3 lead concentration level between 0.225 and 0.200 ppm be instituted, or that a lead concentration
4 less than 0.200 ppm replace the 0.200 ppm level, and (ii) a modification of this Consent
5 Judgment has been entered which reflects the level that shall supersede the drop down to 0.200
6 ppm.

7 **6.2.2. Product Warning Triggers Based on Cadmium Concentration Levels.**

8 (a) For Covered Products with up to 65% cacao content: Product
9 Warnings are required if the Covered Product's associated cadmium concentration level exceeds
10 0.400 ppm, provided, however, that as of the sixth anniversary of the Compliance Date, the
11 foregoing cadmium concentration level shall be deemed to have been reduced to 0.320 ppm
12 unless (i) the Committee has recommended that the 0.400 ppm cadmium concentration level be
13 continued, a cadmium concentration level between 0.400 and 0.320 ppm be instituted, or that a
14 cadmium concentration level less than 0.320 ppm replace the 0.320 ppm level, and (ii) a
15 modification of this Consent Judgment has been entered which reflects the level that shall
16 supersede the drop down to 0.320 ppm.

17 (b) For Covered Products with greater than 65% and up to 95% cacao
18 content: Product Warnings are required if the Covered Product's associated cadmium
19 concentration level exceeds 0.450 ppm, provided, however, that as of the sixth anniversary of
20 the Compliance Date, the foregoing cadmium concentration level shall be deemed to have been
21 reduced to 0.400 ppm unless (i) the Committee has recommended that the 0.450 ppm lead
22 concentration level be continued, a cadmium concentration level between 0.450 and 0.400 ppm
23 be instituted, or that a cadmium concentration level less than 0.400 ppm replace the 0.400 ppm
24 level, and (ii) a modification of this Consent Judgment has been entered which reflects the level
25 that shall supersede the drop down to 0.400 ppm.

26 (c) For Covered Products with greater than 95% cacao content: Product
27 Warnings are required if the Covered Product's associated cadmium concentration level exceeds
28 0.960 ppm, provided, however, that as of the sixth anniversary of the Compliance Date, the

1 foregoing cadmium concentration level shall be deemed to have been reduced to 0.800 ppm
2 unless (i) the Committee has recommended that the 0.960 ppm cadmium concentration level be
3 continued, a cadmium concentration level between 0.960 and 0.800 ppm be instituted, or that a
4 cadmium concentration level less than 0.800 ppm replace the 0.800 ppm level, and (ii) a
5 modification of this Consent Judgment has been entered which reflects the level that shall
6 supersede the drop down to 0.800 ppm.

7 **6.3 Product Warning Language.** Following the Compliance Date, the following
8 Product Warning statement shall be used on any Covered Product authorized or offered for sale
9 in the State of California which exceeds an applicable trigger as set forth in Section 6.2:

10 **WARNING:** Consuming this product may expose you to chemicals including lead and
11 cadmium, which are known to the State of California to cause [cancer and] birth defects
12 or other reproductive harm. For further information go to www.p65warnings.ca.gov

13 The bracketed language in the preceding Product Warning statement may be deleted or included
14 at a Settling Defendant's option.

15 **6.4 Method of Transmission for Product Warnings.**

16 **6.4.1. Labeling Requirement.** Where required pursuant to Sections 6.1 and 6.2,
17 the Product Warning statement set forth in Section 6.3 shall be placed on a consumer Covered
18 Product's labeling with such conspicuousness as compared with other words, statements, or
19 designs on the labeling or packaging as to render it likely to be read and understood by an
20 ordinary individual under customary conditions of use or purchase. The Product Warning
21 statement shall be displayed in at least the same size as the largest of any other health or safety
22 warnings or chemical or allergen disclosures on the Covered Product's label. The Product
23 Warning statement shall be contained in the same section of the label that states other safety
24 warnings or chemical/allergen disclosures about the Covered Product.

25 **6.4.2. Warning for a Settling Defendant's Internet Sales.** In addition to
26 complying with the labeling requirement in subsection 6.4.1, Settling Defendants who maintain
27 their own websites that sell Covered Products to a California consumer, must also provide
28 Product Warnings, where required for a Covered Product under Sections 6.1 and 6.2, by

1 including either the Product Warning statement set forth in Section 6.3 or a clearly marked
2 hyperlink using the word “WARNING” to such a Product Warning statement, either: (a) on the
3 product display page for the Covered Product, (b) on the same page as serves as the order form
4 for the Covered Product, (c) on the same page as where the price for the Covered Product is
5 otherwise displayed; or (d) in a dialogue box that appears and is visible when a California
6 address for delivery is provided by the consumer (but only if the dialogue box appears prior to
7 the completion of the internet sale).

8 **6.5 Non-Consumer Chocolate Products.** The Product Warning requirements set
9 forth in this Section 6 do not directly apply to commercial, non-consumer Chocolate Products
10 that are intended to be used as ingredients in consumer products, as long as such products are
11 not made available for sale directly to California consumers. However, Settling Defendants that
12 manufacture, distribute or sell commercial, non-consumer Chocolate Products that do exceed the
13 limits set forth in Section 6.2 shall advise their customers in writing at least annually that
14 consumer products made with their commercial products may not be offered for sale in the State
15 of California without the applicable warning as set forth in Section 6.3 and 6.4, unless the
16 resulting consumer products do not exceed the limits as set forth in Sections 6.2.1 and 6.2.2.

17 **6.6** Any changes to the language or format of the Product Warnings required under
18 this Section 6 shall be made only after Court approval and following written notice to AYS and
19 to the California Attorney General.

20 **7. OPT-IN PROGRAM**

21 **7.1** This Consent Judgment is executed with the understanding that additional persons
22 and entities who manufacture, distribute, sell, or offer for sale Chocolate Products in the State of
23 California may wish to subscribe to the terms of this Consent Judgment. Each Opt-In Settling
24 Defendant that has not already received a 60-Day Notice of Violation from AYS concerning the
25 range of Chocolate Products it wishes to address through the Opt-In must be able to certify to
26 the facts enumerated in Section 7.3.

27 **7.2** At any time before one hundred eighty (180) days following the Effective Date,
28 prospective Opt-In Settling Defendants who are willing to confirm the representations listed in

1 Section 7.3 may become Settling Defendants under this Consent Judgment by executing an Opt-
2 In Stipulation as provided in Section 7.3 and tendering the applicable payment amounts, as set
3 forth in Section 8. Each Opt-In Defendant that has not received a 60-day Notice of Violation
4 from AYS for the Chocolate Products to be covered by this Consent Judgment shall cooperate
5 with AYS in providing an evidentiary basis upon which AYS can complete a certificate of merit
6 for the 60-day Notice of Violation, as required by Health and Safety Code section
7 25249.7(d)(1).

8 7.3 Each Opt-In Settling Defendant shall execute and deliver to AYS an Opt-In
9 Stipulation in the general form appearing as **Exhibit B** hereto identifying whether the Opt-In
10 Settling Defendant has manufactured, imported, distributed, sold, or offered for use and sale in
11 the State of California Chocolate Products, and certifying to the following facts: (1) it employs
12 ten or more persons; (2) it manufactured, imported, distributed, sold, or offered for use and sale
13 in the State of California one or more specifically identified Chocolate Products without a “clear
14 and reasonable” Proposition 65 warning during the preceding year; and (3) it knows or has
15 reason to believe that one or more of the identified Chocolate Products has in the past contained
16 or presently contains lead or cadmium in excess of at least one of the drop down levels set forth
17 in Section 6.2.1 or 6.2.2.

18 7.4 Not later than ninety (90) days after AYS receives a completed Opt-In Stipulation
19 for a prospective Opt-In Settling Defendant for which a 60-day Notice of Violation has not been
20 issued, any additional information and representations necessary to support a 60-day Notice of
21 Violation, and payment of the applicable payments required in Section 8, AYS shall serve a
22 Notice of Violation pursuant to California Health and Safety Code section 25249.7(d) on the
23 Opt-In Settling Defendant, to the California Attorney General, to every California District
24 Attorney and every California city attorney required to receive such a notice pursuant to
25 California Health and Safety Code section 25249.7.

26 7.5 No earlier than seventy (70) days from the date specified in the Notice of
27 Violation sent to an Opt-In Settling Defendant, and provided that no authorized public
28 prosecutor of Proposition 65 has filed an action against that Opt-In Settling Defendant for

1 alleged exposures to lead or cadmium in the Covered Products and is diligently prosecuting it,
2 AYS shall file in this Court an application for entry of the executed Opt-In Stipulation that AYS
3 has received pursuant to this Section 7 and shall serve notice thereof on all other Settling
4 Defendants. If the Court approves the application for entry of the Opt-In Stipulation, the
5 Complaint shall be deemed to have been amended to specifically name the Opt-In Settling
6 Defendant that executed the Opt-In Stipulation as named defendants in this Action, and each
7 such Opt-In Settling Defendant shall be deemed to be a full Settling Defendant under this
8 Consent Judgment, with all applicable obligations and rights conferred by this Consent
9 Judgment.

10 7.6 In the event that a public prosecutor is diligently prosecuting an Opt-In Settling
11 Defendant's alleged Proposition 65 violation prior to the expiration of the 60-day notice period,
12 AYS shall refund the full payment made by that Opt-In Settling Defendant and have no further
13 obligation to that Opt-In Settling Defendant under this Section 7.

14 7.7 At the time AYS files the final application for entry of the Opt-In Stipulations with
15 the Court pursuant to Section 7.5, it shall prepare and file with the Court and serve on the
16 California Attorney General, an application for approval of the Opt-In Stipulations pursuant to
17 Section 8.2. The application shall be supported by one or more declarations reporting the results
18 of the opt-in program, including all expenses and attorneys' fees incurred by AYS's counsel
19 with respect to the lead and cadmium enforcement process and opt-in process to date. In the
20 event that the application demonstrates that the total amount of the expenses and attorneys' fees
21 incurred by AYS is less than the total amount of reimbursement provided pursuant to Section
22 8.2, AYS shall within thirty (30) days disgorge any attorneys' fees and costs reimbursements in
23 excess of its costs actually incurred in AYS's chocolate-related Proposition 65 matters to the
24 Initial Settling Defendants as set forth in Section 8.2 below.

25 7.8 Opt-In Settling Defendants are subject to the timelines as set forth in Sections 5
26 and 6 of this Consent Judgment, without modification.

1 **8. MONETARY RELIEF**

2 8.1 For the purposes of this Section 8 regarding monetary relief, Settling Defendants
3 shall fall into one of the following categories and provide certification of their qualifications
4 therefore to AYS upon request:

- 5 8.1.1. Large Grinders/Wholesalers/Chocolate Ingredient Suppliers: Total annual
6 U.S. sales of Covered Products of \$500 Million or more
- 7 8.1.2. Medium Grinders/Wholesalers/Chocolate Ingredient Suppliers: Total
8 annual U.S. sales of Covered Products in excess of \$50 Million but less
9 than \$500 Million
- 10 8.1.3. Small Grinders/Wholesalers/Chocolate Ingredient Suppliers: Total annual
11 U.S. sales of Covered Products of less than \$50 Million
- 12 8.1.4. Not Otherwise Completely Released Large Candy Manufacturer: Total
13 annual U.S. sales of Covered Products of \$500 Million or more
- 14 8.1.5. Not Otherwise Completely Released Medium Candy Manufacturer: Total
15 annual U.S. sales of Covered Products of \$50 Million but less than \$500
16 Million
- 17 8.1.6. Not Otherwise Completely Released Small Candy Manufacturer: Total
18 annual U.S. sales of Covered Products of less than \$50 Million
- 19 8.1.7. Large Retailer With Exposure Not Covered By a Downstream Release:
20 Total annual U.S. sales of Covered Products not subject to downstream
21 release of \$100 Million or more
- 22 8.1.8. Small Retailer With Exposure Not Covered By a Downstream Release:
23 Total annual U.S. sales of Covered Products not subject to downstream
24 release of less than \$100 Million.

25 8.2 **Fee Reimbursement.** Within thirty (30) days of the Effective Date, the Initial
26 Settling Defendants, or an entity acting on their behalves, shall collectively reimburse AYS’s
27 attorneys’ fees, investigative costs, and other reasonable litigation costs and expenses in the
28 aggregate amount of \$900,000. The individual amounts set forth in Sections 8.2.1 through 8.2.8
shall apply to the calculation of fee reimbursement payments for Opt-In Settling Defendants
pursuant to Section 7 and shall be reimbursed to the Initial Settling Defendants by AYS within
sixty (60) days of the Court’s action on the application AYS must file pursuant to Section 7.7.
AYS shall make this reimbursement through a lump sum payment to Morrison and Foerster
Client Trust LLP (or an alternate designee of the Initial Settling Defendants), which will
distribute the funds on a pro rata basis based on each Initial Settling Defendant’s total payments

1 made under this Section 8.2 relative to all other Initial Settling Defendants’ total payments made
2 under this Section 8.2 or pursuant to such other allocation as has been agreed upon among the
3 Initial Settling Defendants. In the event the amount provided to the Initial Settling Defendants
4 under this Section 8.2 and Section 8.5 exceeds the fees and costs the Initial Settling Defendants
5 have incurred with respect to this Consent Judgment, excluding any payments made under
6 Sections 8.3, 8.4, or 8.6, but including the legal fees they have incurred in its development and
7 approval and entry by the Court (“Settlement Related Costs”), the Initial Settling Defendants
8 shall disgorge any such excess amount to the California Office of Environmental Health Hazard
9 Assessment (“OEHHA”).

- 10 8.2.1. Large Grinders/Wholesalers/Chocolate Ingredient Suppliers: \$95,000
- 11 8.2.2. Medium Grinders/Wholesalers/Chocolate Ingredient Suppliers: \$45,000
- 12 8.2.3. Small Grinders/Wholesalers/Chocolate Ingredient Suppliers: \$20,000
- 13 8.2.4. Not Otherwise Completely Released Large Candy Manufacturer: \$95,000
- 14 8.2.5. Not Otherwise Completely Released Medium Candy Manufacturer:
15 \$45,000
- 16 8.2.6. Not Otherwise Completely Released Small Candy Manufacturer: \$20,000
- 17 8.2.7. Large Retailer With Exposure Not Covered By a Downstream Release:
18 \$12,500
- 19 8.2.8. Small Retailer With Exposure Not Covered By a Downstream Release:
20 \$10,000

21 8.3 **Civil Penalties.** Within thirty (30) days of the Effective Date, each Initial Settling
22 Defendant, or an entity acting on their collective behalves, shall also make the following
23 payments to AYS as civil penalties, pursuant to Health and Safety Code section 25249.7(b), as
24 set forth in Sections 8.3.1 through 8.3.8. The individual amounts set forth in Sections 8.3.1
25 through 8.3.8 shall also apply to the calculation of payments for Opt-In Settling Defendants
26 pursuant to Section 7. AYS shall remit 75% of the amount to the State of California pursuant to
27 Health and Safety Code section 25249.12(b). Settling Defendants shall have no liability if
28 payments to the State of California are not made by AYS.

- 1 8.3.1. Large Grinders/Wholesalers/Chocolate Ingredient Suppliers: \$22,000
- 2 8.3.2. Medium Grinders/Wholesalers/Chocolate Ingredient Suppliers: \$16,500
- 3 8.3.3. Small Grinders/Wholesalers/Chocolate Ingredient Suppliers: \$11,000
- 4 8.3.4. Not Otherwise Completely Released Large Candy Manufacturer: \$22,000
- 5 8.3.5. Not Otherwise Completely Released Medium Candy Manufacturer:
- 6 \$16,500
- 7 8.3.6. Not Otherwise Completely Released Small Candy Manufacturer: \$11,000
- 8 8.3.7. Large Retailer With Exposure Not Covered By a Downstream Release:
- 9 \$16,500
- 10 8.3.8. Small Retailer With Exposure Not Covered By a Downstream Release:
- 11 \$11,000.

11 **8.4 Additional Settlement Payments In Lieu Of Penalties.** Additionally, within
12 thirty (30) days of the Effective Date, each Initial Settling Defendant, or an entity acting on their
13 collective behalves, shall make the following additional payments to AYS in lieu of additional
14 civil penalties, as set forth in Sections 8.4.1 through 8.4.8. The individual amounts set forth in
15 Sections 8.4.1 through 8.4.8 shall also apply to the calculation of payments for Opt-In Settling
16 Defendants pursuant to Section 7. These additional settlement payments may be used by AYS
17 for grants to California 501(c)(3) non-profit organizations and by AYS itself for research and
18 educational purposes associated with reducing or remediating exposures to lead and cadmium
19 contained in consumer products sold in California and/or to increase consumer awareness of the
20 health hazards posed by these chemicals in consumer products sold in California and how such
21 hazards may be mitigated, but may not be used by AYS or its grantees in support of litigation, or
22 for public relations, directed at the Settling Defendants or their Covered Products. In deciding
23 among grantee proposals, the AYS Board of Directors (“Board”) takes into consideration a
24 number of important factors, including: (1) the nexus between the harm posed by lead and
25 cadmium in consumer products sold in California and the grant program work; (2) the potential
26 for lead or cadmium reduction, prevention, mitigation, remediation, or education benefits to
27 California citizens from the proposal; (3) the budget requirements of the proposed grantee and
28 the alternate funding sources available to it for its project; and (4) the Board’s assessment of the

1 grantee's chances for success in its program work. AYS shall ensure that all funds will be
2 disbursed and used in accordance with this Section 8.4, as well as with AYS's mission
3 statement, articles of incorporation, bylaws, and applicable state and federal laws and
4 regulations. AYS shall obtain and maintain adequate records to document that the funds are
5 spent on the activities described in this Section 8.4, and shall provide the Attorney General,
6 within thirty (30) days of any request, copies of all documentation demonstrating how such
7 funds have been spent. No party to this Consent Judgment, or counsel of record, or spouse or
8 dependent child thereof, has an economic interest in any entity or individual, besides itself, that
9 is designated in this paragraph to receive all or a party of any Additional Settlement Payments.

10 The payments required under this Section 8.4 are as follows:

- 11 8.4.1. Large Grinders/Wholesalers/Chocolate Ingredient Suppliers: \$3,875
- 12 8.4.2. Medium Grinders/Wholesalers/Chocolate Ingredient Suppliers: \$2,125
- 13 8.4.3. Small Grinders/Wholesalers/Chocolate Ingredient Suppliers: \$500
- 14 8.4.4. Not Otherwise Completely Released Large Candy Manufacturer: \$3,875
- 15 8.4.5. Not Otherwise Completely Released Medium Candy Manufacturer: \$2,125
- 16 8.4.6. Not Otherwise Completely Released Small Candy Manufacturer: \$500
- 17 8.4.7. Large Retailer With Exposure Not Covered By a Downstream Release:
18 \$2,125
- 19 8.4.8. Small Retailer With Exposure Not Covered By a Downstream Release:
20 \$500.

21 8.5 **Payments to Fund Committee's Work.** Additionally, within thirty (30) days of
22 the Effective Date, as contemplated in Section 3.3.2, the Initial Settling Defendants, or an entity
23 acting on their behalves, shall collectively tender to AYS an aggregate amount of \$500,000 to
24 fund the Committee investigation. The individual amounts of payments set forth in Sections
25 8.5.1 through 8.5.8 shall apply to the calculation of payments towards the Committee's work for
26 Opt-In Settling Defendants pursuant to Section 7. The first \$100,000 of payments received by
27 AYS from Opt-In Settling Defendants pursuant to this Section 8.5 will be used exclusively to
28 fund the remaining expense, if any, associated with the Committee's investigation and final
report pursuant to Section 3. Any portion of the \$100,000 that is not required for the remaining

1 expense of the Committee shall be transferred to the Compliance Testing Fund established under
2 Section 8.6. Any funds raised from Opt-In Settling Defendants pursuant to this Section 8.5 in
3 excess of the \$100,000 amount shall be paid to the Initial Settling Defendants by AYS within
4 sixty (60) days of the Court's action on the application AYS must file pursuant to Section 7.7.
5 AYS shall make this reimbursement through a lump sum payment to the Morrison and Foerster
6 LLP Client Trust (or an alternate designees of the Initial Settling Defendants), which will
7 distribute the funds on a pro rata basis based on each Initial Settling Defendant's total payments
8 made under this Section 8.5 relative to all other Initial Settling Defendants' total payments made
9 under this Section 8.5 or pursuant to such other allocation as has been agreed upon by the Initial
10 Settling Defendants. If the funds raised from the Opt-In Settling Defendants under this Section
11 8.5 are not sufficient to generate the additional \$100,000, the Initial Settling Defendants shall
12 collectively tender the difference to AYS within one year of the Effective Date. The payments
13 required by Opt-In Settling Defendants under this Section 8.5 shall be:

- 14 8.5.1. Large Grinders/Wholesalers/Chocolate Ingredient Suppliers: \$77,500
- 15 8.5.2. Medium Grinders/Wholesalers/Chocolate Ingredient Suppliers: \$35,000
- 16 8.5.3. Small Grinders/Wholesalers/Chocolate Ingredient Suppliers: \$15,000
- 17 8.5.4. Not Otherwise Completely Released Large Candy Manufacturer: \$77,500
- 18 8.5.5. Not Otherwise Completely Released Medium Candy Manufacturer:
19 \$35,000
- 20 8.5.6. Not Otherwise Completely Released Small Candy Manufacturer: \$15,000
- 21 8.5.7. Large Retailer With Exposure Not Covered By a Downstream Release:
22 \$7,500
- 23 8.5.8. Small Retailer With Exposure Not Covered By a Downstream Release:
24 \$2,500.

24 **8.6 Payments to Fund Compliance Verification Testing and Oversight Program.**

25 Additionally, within thirty (30) days of the Effective Date, each Initial Settling Defendant, or an
26 entity acting on their collective behalves, shall make the following additional payments to AYS
27 to provide seed funding for the compliance verification testing and oversight program set forth
28 in Sections 5.2 to 5.5 ("Compliance Testing Fund"). The individual amounts of payments set

1 forth in Sections 8.6.1 through 8.6.8 shall also apply to the calculation of payments towards the
2 compliance verification testing and oversight program for Opt-In Settling Defendants pursuant
3 to Section 7. The payments received by AYS pursuant to this Section 8.6 shall be used
4 exclusively to fund the compliance verification testing and oversight program described in
5 Sections 5.2 through 5.5. The payments required under this Section 8.6 shall be:

- 6 8.6.1. Large Grinders/Wholesalers/Chocolate Ingredient Suppliers: \$12,500
- 7 8.6.2. Medium Grinders/Wholesalers/Chocolate Ingredient Suppliers: \$10,000
- 8 8.6.3. Small Grinders/Wholesalers/Chocolate Ingredient Suppliers: \$7,500
- 9 8.6.4. Not Otherwise Completely Released Large Candy Manufacturer: \$12,500
- 10 8.6.5. Not Otherwise Completely Released Medium Candy Manufacturer:
11 \$10,000
- 12 8.6.6. Not Otherwise Completely Released Small Candy Manufacturer: \$7,500
- 13 8.6.7. Large Retailer With Exposure Not Covered By a Downstream Release:
14 \$10,000
- 15 8.6.8. Small Retailer With Exposure Not Covered By a Downstream Release:
16 \$7,500.

17 8.7 Initial Settling Defendants, or an entity acting on their collective behalves, shall
18 issue all payments as required under this Section 8 with a check made payable to Shute, Mihaly
19 & Weinberger LLP Client Trust Account and delivered to Ellison Folk, Shute, Mihaly &
20 Weinberger LLP, 396 Hayes Street, San Francisco, CA 94102 or via wire or ACH electronic
21 funds transfer if mutually arranged with Shute, Mihaly & Weinberger LLP in advance. Funds
22 tendered by the Opt-In Defendants for purposes of Section 8.2 shall be provided along with the
23 other documentation and payments required under Section 7.4 and maintained in the Shute,
24 Mihaly & Weinberger LLP Client Trust Account until disbursed for fee and cost reimbursement
25 approved by the Court or, if there is a surplus, until disbursed to the Initial Settling Defendants.
26 Funds tendered for purposes of Section 8.5 shall be maintained in the Shute, Mihaly &
27 Weinberger LLP Client Trust Account until disbursed for the Committee's expenses or, if there
28 is a surplus, until disbursed to the Initial Settling Defendants.

1 8.8 Except as provided in Sections 5.5, 5.6, and 16.1, the payments made pursuant to
2 this Section 8 shall be the only monetary obligation of Settling Defendants with respect to this
3 Consent Judgment, including as to any fees, costs, or expenses AYS has incurred in relation to
4 this Action.

5 **9. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

6 AYS agrees to comply with the reporting requirements referenced in California Health
7 and Safety Code section 25249.7(f). Pursuant to the regulations promulgated under that section,
8 AYS shall present this Consent Judgment to the California Attorney General’s Office within two
9 (2) days after receipt of all necessary Initial Settling Defendant signatures. The Parties
10 acknowledge that, pursuant to Health and Safety Code section 25249.7, a noticed motion must
11 be filed to obtain judicial approval of the Consent Judgment. Accordingly, a motion for
12 approval of the Consent Judgment shall be prepared and filed by AYS within a reasonable
13 period of time after the date this Consent Judgment is signed by all Parties.

14 **10. MODIFICATION OF SETTLEMENT**

15 This Consent Judgment may be modified by: (1) written agreement among the Parties
16 and upon entry of a modified Consent Judgment by the Court thereon, or (2) motion of AYS or a
17 Settling Defendant as provided by law and upon entry of a modified Consent Judgment by the
18 Court thereon. All Parties and the California Attorney General’s Office shall be served with
19 notice of any proposed modification to this Consent Judgment in advance of its consideration by
20 the Court.

21 **11. APPLICATION OF CONSENT JUDGMENT**

22 This Consent Judgment shall apply to and be binding upon AYS, acting in the public
23 interest, and the Settling Defendants and the predecessors, successors or assigns of each of them.

24 **12. CLAIMS COVERED/RELEASES**

25 12.1 **Release of Settling Defendants.** This Consent Judgment is a full, final, and
26 binding resolution between AYS, on behalf of itself and in the public interest, and the Settling
27 Defendants, of any alleged violation of Proposition 65 for failure to provide Proposition 65
28 warnings of exposure to lead and/or cadmium in the Covered Products. AYS, on behalf of

1 itself, its affiliates, agents, officers, directors, representatives, attorneys, successors and/or
2 assignees, and on behalf of the general public in the public interest, hereby releases and
3 discharges: (a) Settling Defendants and their parent companies, subsidiaries, affiliates, and
4 divisions; (b) their respective joint venturers and partners; and (c) each of the respective officers,
5 directors, shareholders, employees, agents, and representatives of the persons and entities
6 described in (a) and (b) (including the predecessors, successors and assigns of any of them, are
7 collectively referred to as the “Released Parties”) from any and all claims, actions, causes of
8 action, suits, demands, liabilities, damages, penalties, fees (including but not limited to
9 investigation fees, attorneys’ fees, and expert fees), costs, and expenses (collectively, “Claims”) as to any alleged violation of Proposition 65 arising from the failure to provide Proposition 65 warnings regarding alleged exposures to lead and/or cadmium in the Chocolate Products manufactured, imported distributed, or sold before the Effective Date.

13 **12.2 Settling Defendants’ Waiver and Release of Plaintiff.** Settling Defendants, on
14 behalf of themselves and their affiliates, agents, officers, directors, representatives, attorneys,
15 successors and/or assignees, hereby release AYS and its affiliates, agents, officers, directors,
16 representatives, attorneys, successors and/or assignees from and waive any claims against AYS
17 for injunctive relief or damages, penalties, fines, sanctions, mitigation, fees (including fees of
18 attorneys, experts, and others), costs, expenses, or any other sum incurred or claimed or which
19 could have been claimed for matters related to the Notices or Complaint[s].

20 **12.3 Effect of Judgment.** From the Effective Date forward, compliance with the terms
21 of this Consent Judgment shall be deemed to constitute compliance by any Settling Defendant or
22 Released Party with Proposition 65 regarding alleged exposures to lead and/or cadmium in the
23 Covered Products.

24 **12.4 Downstream Release.** A distributor, wholesaler, retailer, customer, user, or other
25 entity that is downstream in the chain of commerce from a Settling Defendant or Released Party
26 (“Downstream Entity”) shall be released from any liability under Proposition 65 as to the lead or
27 cadmium contribution from the cocoa-based ingredients or chocolate in a Covered Product
28 provided that the cocoa-based ingredients or chocolate in the Covered Product contains

1 concentrations of lead and cadmium at or below the applicable warning trigger levels set forth in
2 Section 6.2.1 and 6.6.2. This release to Downstream Entities does not extend to the cocoa-based
3 ingredients or chocolate used in the protein bar and nutritional drink products whose names
4 appear on **Exhibit D**.

5 12.5 Nothing in this Section 12 shall affect or limit any Party's right to seek to enforce
6 the terms of this Consent Judgment.

7 **13. RETENTION OF JURISDICTION**

8 This Court shall retain jurisdiction of this matter to implement this Consent Judgment.

9 **14. COURT APPROVAL**

10 If this Consent Judgment is not approved by this Court, it shall be of no force or effect
11 and cannot be used in any proceeding for any purpose.

12 **15. DURATION OF CONSENT JUDGMENT**

13 15.1 At any time after the seventh anniversary of the Effective Date, any Party may
14 move for the Court to terminate the Consent Judgment for good cause shown and any Party may
15 oppose such motion.

16 15.2 At least six (6) months prior to bringing a motion to terminate pursuant to Section
17 15.1, a Party shall first offer to meet and confer with all other Parties concerning the basis on
18 which they intend to seek termination and set forth its position as to: (a) how Section 6 of this
19 Consent Judgment could be modified to address their position, and (b) why such modifications
20 and the means to achieve them have become Feasible or why Feasible technologies or methods
21 have not become available or proven Feasible. To the extent that the meet and confer does not
22 result in a stipulated modification of the Consent Judgment being submitted to the Court for
23 approval pursuant to Section 10 within three (3) months after a Party gives notice of its intention
24 to bring a motion for termination, the Party or Parties which elect to oppose the proposed motion
25 for termination may seek to have the matter referred to a mutually acceptable mediator, to be
26 paid for at its or their sole expense, who shall be given another three (3) months to attempt to
27 resolve the matter in a manner that allows the Consent Judgment to remain in effect by mutual
28 agreement.

1 15.3 The Committee’s findings concerning Feasible measures or limits shall be
2 admissible but not be dispositive for purposes of this Section 15.

3 15.4 The meet and confer and potential mediation deadlines specified under Section
4 15.2 may be modified in writing by the Parties pursuant to Section 10.

5 **16. ENFORCEMENT**

6 16.1 In the event that a dispute arises with respect to any provisions of this Consent
7 Judgment, the respective Parties shall meet and confer within thirty (30) days of receiving
8 written notice of the alleged violation. In the event that the respective Parties are unable to
9 resolve their dispute through the meet and confer process, this Consent Judgment may be
10 enforced using any available provision of law. If AYS is the prevailing Party in any dispute
11 regarding compliance with the terms of this Consent Judgment, it may seek any fines, costs,
12 penalties, or remedies provided by law for failure to comply with California Health and Safety
13 Code sections 25249.5, et seq. A prevailing Party in such a dispute regarding compliance with
14 the terms of this Consent Judgment is entitled to seek recovery of its reasonable attorneys’ fees
15 and costs incurred in any such motion or proceeding pursuant to the provisions of Code of Civil
16 Procedure section 1021.5. Notwithstanding any language to the contrary in Sections 3, 5, or
17 otherwise herein, AYS may disclose test results received from a Settling Defendant in a court
18 filing in support of any motion to enforce this Consent Judgment provided that AYS first
19 provides the Settling Defendant an opportunity to make a motion for leave to seal such data
20 pursuant to a protective order.

21 16.2 In the event that a Settling Defendant misses any deadline required under this
22 Consent Judgment for the submission of reports, testing, or of any other notifications to AYS,
23 the Settling Defendant shall nonetheless be deemed to be in compliance with such a deadline if
24 it submits the required information or notification to AYS within fourteen days of discovering
25 the missed deadline. If AYS brings a missed deadline to the attention of a Settling Defendant,
26 such Settling Defendant shall pay penalties to AYS in the amount of up to \$5,000 per incident as
27 may be reasonably requested by AYS given the nature of the deadline and materiality of the
28

1 timeliness of the information involved. All missed deadlines within a calendar quarter shall be
2 deemed to constitute a single “incident.”

3 **17. GOVERNING LAW**

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

6 **18. EXCHANGE IN COUNTERPARTS**

7 Stipulations to this Consent Judgment may be executed in counterparts (and, without
8 limitation, by facsimile or by electronic mail in “portable document format” (“.pdf”), each of
9 which shall be deemed an original, and all of which, when taken together, shall be deemed to
10 constitute one and the same instrument.

11 **19. NOTICES**

12 All correspondence and notices required to be provided by a Party to the other Parties
13 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (a)
14 first-class, registered mail, certified return receipt requested, or (b) by overnight or Two Day
15 courier at the addresses set forth below. AYS or the Settling Defendants may specify in writing
16 to the other Parties a change of address to which all notices and other communications shall be
17 sent.

18 Whenever notice or a document is required to be sent to AYS, it shall be sent to:

19 Danielle Fugere
20 President
21 As You Sow
22 1611 Telegraph Ave, Suite 1450
23 Oakland, CA 94612

24 and

25 Ellison Folk
26 Shute, Mihaley & Weinberger LLP
27 396 Hayes Street
28 San Francisco, CA 94104

Whenever notice or a document is required to be sent to a Settling Defendant, it shall be
sent to the contact name(s) and address(es) identified in **Exhibit E**, which shall also be
completed and appended to each Opt-In Stipulation submitted pursuant to Section 7.3.

1 **20. SEVERABILITY**

2 If, subsequent to court approval of this Consent Judgment, any of the provisions of this
3 Consent Judgment are held by a court to be unenforceable or preempted, the validity of the
4 enforceable provisions remaining shall not be adversely affected.

5 **21. ENTIRE AGREEMENT**


6 This Consent Judgment contains the sole and entire agreement and understanding of the
7 Parties with respect to the entire subject matter hercof, and any and all prior discussions,
8 negotiations, commitments, and understandings related hereto. No representations, oral or
9 otherwise, express or implied, other than those contained herein have been made by any Party
10 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
11 deemed to exist or to bind any of the Parties.

12 **22. AUTHORIZATION TO ENTER INTO AGREEMENT**

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

16
17
18 DATED: 12/4/17

AS YOU SOW

19 
20 _____
21 Andrew Behar, CEO

22
23 DATED: _____

BARRY CALLEBAUT U.S.A., LLC

24
25 _____
26 Name: _____
27 Title: _____

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1 **20. SEVERABILITY**

2 If, subsequent to court approval of this Consent Judgment, any of the provisions of this
3 Consent Judgment are held by a court to be unenforceable or preempted, the validity of the
4 enforceable provisions remaining shall not be adversely affected.

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6 This Consent Judgment contains the sole and entire agreement and understanding of the
7 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
8 negotiations, commitments, and understandings related hereto. No representations, oral or
9 otherwise, express or implied, other than those contained herein have been made by any Party
10 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
11 deemed to exist or to bind any of the Parties.

12 **22. AUTHORIZATION TO ENTER INTO AGREEMENT**

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

16
17
18 DATED: _____

AS YOU SOW

19
20 _____
Andrew Behar, CEO

21
22
23 DATED: 12/6/2017

BARRY CALLEBAUT U.S.A., LLC

24
25 _____
Name: JAMES G. HAGEDORN
26 Title: EVP
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DATED: 12/8/17

BLOMMER CHOCOLATE CO.



Name: PETER W. BLOMMER
Title: CEO

DATED: _____

GUITTARD CHOCOLATE CO.

Name: _____
Title: _____

DATED: _____

THE HERSHEY COMPANY

Name: _____
Title: _____

DATED: _____

LINDT & SPRUNGLI (NORTH AMERICA), INC.

Name: _____
Title: _____

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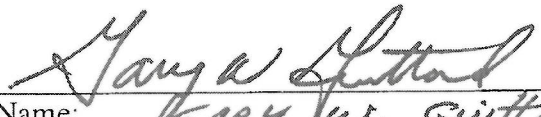
DATED: _____

BLOMMER CHOCOLATE CO.

Name: _____
Title: _____

DATED: 12/6/17

GUITTARD CHOCOLATE CO.



Name: GARY W. GUITTARD
Title: CEO

DATED: _____

THE HERSHEY COMPANY

Name: _____
Title: _____

DATED: _____

LINDT & SPRUNGLI (NORTH AMERICA), INC.

Name: _____
Title: _____

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DATED: _____

BLOMMER CHOCOLATE CO.

Name: _____
Title: _____


DATED: _____

GUITTARD CHOCOLATE CO.

Name: _____
Title: _____

DATED: 11-30-2017

THE HERSHEY COMPANY



Name: Adrian D. Mebane
Title: Assistant Secretary

DATED: _____

LINDT & SPRUNGLI (NORTH AMERICA), INC.

Name: _____
Title: _____

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DATED: _____

BLOMMER CHOCOLATE CO.

Name: _____
Title: _____

DATED: _____

GUITTARD CHOCOLATE CO.

Name: _____
Title: _____


DATED: _____

THE HERSHEY COMPANY

Name: _____
Title: _____

DATED: 11/30/2017

LINDT & SPRUNGLI (NORTH AMERICA) INC.




Name: Andreas Pfluger
Title: President

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DATED: 12-7-17

CARGILL, INC., on behalf of itself, its affiliates, and subsidiaries


Name: FLORIAN GIRTZINGER
Title: President, Managing Director of Cargill Cocoa and chocolate

DATED: _____

MARS, INC.

Name: _____
Title: _____

DATED: _____

MONDELEZ GLOBAL LLC, as the United States operating company for MONDELEZ INTERNATIONAL, INC.

Name: _____
Title: _____

DATED: _____

NESTLÉ USA, INC.

Name: _____
Title: _____

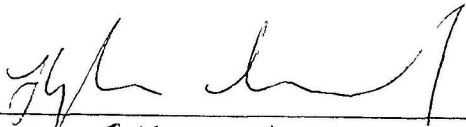
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CARGILL, INC., on behalf of itself, its affiliates, and subsidiaries

Name: _____
Title: _____

7 DATED: 12-08-17
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MARS, INC.


Name: SHAUGHAN M KENNEDY
Title: VP RESEARCH AND DEVELOPMENT

13 DATED: _____
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MONDELEZ GLOBAL LLC, as the United States operating company for MONDELEZ INTERNATIONAL, INC.

Name: _____
Title: _____

20 DATED: _____
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NESTLÉ USA, INC.

Name: _____
Title: _____

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DATED: _____

CARGILL, INC., on behalf of itself, its affiliates, and subsidiaries

Name: _____
Title: _____

DATED: _____

MARS, INC.

Name: _____
Title: _____

DATED: 12/6/17

MONDELEZ GLOBAL LLC, as the United States operating company for MONDELEZ INTERNATIONAL, INC.

Valerie Oswald
Name: Valerie Oswald
Title: President NA Confections

DATED: _____

NESTLÉ USA, INC.

Name: _____
Title: _____

1 DATED: _____

CARGILL, INC., on behalf of itself, its affiliates, and subsidiaries

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Name: _____

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Title: _____

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MARS, INC.

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Name: _____

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Title: _____

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13 DATED: _____

MONDELEZ GLOBAL LLC, as the United States operating company for MONDELEZ INTERNATIONAL, INC.

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Name: _____

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Title: _____


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20 DATED: 12-5-2017

NESTLÉ USA, INC.

21

22



Name: Daniel Nugent

23

Title: Chief Legal Officer + General Counsel

24

JL

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28

1 **EXHIBIT B**

2 Opt-In Stipulation

3
4 ELLISON FOLK (State Bar No. 149232)
5 LAURA D. BEATON (State Bar No. 294466)
6 SHUTE, MIHALY & WEINBERGER LLP
7 396 Hayes Street
8 San Francisco, California 94102
9 Telephone: (415) 552-7272
10 Facsimile: (415) 552-5816
11 Folk@smwlaw.com
12 Beaton@smwlaw.com

13 Attorneys for AS YOU SOW

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SAN FRANCISCO
16 UNLIMITED JURISDICTION

17 AS YOU SOW,

18 Plaintiff,

19 v.

20 TRADER JOES COMPANY; and DOES 1
21 through 150,

22 Defendants.

Case No. CGC-15-548791

**STIPULATION FOR ENTRY OF
JUDGMENT**

1 1. The following constitutes the knowing and voluntary election and stipulation of
2 the entity named below (“Company” or “Opt-In Defendant”) to join as a Settling Defendant
3 under the Consent Judgment previously entered by the Court in *As You Sow v. Trader Joe’s*
4 *Company, et al.*, San Francisco Superior Court Case No. CGC-15-548791 (“Action”) and to
5 be bound by the terms of that “Consent Judgment.”

6 2. At any time during the three (3)-year period prior to the filing of this Stipulation
7 (“Relevant Period”), the Company has employed ten or more persons on a full or part time
8 basis and manufactured, distributed, or offered for use or sale in California, or sold in
9 California, one or more Covered Products, as defined in the Consent Judgment Section 2.4.

10 3. Based on information and good faith belief, the Company knows or has
11 reason to believe that one or more of its Covered Products has in the past contained or
12 presently may contain lead or cadmium in excess of an applicable drop down level set forth in
13 Section 6.2.1 or 6.2.2 of the Consent Judgment.

14 4. The Company has not provided Proposition 65 warnings in conjunction with the
15 sale or use of its Covered Products in California at all times during the Relevant Period.

16 5. The Company agrees to be bound by all terms of the Consent Judgment,
17 including, but not limited to, the injunctive relief provisions set forth in Section 6 of the
18 Consent Judgment.

19 6. In conjunction with the execution of this Stipulation, the Company had provided
20 the payments required of it under the Consent Judgment and shall make all future payments
21 that may apply to the Company.

22 7. At least 70 days prior to the submissions of this Stipulation to the Court for
23 entry, provided that it has been mailed to the address for notice shown in Exhibit E of the
24 Consent Judgment, a completed copy of which is attached to this Stipulation, the Company
25 agrees to be deemed to have accepted service of a 60-day notice letter from As You Sow
26 (“AYS”) alleging certain violations of Proposition 65 with respect to sales of the Covered
27 Products.

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EXHIBIT C

Scope of Work – Chocolate Consent Judgment¹

I. Phases of Investigation and Committee Work

A. Phase 1: Scope of Root Cause

The Root Cause Phase of the investigation is intended to identify any potential sources of lead and cadmium in chocolate across all phases of the cacao and Chocolate Products process and supply chains. For each source that the Committee identifies, the Committee should also identify the likelihood that each source would contribute lead or cadmium to chocolate (e.g., “common source,” “infrequent source,” “rare source,” etc.). The Committee’s conclusions may be based on literature review; consultation with subject matter experts and chocolate industry personnel; testing for lead/cadmium in soil, water, beans, ingredients, equipment, packaging, tools, etc.; and any information the Committee deems relevant and reliable. The Committee should evaluate all of the following as potential sources of lead/cadmium contamination in chocolate:

1. Soil;
2. Water;
3. Potential lead or cadmium pollution sources proximate to significant cocoa growing or processing locations (such as smelters, incinerators, diesel traffic), or other historic or less proximate sources (such as prior use of leaded gasoline, or deposition patterns from other sources of pollution);
4. Cacao plant fertilization, pest, disease and weed control practice and materials; and irrigation sources and practices;
5. Cacao bean harvesting, fermentation, drying, and transportation practices and materials, including but not limited to:
 - a. harvesting tools;
 - b. bean transportation vessels, such as sacks, tarps, baskets, and buckets;
 - c. open-air drying and open-air transport of cocoa beans; and
 - d. fermentation tarps, racks, cloths, or other materials that come into contact with beans.
6. Cocoa bean processing and chocolate manufacturing practices that may introduce lead or cadmium, including but not limited to:

¹ All defined terms as used herein shall have the meaning assigned to them in the Consent Judgment. A glossary of such terms is provided in Attachment 1.

- a. processing water;
- b. sugar or other inclusions;
- c. factory conveyance implements;
- d. other factory equipment, such as roasters, winnowers, crushers, melangers, grinders, blenders, melters, molds, etc.;
- e. product packaging.

The Committee's investigation is not limited to these potential sources. If the Committee identifies other potential sources of lead/cadmium in cocoa beans or Chocolate Products, it shall evaluate whether each additional potential source is a contributor of lead or cadmium, and what that source's likelihood and significance of contribution is.

B. Phase 2: Scope of Reduction Recommendations

After identifying the likely sources of lead/cadmium in cocoa beans and Chocolate Products, the Committee will identify Feasible methods for reducing lead/cadmium in the Chocolate Products. As with the Root Cause Phase of the investigation, the Committee's recommendations will be Consensus Based and result from the Root Cause Phase as well as further literature review, consultation with outside subject matter experts, review of test results, and any other information the Committee deems relevant and reliable.

The Committee should evaluate lead/cadmium reduction options for all of the following phases of the cocoa bean and Chocolate Product production and supply chain. Then, it should identify which reduction measures are Feasible at each phase of the production process.

1. Growing cacao, harvesting and fermentation of cocoa beans -- Some options for potential evaluation may include soil remediation, testing irrigation water and avoiding contaminated water, soil amendments to reduce heavy metal uptake, growing different varieties of cacao that uptake less heavy metals, changing fertilizers and pesticides/herbicides, etc.;
2. Storage and transport of fermented cocoa beans -- Some options for potential evaluation may include changing storage and transportation implements; avoiding open-air drying near roads and other sources of pollution, etc.;
3. Cacao bean processing and chocolate manufacturing -- Some options for potential evaluation may include comprehensive testing of a manufacturer's equipment, replacing outdated equipment, substituting non-cacao ingredients, blending beans to lower lead/cadmium levels, implementing processes that extract lead/cadmium from the cacao beans or chocolate, and/or modifying product packaging.

If the Committee believes other options may prove Feasible, it should evaluate those options as well.

1 C. Phase 3: Evaluation of Future Proposition 65 Warning Triggers

2 The Committee shall evaluate whether the levels to trigger warnings shall be modified from the
3 “drop down” levels described in Sections 6.2.1 and 6.2.2 of the Consent Judgement. The
4 Committee shall make recommendations in this regard based on:

- 5 1. The identification of Feasible reduction methods (Phase 2) that could reasonably lower
6 levels of lead and cadmium in Chocolate Products below the drop down levels to trigger
7 warnings.
- 8 2. The inability to identify Feasible reduction methods (Phase 2) that could reasonably
9 lower levels of lead and cadmium in Chocolate Products below the drop down levels to
10 trigger warnings.
- 11 3. The conclusion that the drop down levels to trigger warnings are not Feasible to achieve
12 and an identification of the levels between the drop down levels and the initial levels
13 which are Feasible.

14 In the event the Committee determines that levels other than the specified drop down levels are
15 appropriate and can be achieved through Feasible measures, the Committee shall specify what
16 those levels are, when the levels of lead and/or cadmium in Chocolate Products can be expected
17 to be reduced, and by whom.

18 As with the first two phases of the Scope of Work, the Committee’s recommendations shall be
19 Consensus Based and be based on literature review, consultation with outside subject matter
20 experts, review of test results, and any other information the Committee deems relevant and
21 reliable.

22 D. Final Report Phase

23 The Committee shall prepare a final, written report to describe and explain its findings,
24 conclusions, and recommendations for all three phases of its investigation. The final report
25 shall include supporting references with complete citations for the Committee’s conclusions
26 and identify any SMEs who advised the Committee during its deliberations. The final report
27 shall not be edited by any persons other than the members of the Committee. The final
28 report shall present all Consensus Based Committee findings and recommendations and may
include an appendix setting forth significant areas where consensus could not be achieved
and an appendix setting forth any significant conflicting opinions on aspects of a Consensus
Based finding where they exist.

II. Deliverables and Schedule

1. Based on a schedule developed by the Project Manager, the Committee members will
commit to standing meetings (by phone conference) on a periodic basis or on an as
needed basis to ensure coordination and the efficient sharing of information. The Project
Manager shall develop a working agenda for each meeting and provide the Committee
members with a brief written summary highlighting the discussion points and action
items.
2. After the investigative portion of each of the first three phases of the Scope of Work is
complete (as agreed upon by the Committee members), an outline of the findings,

1 conclusions, and recommendations shall be produced by the Committee and Project
2 Manager for each investigative phase. These interim documents will be used to assist in
3 internal discussions of the Committee and will form the basis of the final report.

- 4 3. The Committee and the Project Manager, in providing quarterly reports as required under
5 the Consent Judgment, will produce a list of all outside SMEs consulted with and a brief
6 description of the information gathered.
- 7 4. The Committee will produce an alphabetized list of all information sources with complete
8 citations, including Internet URLs when available, to be included in the final report
9 appendix.
- 10 5. Following submission of the final report, the Committee may be asked to present an oral
11 summary of its main findings, conclusions, and recommendations (including any
12 alternative conclusions and recommendations by any Committee members) as deemed
13 desirable by the Initial Settling Defendants and/or As You Sow.
- 14 6. The Committee, with the approval of the Initial Settling Defendants and As You Sow,
15 may elect to prepare the final report for submission to an appropriate trade journal for
16 public access. The Committee shall agree not to pursue this publication until all of its
17 work as outlined in the Scope of Work and the final report has been submitted.

18 Unless otherwise agreed upon by the Initial Settling Defendants and AYS, the final report shall
19 be delivered by the Committee through the Project Manager within 18 to 24 months of the
20 kickoff meeting that will be held pursuant to Section 3.2.2 of the Consent Judgment.

21 **III. Cost/Budget**

22 Unless revisited by AYS and the Initial Settling Defendants, all work and deliverables set forth
23 in this Scope of Work shall be completed at a cost of \$90,000 for each Committee member plus
24 some funds to set aside for a part time Project Manager and possible outside expert consultation,
25 up to an aggregate cap of \$500,000.

26 **IV. Confidentiality**

27 All work by the Committee members and the Project Manager shall be subject to the
28 confidentiality provisions set forth in Sections 3.3.3 and 3.4.4 of the Consent Judgment.

1 **EXHIBIT D**

2 **Products Not Subject to Section 12.4 Downstream Release:**

3
4 PowerBar Protein Plus Chocolate Peanut Butter

5 ZonePerfect Nutrition Bar Dark Chocolate Almond

6 Atkins Meal Cookies n' Crème Bar

7 Atkins Treat Nutty Fudge Brownie Bar

8 thinkThin High Protein Bar, Chocolate Fudge

9 thinkThin High Protein Bar, Brownie Crunch

10 QuestBar Protein Bar, Chocolate Brownie

11 MET-Rx Protein Plus, Chocolate Chocolate Chunk

12 MET-Rx Protein Plus, Super Cookie Crunch

13 Vega Sport Protein Bar, Chocolate Peanut Butter

14 Pure Protein Bar, Chocolate Deluxe

15 NuGo Dark Chocolate Coconut

16 NuGo Dark Mint Chocolate Chip

17 NuGo Dark Mocha Chocolate

18 Go Macro Macrobar Protein Pleasure, Peanut Butter Chocolate Chip

19 Go Macro Macrobar Everlasting Joy, Coconut + Almond Butter + Chocolate

20 Pro Bar Meal Chocolate Coconut

21 Vega One All-In-One Nutritional Shake, Chocolate

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EXHIBIT E

Designees to Receive Notices Under Consent Judgment

Company Name: Barry Callebaut U.S.A. LLC

Attention of: James G. Hagedorn

Address: 600 West Chicago Avenue
Suite 860

Chicago, IL 60654

Telephone: 312.496.7312

Email: jerry_hagedorn@barry-
callebaut.com

(Optional) with a CC to:

Name: Philipp M. Muheim

(legal counsel or other designee)

Firm/Company: Barry Callebaut U.S.A. LLC

Address: 600 West Chicago Avenue
Suite 860

Chicago, IL 60654

Telephone: 312.496.7435

Email: philipp_muheim@barry-
callebaut.com

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EXHIBIT E

Designees to Receive Notices Under Consent Judgment

Company Name: Blommer Chocolate Company

Attention of: Peter Blommer

Address: 1101 Blommer Drive
P.O. Box 45
East Greenville PA 18041-0045

Telephone: (215) 679-4472

Email: pblommer@eg.blommer.com

(Optional) with a CC to:

Name: Allen C. Schlinsog, Jr.

Firm/Company: Reinhart Boerner Van Deuren s.c.

Address: 1000 North Water Street
P.O. Box. 2965
Milwaukee, WI 53201-2965

Telephone: (414)298-8214

Email: aschlinsog@reinhartlaw.com

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EXHIBIT E

Designees to Receive Notices Under Consent Judgment

Company Name: Cargill, Incorporated

Attention of: Managing Director, Cargill Cocoa
and Chocolate North America

Address: 15407 McGinty Road West, MS 36
Wayzata, MN 55391

Telephone: (952) 984-5206

Email: Florian_Girthofer@Cargill.com

(Optional) with a CC to:

Name: Cargill, Incorporated

Firm/Company: Attn: Law Department, Cocoa and
Chocolate North America Lawyer

Address: 15407 McGinty Road West, MS 24
Wayzata, MN 55391

Telephone: (952) 742-0316

Email: Kelly_McLain@Cargill.com

EXHIBIT E

Designees to Receive Notices Under Consent Judgment

Company Name: GUITTARO CHOCOLATE

Attention of: GARY GUITTARO

Address: 10 GUITTARO RD.
BURLINGAME CA. 94010

Telephone: 650-697-4427

Email: GARY@GUITTARO.COM

(Optional) with a CC to:

Name: Robert Falk

(legal counsel or other designee)

Firm/Company: MORRISON + FOERSTER LLP

Address: 425 MARKET ST
SF CA 94105

Telephone: 415-268-6294

Email: RFALK@MFO.COM

1 **EXHIBIT E**

2 **Designees to Receive Notices Under Consent Judgment**

3
4
5 Company Name: The Hershey Company

6 Attention of: Hershey Legal Department

7 Address: 100 Crystal A Drive

8 Hershey, PA 17033

9
10 Telephone: 717-534-4200

11 Email: legalnotices@hersheys.com

12
13 (Optional) with a CC to:

14 Name: Robert Falk

(legal counsel or other designee)

15 Firm/Company: Morrison & Foerster, LLP

16 Address: 425 Market Street

17 San Francisco, CA 94105

18
19 Telephone: 415-268-6294

20 Email: RFalk@mofocom

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EXHIBIT E

Designees to Receive Notices Under Consent Judgment

Company Name: Lindt & Sprüngli (North America)
Inc. _____

Attention of: Simon Kehl _____

Address: 4900 Oak Street _____
Kansas City, MO 64112, USA

Telephone: +1.816.855.2224 _____

Email: sikehl@lindt.com _____

(Optional) with a CC to:

Name: Chris Locke _____

Firm/Company: Farella Braun + Martel LLP _

Address: Russ Building _____
235 Montgomery Street _____
San Francisco, CA 94104 ____

Telephone: 415.954.4486 _____

Email: clocke@fbm.com _____

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EXHIBIT E

Designees to Receive Notices Under Consent Judgment

Company Name: Mars Wrigley Confectionery US, LLC

Attention of: Shaughan Kennedy

Address: 1132 W. Blackhawk St.
Chicago, IL 60642

Telephone: (312) 241-5102

Email: Shaughan.kennedy@effem.com

(Optional) with a CC to:

Name: Katherine Fitzpatrick

(legal counsel or other designee)

Firm/Company: Mars Wrigley Confectionery US, LLC

Address: 600 W. Chicago

Suite 500

Chicago, IL 60654

Telephone: (312) 794-6245

Email: Katherine.Fitzpatrick@effem.com

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EXHIBIT E

Designees to Receive Notices Under Consent Judgment

Company Name: Mondelēz Global LLC, as the United States operating company for Mondelēz International, Inc.

Attention of: Ellen M. Smith, VP & Chief Legal Counsel–North America

Address: Mondelēz Global LLC
100 DeForest Avenue
East Hanover, NJ 07936

Telephone: (973) 503-2023

Email: ellen.smith@mdlz.com

(Optional) with a CC to:

Name: Trenton H. Norris; Sarah Esmaili
(legal counsel or other designee)

Firm/Company: Arnold & Porter Kaye Scholer LLP

Address: 3 Embarcadero Center, Suite 1000
San Francisco, CA 94111

Telephone: (415) 471-3100

Email: trent.norris@aporter.com
sarah.esmaili@aporter.com

1 **EXHIBIT E**

2 **Designees to Receive Notices Under Consent Judgment**

3
4
5 Company Name: Nestle USA, Inc.

6 Attention of: Chief Legal Officer + General Counsel

7 Address: 1812 N. Moore Street

8 Arlington, VA 22209

9
10 Telephone: 818-331-6397

11 Email: Daniel.Nugent@us.nestle.com

12
13 (Optional) with a CC to:

14 Name: Doug Besman

(legal counsel or other designee)

15 Firm/Company: Nestlé USA, Inc. - Legal Dept.

16 Address: 30003 Bainbridge Rd.

17 Solon, OH 44139

18
19 Telephone: 440/264-5191

20 Email: Douglas.besman@us.nestle.com