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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 17-851466
Plaintiff,) **[PROPOSED] CONSENT JUDGMENT**
v.) **AS TO KF WHOLESALE LLC**
RESER’S FINE FOODS, INC., *et al.*,)
Defendants.)

1. DEFINITIONS

1.1 The “Complaint” means the operative complaint in the above-captioned matter.

1.2 “Covered Products” means hash brown potato products, including but not limited to hash browns, hash brown patties, tater tots, and tater puffs (“Covered Products”). An initial list of the Covered Products is attached as Exhibit A.

1.3 “Effective Date” means the date on which notice of entry of this Consent Judgment is by the Court is served upon Settling Defendant.

1 **2. INTRODUCTION**

2 2.1 The Parties to this Consent Judgment are the Center For Environmental Health
3 (“CEH”), a California non-profit corporation, and KF Wholesale LLC (“Settling Defendant”).
4 CEH and Settling Defendant (the “Parties”) enter into this Consent Judgment to settle certain
5 claims asserted by CEH against Settling Defendant as set forth in Complaint.

6 2.2 On November 29, 2016, CEH provided a 60-day Notice of Violation of
7 Proposition 65 to the California Attorney General, to the District Attorneys of every county in
8 California, to the City Attorneys of every California city with a population greater than 750,000,
9 and to Settling Defendant, alleging that Settling Defendant violated Proposition 65 by exposing
10 persons to acrylamide when using Covered Products under the provided directions for use,
11 without first providing a clear and reasonable Proposition 65 warning.

12 2.3 Settling Defendant is a corporation or other business entity that manufactures,
13 distributes, sells, or offers for sale Covered Products that are sold in the State of California or has
14 done so in the past.

15 2.4 On March 2, 2017, CEH filed the Complaint, naming Settling Defendant as a
16 defendant in the action.

17 2.5 For purposes of this Consent Judgment only, the Parties stipulate that this Court
18 has jurisdiction over the allegations of violations contained in the Complaint and personal
19 jurisdiction over Settling Defendant as to the acts alleged in the Complaint, that venue is proper
20 in the County of Alameda, and that this Court has jurisdiction to enter and enforce this Consent
21 Judgment as a full and final resolution of all claims which were or could have been raised in the
22 Complaint based on the facts alleged therein with respect to Covered Products manufactured,
23 distributed, and/or sold by Settling Defendant.

24 2.6 Nothing in this Consent Judgment is or shall be construed as an admission by the
25 Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall compliance with
26 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
27 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall

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1 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
2 other pending or future legal proceedings. This Consent Judgment is the product of negotiation
3 and compromise and is accepted by the Parties solely for purposes of settling, compromising, and
4 resolving issues disputed in this Action.

5 **3. INJUNCTIVE RELIEF**

6 3.1 **Compliance Measures.** As of five months from the date this Consent Judgment
7 is entered by the Court (the “Effective Date”), Settling Defendant shall not purchase,
8 manufacture, ship, sell, or offer for sale any Covered Product that will be sold or offered for sale
9 in California that exceed the following acrylamide concentration limits (the “Reformulation
10 Levels”), such concentration to be determined by use of a test performed by an accredited
11 laboratory using either GC/MS (Gas Chromatograph/Mass Spectrometry), LC-MS/MS (Liquid
12 Chromatograph-Mass Spectrometry) or any other testing method agreed upon by the Parties:

13 3.1.1 The average acrylamide concentration of Covered Products as used per
14 cooking instructions, shall not exceed, on average, 250 parts per billion (“ppb”) by weight (the
15 “Average Level”). The Average Level is determined by randomly selecting at least 5 samples
16 from 5 different lots of Covered Products (or the maximum number of lots available for testing if
17 less than 5) during a testing period of at least 60 days.

18 3.1.2 The acrylamide concentration of any individual unit, as used per cooking
19 instructions, shall not exceed 300 ppb by weight (the “Unit Level”).

20 3.2 **Compliance Testing.** Compliance with the Unit Level shall be determined after
21 cooking each Covered Product as if prepared for consumption in accordance with the instructions
22 on the packaging label of that Covered Product.

23 3.3 **Technology Licensing.** The requirements in this Consent Judgment are not
24 contingent upon the use of any particular method to achieve the Reformulation Levels, but
25 Settling Defendant shall license any patented technology used to meet the Reformulation Levels,
26 whether existing or in the future, to others for use in other food products, at a commercially
27 reasonable price, and using other commercially reasonable terms.

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1 **4. ENFORCEMENT**

2 4.1 **General Enforcement Provisions.** CEH may, by motion or application for an
3 order to show cause before this Court, enforce the terms and conditions contained in this Consent
4 Judgment. Any action to enforce alleged violations of Section 3.1 by Settling Defendant shall be
5 brought exclusively pursuant to this Section 4, and be subject to the meet and confer requirement
6 of Section 4.2.4, if applicable.

7 4.2 **Enforcement of Reformulation Commitment.**

8 4.2.1 Notice of Violation. In the event that CEH identifies a Covered Product
9 that was sold or offered for sale to California consumers with a best-by or sell-by (or equivalent)
10 date or other code that reflects that the Covered Product was manufactured on or after the
11 Effective Date, and for which CEH has laboratory test results showing that the Covered Product,
12 as prepared for consumption in accordance with the instructions on the packaging label of that
13 Covered Product, has an acrylamide level each exceeding the Unit Level, CEH shall inform
14 Defendant and give informal notice to cure within 90 days. If Defendant does not cure, then CEH
15 may issue a Notice of Violation pursuant to this Section.

16 4.2.2 Service of Notice of Violation and Supporting Documentation.

17 4.2.2.1 The Notice of Violation shall be sent to the person(s) identified in
18 Section 8.2 to receive notices for Settling Defendant, and must be served within sixty (60) days of
19 the later of the date the Covered Product at issue was purchased or otherwise acquired by CEH or
20 the date that CEH can reasonably determine that the Covered Product at issue was manufactured,
21 shipped, sold, or offered for sale by Settling Defendant, provided, however, that CEH may have
22 up to an additional sixty (60) days to send the Notice of Violation if, notwithstanding CEH's
23 good faith efforts, the test data required by Section 4.2.2.2 below cannot be obtained by CEH
24 from its laboratory before expiration of the initial sixty (60) day period.

25 4.2.2.2 The Notice of Violation shall, at a minimum, set forth: (a) the date
26 the Covered Product was purchased; (b) a description of the Covered Product giving rise to the
27 alleged violation, including the name and address of the retail entity from which the sample was
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1 obtained and if available information that identifies the product lot; and (c) all test data obtained
2 by CEH regarding the Covered Product and supporting documentation sufficient for validation of
3 the test results, including any laboratory reports, quality assurance reports, and quality control
4 reports associated with testing of the Covered Product.

5 4.2.3 Notice of Election of Response. No more than forty-five (45) days after
6 effectuation of service of a Notice of Violation, Settling Defendant shall provide written notice to
7 CEH whether it elects to contest the allegations contained in a Notice of Violation (“Notice of
8 Election”). Failure to provide a Notice of Election within forty-five (45) days of effectuation of
9 service of a Notice of Violation shall be deemed an election to contest the Notice of Violation.

10 4.2.3.1 If a Notice of Violation is contested, the Notice of Election shall
11 include all then-available documentary evidence regarding the alleged violation, including all
12 available test data. If Settling Defendant or CEH later acquires additional test or other data
13 regarding the alleged violation, it shall notify the other party and promptly provide all such data
14 or information to the party.

15 4.2.4 Meet and Confer. If a Notice of Violation is contested, CEH and Settling
16 Defendant shall meet and confer to attempt to resolve their dispute. Within thirty (30) days of
17 serving a Notice of Election contesting a Notice of Violation, Settling Defendant may withdraw
18 the original Notice of Election contesting the violation and serve a new Notice of Election to not
19 contest the violation, provided, however, that, in this circumstance, Settling Defendant shall pay
20 \$2,500 in addition to any payment required under this Consent Judgment. At any time, CEH may
21 withdraw a Notice of Violation, in which case for purposes of this Section 4.2 the result shall be
22 as if CEH never issued any such Notice of Violation. If no informal resolution of a Notice of
23 Violation results within thirty (30) days of a Notice of Election to contest, CEH may file an
24 enforcement motion or application pursuant to Section 4.1. In any such proceeding, CEH may
25 seek whatever fines, costs, penalties, attorneys’ fees, or other remedies are provided by law for
26 failure to comply with the Consent Judgment.

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1 4.2.5 Non-Contested Notices. If Settling Defendant elects to not contest the
2 allegations in a Notice of Violation, it shall undertake corrective action(s) and make payments, if
3 any, as set forth below.

4 4.2.5.1 Settling Defendant shall include in its Notice of Election a detailed
5 description with supporting documentation of the corrective action(s) that it has undertaken or
6 proposes to undertake to address the alleged violation. Any such correction shall, at a minimum,
7 provide reasonable assurance that all Covered Products having the same lot number as that of the
8 Covered Product identified in CEH’s Notice of Violation (the “Noticed Covered Products”) will
9 not be thereafter sold or offered for sale to California consumers. Settling Defendant shall make
10 available to CEH for inspection and copying records any correspondence regarding the market
11 withdrawal and destruction of the Noticed Covered Products to the extent it has such documents
12 on file . If there is a dispute over the corrective action, Settling Defendant and CEH shall meet
13 and confer before seeking any remedy in court. In no case shall CEH issue more than one Notice
14 of Violation per manufacturing lot of a type of Covered Product. In no case shall CEH issue
15 more than one Notice of Violation per manufacturing lot of a type of Covered Product, nor shall
16 CEH issue more than two Notices of Violation in the first calendar year following the Effective
17 Date.

18 4.2.5.2 If the Notice of Violation is the first, second, third, or fourth Notice
19 of Violation received by Settling Defendant under Section 4.2.1 that was not successfully
20 contested or withdrawn, then Settling Defendant shall pay \$5,000 for each Notice of Violation. If
21 Settling Defendant has received more than four (4) Notices of Violation under Section 4.2.1 that
22 were not successfully contested or withdrawn, then Settling Defendant shall pay \$10,000 for each
23 Notice of Violation. If Settling Defendant produces with its Notice of Election test data for the
24 Covered Product that: (i) was conducted prior to the date CEH purchased the Covered Product
25 that is the subject of the Notice of Violation; (ii) was conducted on the same type of Covered
26 Product; and (iii) demonstrates acrylamide levels below the Unit Level, then any payment under
27 this Section shall be reduced by 100 percent (100%) for the first Notice of Violation, by seventy-

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1 five percent (75%) for the second Notice of Violation, and by fifty percent (50%) for any
2 subsequent Notice of Violation. In no case shall Settling Defendant be obligated to pay more
3 than \$50,000 for uncontested Notices of Violation in any calendar year irrespective of the total
4 number of Notices of Violation issued.

5 4.2.6 Payments. Any payments under Section 4.2 shall be made by check
6 payable to the “Lexington Law Group” and shall be paid within thirty (30) days of service of a
7 Notice of Election triggering a payment and which shall be used as reimbursement for costs for
8 investigating, preparing, sending, and prosecuting Notices of Violation, and to reimburse
9 attorneys’ fees and costs incurred in connection with these activities, and shall be the extent of all
10 monetary remedies available to CEH under this Consent Judgment for a non-contested Notice of
11 Violation.

12 4.3 **Repeat Violations.** If Settling Defendant has received four (4) or more Notices of
13 Violation concerning the same type of Covered Product that were not successfully contested or
14 withdrawn in any two (2) year period then, at CEH’s option, CEH may seek whatever fines,
15 costs, penalties, attorneys’ fees, or other remedies that are provided by law for failure to comply
16 with the Consent Judgment. Prior to seeking such relief, CEH shall meet and confer with Settling
17 Defendant for at least thirty (30) days to determine if Settling Defendant and CEH can agree on
18 measures that Settling Defendant can undertake to prevent future violations.

19 **5. PAYMENTS**

20 5.1 **Payments by Settling Defendant.** Settling Defendant shall pay the total sum of
21 \$40,000 as a settlement payment as further set forth in this Section according to the following
22 schedule: (a) on or before July 14, 2017: \$20,000; and (b) on or before September 1, 2017:
23 \$20,000.

24 5.2 **Allocation of Payments.** The total settlement amount for Settling Defendant shall
25 be paid in the amounts specified below and delivered as set forth below. Any failure by Settling
26 Defendant to comply with the payment terms herein shall be subject to a stipulated late fee to be
27 paid by Settling Defendant in the amount of \$100 for each day the full payment is not received
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1 after the applicable payment due date set forth in Section 5.1. The late fees required under this
2 Section shall be recoverable, together with reasonable attorneys' fees, in an enforcement
3 proceeding brought pursuant to Section 4.1 of this Consent Judgment. The funds paid by Settling
4 Defendant shall be allocated as set forth below between the following categories and made
5 payable as follows:

6 5.2.1 \$5,200 as a civil penalty pursuant to Health & Safety Code § 25249.7(b).

7 The civil penalty payment shall be apportioned in accordance with Health & Safety Code §
8 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health
9 Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of the civil penalty
10 payment for \$3,900 shall be made payable to OEHHA and associated with taxpayer identification
11 number 68-0284486. This total amount shall be made in two payments of \$1,950 each payable
12 on or before July 14, 2017 and on or before September 1, 2017 and delivered as follows:

13 For United States Postal Service Delivery:

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

17 For Non-United States Postal Service Delivery:

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

21 The CEH portion of the civil penalty payment for \$1,300 shall be made payable to
22 the Center For Environmental Health and associated with taxpayer identification number 94-
23 3251981. This total amount shall be made in two payments of \$650 each payable on or before
24 July 14, 2017 and on or before September 1, 2017 and delivered to Lexington Law Group, 503
25 Divisadero Street, San Francisco, CA 94117.

26 5.2.2 \$3,900 as an Additional Settlement Payment ("ASP") to CEH pursuant to
27 Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3204. CEH

1 intends to restrict use of the ASPs received from the Consent Judgment before the Court to the
2 following purposes: the funds will be placed in CEH's Toxics in Food Fund and used to support
3 CEH programs and activities that seek to educate the public about acrylamide and other toxic
4 chemicals in food, to work with the food industry and agriculture interests to reduce exposure to
5 acrylamide and other toxic chemicals in food, and to thereby reduce the public health impacts and
6 risks of exposure to acrylamide and other toxic chemicals in food sold in California. CEH shall
7 obtain and maintain adequate records to document that ASPs are spent on these activities and
8 CEH agrees to provide such documentation to the Attorney General within thirty (30) days of any
9 request from the Attorney General. The payment pursuant to this Section shall be made payable
10 to the Center for Environmental Health and associated with taxpayer identification number 94-
11 3251981. The total amount under this section shall be made in two payments of \$1,950 each
12 payable on or before July 14, 2017 and on or before September 1, 2017 and delivered to
13 Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

14 5.2.3 \$30,900 as a reimbursement of a portion of CEH's reasonable attorneys'
15 fees and costs. The attorneys' fees and cost reimbursement shall be allocated as follows: (a)
16 \$26,265 payable to the Lexington Law Group and associated with taxpayer identification number
17 94-3317175; and (b) \$4,635 payable to the Center For Environmental Health and associated with
18 taxpayer identification number 94-3251981. The total amounts due under this section shall be
19 made in four payments delivered to Lexington Law Group, 503 Divisadero Street, San Francisco,
20 CA 94117 as follows: (a) \$13,132.50 payable to the Lexington Law Group on or before July 14,
21 2017; (b) \$2,317.50 payable to the Center For Environmental Health on or before July 14, 2017;
22 (c) \$13,132.50 payable to the Lexington Law Group on or before September 1, 2017; and (d)
23 \$2,317.50 payable to the Center For Environmental Health on or before September 1, 2017.

24 **6. MODIFICATION AND DISPUTE RESOLUTION**

25 6.1 **Modification.** This Consent Judgment may be modified from time to time by
26 express written agreement of the Parties, with the approval of the Court and prior notice to the
27 Attorney General's Office, or by an order of this Court upon motion and prior notice to the
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1 Attorney General’s Office and in accordance with law.

2 6.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
3 shall attempt in good faith to meet and confer with the other Party prior to filing a motion to
4 modify the Consent Judgment.

5 **7. CLAIMS COVERED AND RELEASE**

6 7.1 This Consent Judgment is a full, final, and binding resolution between CEH on
7 behalf of itself and the public interest and Settling Defendant and its parents, subsidiaries,
8 affiliated entities that are under common ownership, directors, officers, employees, agents,
9 shareholders, successors, assigns, and attorneys (“Defendant Releasees”), and all entities to
10 which Settling Defendant directly or indirectly distributes or sells Covered Products, including
11 but not limited to distributors, wholesalers, customers, retailers, franchisees, licensors, and
12 licensees, including but not limited to Wal-Mart Stores, Inc. and Walmart.com (“Downstream
13 Defendant Releasees”), of any violation of Proposition 65 based on failure to warn about alleged
14 exposure to acrylamide contained in Covered Products that were sold, distributed, or offered for
15 sale by Settling Defendant prior to the Effective Date.

16 7.2 CEH, for itself, its agents, successors, and assigns, releases, waives, and forever
17 discharges any and all claims against Settling Defendant, Defendant Releasees, and Downstream
18 Defendant Releasees arising from any violation of Proposition 65 or any other statutory or
19 common law claims that have been or could have been asserted by CEH individually or in the
20 public interest regarding the failure to warn about exposure to acrylamide arising in connection
21 with Covered Products manufactured, distributed, or sold by Settling Defendant prior to the
22 Effective Date.

23 7.3 Compliance with the terms of this Consent Judgment by Settling Defendant and
24 Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant,
25 Defendant Releasees, and Downstream Defendant Releasees with respect to any alleged failure to
26 warn about acrylamide in Covered Products manufactured, distributed, or sold by Settling
27 Defendant after the Effective Date.

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1 **8. PROVISION OF NOTICE**

2 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
3 notice shall be sent by first class and electronic mail to:

4 Howard Hirsch
5 Lexington Law Group
6 503 Divisadero Street
7 San Francisco, CA 94117
8 hhirsch@lexlawgroup.com

9 8.2 When Settling Defendant is entitled to receive any notice under this Consent
10 Judgment, the notice shall be sent by first class and electronic mail to:

11 Abhishek K. Gurnani
12 Amin Talati Upedhye
13 100 S. Wacker Dr., Suite 2000
14 Chicago, IL 60606
15 abhishek@amintalati.com

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

18 **9. COURT APPROVAL**

19 9.1 This Consent Judgment shall become effective upon the date signed by CEH and
20 Settling Defendant, whichever is later, provided, however, that CEH shall prepare and file a
21 Motion for Approval of this Consent Judgment and Settling Defendant shall support approval of
22 such Motion.

23 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
24 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
25 purpose.

26 **10. GOVERNING LAW AND CONSTRUCTION**

27 10.1 The terms of this Consent Judgment shall be governed by the laws of the State of
28 California.

11. ATTORNEYS' FEES

11.1 A Party who unsuccessfully brings or contests an action arising out of this Consent

1 Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs..

2 11.2 Nothing in this Section 11 shall preclude a party from seeking an award of
3 sanctions pursuant to law.

4 **12. ENTIRE AGREEMENT**

5 12.1 This Consent Judgment contains the sole and entire agreement and understanding
6 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
7 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
8 and therein. There are no warranties, representations, or other agreements between the Parties
9 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
10 other than those specifically referred to in this Consent Judgment have been made by any Party
11 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
12 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
13 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
14 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
15 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
16 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
17 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
18 whether or not similar, nor shall such waiver constitute a continuing waiver.

19 **13. RETENTION OF JURISDICTION**

20 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
21 Consent Judgment.

22 **14. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

23 14.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
24 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
25 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

26 **15. NO EFFECT ON OTHER SETTLEMENTS**

27 15.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
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**IT IS SO ORDERED, ADJUDGED,
AND DECREED**

Dated: _____

Judge of the Superior Court


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against any entity other than Settling Defendant on terms that are different than those contained in this Consent Judgment.

16. EXECUTION IN COUNTERPARTS

16.1 The stipulations to this Consent Judgment 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.

IT IS SO STIPULATED:

<p>Dated: <u>24 April</u>, 2017</p>	<p>CENTER FOR ENVIRONMENTAL HEALTH</p> <p></p> <hr/> <p>Signature</p> <p><u>CHARLIZ PIZANO</u></p> <hr/> <p>Printed Name</p> <p><u>ASSOCIATE DIRECTOR</u></p> <hr/> <p>Title</p>
<p>Dated: _____, 2017</p>	<p>KF WHOLESALE LLC</p> <p>_____</p> <hr/> <p>Signature</p> <p>_____</p> <hr/> <p>Printed Name</p> <p>_____</p> <hr/> <p>Title</p>

1 against any entity other than Settling Defendant on terms that are different than those contained
2 in this Consent Judgment.

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4 16.1 The stipulations to this Consent Judgment may be executed in counterparts and by
5 means of facsimile or portable document format (pdf), which taken together shall be deemed to
6 constitute one document.

7 **IT IS SO STIPULATED:**

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Dated: _____, 2017	CENTER FOR ENVIRONMENTAL HEALTH _____ Signature _____ Printed Name _____ Title
Dated: <u>April 17</u> , 2017	KF WHOLESALE LLC  _____ Signature <u>Mathias A. Cohen</u> Printed Name <u>Founder & CEO</u> Title

EXHIBIT A

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COVERED PRODUCTS
Totally Rockin' Tots - Russet Potato + Cauliflower
Totally Rockin' Tots - Yukon Gold + Yellow Squash
VALUE Totally Rockin' Tots - Russet Potato + Cauliflower
VALUE Totally Rockin' Tots - Yukon Gold + Yellow Squash