

## **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release (the “Agreement”) is between the Center for Environmental Health (“CEH”), on the one hand, and Kellogg USA Inc. and Kellogg Sales Company (collectively, “Settling Entities”), on the other hand. CEH and Settling Entities are together referred to herein as “the Parties.” The effective date of this Agreement is the date on which it is fully executed by the Parties (the “Effective Date”).

### **1. INTRODUCTION**

1.1. On or about October 28, 2016, CEH, a non-profit corporation acting in the public interest, provided a “Notice of Violation of Proposition 65” to the California Attorney General, the District Attorneys of every county in California, the City Attorneys of every California city with a population greater than 750,000, and the Settling Entities. The Notice alleges that Settling Entities violated Proposition 65 by exposing persons to acrylamide, a chemical known to the State of California to cause cancer, contained in fried or baked potato or sweet potato based snack foods without first providing a clear and reasonable Proposition 65 warning.

1.2. The Parties enter into this Agreement for the purpose of avoiding prolonged and costly litigation. This Agreement covers the acrylamide content of Special K Cracker Chips that are sold, distributed, or offered for sale by Settling Entities (“Covered Products”).

1.3. By executing this Agreement, the Parties do not admit any facts or conclusions of law. Nothing in this Agreement shall be construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall compliance with the Agreement constitute or be construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law. Nothing in this Agreement shall prejudice, waive, or impair any right,

remedy, argument, or defense the Parties may have in this or any other or future legal proceedings.

## **2. INJUNCTIVE RELIEF**

**2.1. Reformulation of Covered Products.** As of June 1, 2018 (the “Compliance Date”), Settling Entities shall not manufacture any Covered Products that will be sold or offered for sale in California that exceed the following acrylamide concentration limits, such concentration to be determined by use of a test performed by an accredited laboratory using either GC/MS (Gas Chromatograph/Mass Spectrometry), LC-MS/MS (Liquid Chromatograph-Mass Spectrometry), or any other testing method agreed upon by the Parties:

**2.1.1.** The average acrylamide concentration shall not exceed 490 parts per billion (“ppb”) by weight (the “Average Level”). The Average Level is determined by randomly selecting at least 5 samples from 5 different lots of Covered Products (or the maximum number of lots available for testing if less than 5) during a testing period of at least 60 days.

**2.1.2.** The acrylamide concentration of any individual unit shall not exceed 490 ppb by weight (the “Unit Level”).

## **3. ENFORCEMENT OF SETTLEMENT AGREEMENT**

### **3.1. General Enforcement Provisions.**

**3.1.1.** The Parties agree that any action based on a violation of this Agreement shall be brought in the Superior Court of California in Alameda County. For purposes of this Agreement, notwithstanding Section 1.3 above, the Parties agree that the Superior Court of California in Alameda County has subject matter jurisdiction over any disputes arising from this Agreement and personal jurisdiction over each of the Parties, and that venue is proper in the County of Alameda. Any action to enforce alleged violations of Section 2.1 by

Settling Entities shall be brought exclusively pursuant to Section 3.2, and be subject to the meet and confer requirement of Section 3.2.4, if applicable.

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

**3.2. Enforcement of Reformulation Commitment.**

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

**3.2.2. Service of Notice of Violation and Supporting Documentation.**

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

**3.2.2.2.** The Notice of Violation shall, at a minimum, set forth:  
(a) the date the Covered Products were purchased; (b) the location at which the Covered

Products were purchased; (c) a description of the Covered Products giving rise to the alleged violation, including the name and address of the retail entity from which the sample was obtained and pictures of the product packaging from all sides, which identify the product lot; and (d) all test data obtained by CEH regarding the Covered Products and supporting documentation sufficient for validation of the test results, including any laboratory reports, quality assurance reports, and quality control reports associated with testing of the Covered Products.

**3.2.3. Notice of Election of Response.** No more than thirty (30) days after effectuation of service of a Notice of Violation, Settling Entities shall provide written notice to CEH whether they elect to contest the allegations contained in a Notice of Violation (“Notice of Election”). Failure to provide a Notice of Election within thirty (30) days of effectuation of service of a Notice of Violation shall be deemed an election to contest the Notice of Violation. Upon notice to CEH, Settling Entities may have up to an additional sixty (60) days to elect if, notwithstanding Settling Entities’ good faith efforts, Settling Entities are unable to verify the test data provided by CEH before expiration of the initial thirty (30) day period.

**3.2.3.1.** If a Notice of Violation is contested, the Notice of Election shall include all documents upon which Settling Entities are relying to contest the alleged violation, including all available test data. If Settling Entities or CEH later acquire additional test or other data regarding the alleged violation, during the meet and confer period described in Section 3.2.4, they or it shall notify the other Party and promptly provide all such data or information to the Party unless either the Notice of Violation or Notice of Election has been withdrawn.

**3.2.4. Meet and Confer.** If a Notice of Violation is contested, CEH and Settling Entities shall meet and confer to attempt to resolve their dispute. Within thirty (30) days

of serving a Notice of Election contesting a Notice of Violation, Settling Entities may withdraw the original Notice of Election contesting the violation and serve a new Notice of Election to not contest the violation, provided, however, that in this circumstance Settling Entities shall pay \$2,500 in addition to any payment required under this Agreement. At any time, CEH may withdraw a Notice of Violation, in which case for purposes of this Section 3.2 the result shall be as if CEH never issued any such Notice of Violation. If no informal resolution of a Notice of Violation results within thirty (30) days of a Notice of Election to contest, CEH may file an enforcement action pursuant to Section 3.1. In any such proceeding, CEH may seek whatever fines, costs, penalties, attorneys' fees, or other remedies are provided by law for an alleged failure to comply with the Agreement.

**3.2.5.** Non-Contested Notices. If Settling Entities elect to not contest the allegations in a Notice of Violation, they shall undertake corrective action(s) and make payments, if any, as set forth below.

**3.2.5.1.** Settling Entities shall include in their Notice of Election a detailed description with supporting documentation of the corrective action(s) that they have undertaken or propose to undertake to address the alleged violation. Any such correction shall, at a minimum, provide reasonable assurance that all Covered Products having the same lot number as that of the Covered Product identified in CEH's Notice of Violation (the "Noticed Covered Products") will not be thereafter sold in California or offered for sale to California customers by Settling Entities and that Settling Entities have sent instructions to any retailers or customers that offer the Noticed Covered Products for sale to cease offering the Noticed Covered Products for sale to California consumers and to return all such Noticed Covered Products to Settling Entities if Settling Entities have reason to believe the Noticed Covered Products are still

offered for sale to California consumers. Settling Entities shall keep for a period of one year and make available to CEH upon reasonable notice (which shall not exceed more than one request per year) for inspection and copying records of any correspondence regarding the foregoing. If there is a dispute over the corrective action, Settling Entities and CEH shall meet and confer before seeking any remedy in court. In no case shall CEH issue more than one Notice of Violation per manufacturing lot of a type of Covered Product, nor shall CEH issue more than two Notices of Violation in the first calendar year following the Compliance Date.

**3.2.5.2.** If the Notice of Violation is the first, second, third, or fourth Notice of Violation received by Settling Entities under Section 3.2.2 that was not successfully contested or withdrawn, then Settling Entities shall pay \$15,000 for each Notice of Violation. If Settling Entities have received more than four (4) Notices of Violation under Section 3.2.2 that were not successfully contested or withdrawn, then Settling Entities shall pay \$25,000 for each Notice of Violation. If Settling Entities produce with their Notice of Election test data for the Covered Product that: (i) was conducted prior to the date CEH sent the Notice of Violation; (ii) was conducted on the same or same type of Covered Product; and (iii) demonstrates acrylamide levels below the Unit Level, then any payment under this Section shall be reduced by 100 percent (100%) for the first Notice of Violation, by seventy-five percent (75%) for the second Notice of Violation, and by fifty percent (50%) for any subsequent Notice of Violation. In no case shall Settling Entities be obligated to pay more than \$100,000 for uncontested Notices of Violation in any calendar year irrespective of the total number of Notices of Violation issued. In no case shall the Settling Entities be obligated to make more than one payment for uncontested Notices of Violation for any one manufacturing lot of a type of Covered Product.

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

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

#### **4. SETTLEMENT PAYMENTS**

4.1. In consideration of the mutual covenants and releases provided in this Agreement, within twenty-one (21) days of the Effective Date, Settling Entities shall pay a total of \$85,000 as a settlement payment. This total shall be paid in four (4) separate checks in the amounts specified below and delivered as set forth below. Any failure by Settling Entities to comply with the payment terms herein shall be subject to a stipulated late fee to be paid by Settling Entities in the amount of \$100 for each day the full payment is not received after the applicable payment due date set forth in Section 4.1. The late fees required under this Section shall be recoverable, together with reasonable attorneys’ fees, in an enforcement proceeding brought pursuant to Section 3.1 of this Agreement. The funds paid by Settling Entities shall be allocated as set forth below between the following categories and made payable as follows:

4.2. **Civil Penalty.** Settling Entities shall pay \$11,375 as a penalty pursuant to Health & Safety Code § 25249.7(b). The civil penalty payment shall be apportioned in accordance with Health & Safety Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”). Accordingly, the OEHHA portion of the civil penalty payment for \$8,531.25 shall be made payable to OEHHA and associated with taxpayer identification number 68-0284486. This payment shall be delivered as follows:

For United States Postal Service Delivery:

Attn: Mike Gyurics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
P.O. Box 4010, MS #19B  
Sacramento, CA 95812-4010

For Non-United States Postal Service Delivery:

Attn: Mike Gyurics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
1001 I Street, MS #19B  
Sacramento, CA 95814

The CEH portion of the civil penalty payment for \$2,843.75 shall be made payable to the Center for Environmental Health and associated with taxpayer identification number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

4.3. **Attorneys’ Fees and Costs.** Settling Entities shall pay \$73,625 as a reimbursement of a portion of CEH’s reasonable investigation fees and costs, attorneys’ fees, and any other costs incurred as a result of investigating the alleged violations, bringing this matter to Settling Entities’ attention, and negotiating a settlement in the public interest. The attorneys’ fees and cost reimbursement shall be made in two separate checks as follows: (a) \$55,065 payable to the Lexington Law Group and associated with taxpayer identification number



94-3317175; and (b) \$18,560 payable to the Center for Environmental Health and associated with taxpayer identification number 94-3251981. These payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

## **5. MODIFICATION OF SETTLEMENT AGREEMENT**

5.1. This Agreement may be modified only by written agreement of the Parties or by order of the Alameda Superior Court, which shall have jurisdiction over any action to modify this Agreement.

5.2 Settling Entities may request that CEH agree to modify this Agreement to substitute higher Unit or Average Levels that CEH agrees to in a future consent judgment or settlement agreement applicable to products manufactured by other companies that are of the same type as the Covered Products, and CEH agrees not to oppose any such request. If a dispute should arise concerning the application of this provision, then the Parties shall meet and confer in good faith to attempt to resolve the dispute, but if it cannot be resolved in that manner, either Party may present the dispute to the Alameda Superior Court for resolution.

## **6. APPLICATION OF SETTLEMENT AGREEMENT**

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

## **7. CLAIMS COVERED**

7.1. Provided that Settling Entities comply in full with their obligations under Section 4 hereof, CEH on behalf of itself and its successors and assigns discharges, waives, and releases Settling Entities and each company's parents, subsidiaries, affiliated entities that are under common ownership, directors, officers, employees, and agents (collectively, the "Settling Entity Releasees"), and all entities to whom they directly or indirectly distribute or sell Covered

Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (collectively, the “Downstream Releasees”) from all claims under Proposition 65 or any other statutory or common law regarding the failure to warn about exposures to acrylamide arising in connection with Covered Products manufactured, distributed, or sold by Settling Entities on or before the Compliance Date.

7.2. Provided that Settling Entities comply in full with their obligations under Section 4 hereof, compliance with the terms of this Agreement by Settling Entities constitutes compliance with Proposition 65 by Settling Entities, Settling Entity Releasees, and Downstream Releasees for purposes of exposures to acrylamide from the Covered Products manufactured, distributed, or sold by Settling Entities after the Compliance Date.

## **8. SPECIFIC PERFORMANCE**

8.1. The Parties expressly recognize that Settling Entities’ obligations under this Agreement are unique. In the event that Settling Entities are found to be in breach of this Agreement for failure to comply with the provisions of Section 2.1 hereto, the Parties agree that it would be extremely impracticable to measure any resulting damages and that such breach would cause irreparable damage. Accordingly, in addition to any other available rights or remedies, but in accordance with the processes specified in Section 3.2, CEH may sue in equity for specific performance, and Settling Entities expressly waive the defense that a remedy in damages will be adequate.

## **9. GOVERNING LAW**

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

**10. PROVISION OF NOTICE**

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

For CEH:                   Howard Hirsch  
Lexington Law Group  
503 Divisadero Street  
San Francisco, CA 94117  
hhirsch@lexlawgroup.com

For Settling Entities: Trenton H. Norris  
Arnold & Porter Kaye Scholer LLP  
Three Embarcadero Center, 10th Floor  
San Francisco, CA 94111  
trent.norris@arnoldporter.com

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

**11. ENTIRE AGREEMENT**

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

termination of this Agreement shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

**12. NO EFFECT ON OTHER SETTLEMENTS**

12.1. Nothing in this Agreement shall preclude CEH from resolving any claim against any entity that is not a Settling Entity on terms that are different from those contained in this Agreement, except as provided in the release in Section 7. Likewise, nothing in this Agreement shall preclude or restrict Settling Entities from selling, distributing, or offering for sale any products other than the Covered Products.

**13. EXECUTION IN COUNTERPARTS**

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

**14. AUTHORIZATION**

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

**AGREED TO:**

**CENTER FOR ENVIRONMENTAL HEALTH**



\_\_\_\_\_  
Charlie Pizarro  
Associate Director

Dated: 6 April 2018

**KELLOGG USA INC.**

\_\_\_\_\_

Dated: \_\_\_\_\_

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

**KELLOGG SALES COMPANY**

\_\_\_\_\_

Dated: \_\_\_\_\_

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

**AGREED TO:**

**CENTER FOR ENVIRONMENTAL HEALTH**

\_\_\_\_\_  
Charlie Pizarro  
Associate Director

Dated: \_\_\_\_\_

**KELLOGG USA INC.**

  
\_\_\_\_\_

Dated: 2/6/18

Thomas P. Marce  
Name

VP - Chief Counsel Litigation  
Title

**KELLOGG SALES COMPANY**

  
\_\_\_\_\_

Dated: 2/6/18

Thomas P. Marce  
Name

VP - Chief Counsel Litigation  
Title