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

CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 17- 881931
)
Plaintiff,) **[PROPOSED] CONSENT JUDGMENT**
) **AS TO D.F. STAUFFER BISCUIT CO.,**
v.) **INC.**
)
BISCOMERICA CORP., *et al.*,)
)
Defendants.)
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1. DEFINITIONS

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

1.2 "Covered Products" or "Covered Product" means animal crackers. An initial list of the Covered Products is attached hereto as Exhibit A.

1.3 "Effective Date" means the date on which notice of entry of this Consent Judgment 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, a
3 California non-profit corporation (“CEH”) and D.F. Stauffer Biscuit Co., Inc. (“Settling
4 Defendant”). CEH and Settling Defendant (the “Parties”) enter into this Consent Judgment to
5 settle certain claims asserted by CEH against Settling Defendant as set forth in the Complaint.

6 2.2 On or about January 12, 2017, CEH provided a 60-day Notice of Violation of
7 Proposition 65 to the California Attorney General, the District Attorneys of every county in
8 California, 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 in California to acrylamide contained in Covered Products without first providing a clear
11 and reasonable Proposition 65 warning (the “Notices”).

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 at times relevant to the Complaint.

15 2.4 On November 9, 2017, CEH filed the Complaint in the above-captioned matter,
16 naming Settling Defendant as an original defendant.

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 and in the Notices with respect to Covered Products
23 manufactured, distributed, and/or sold by Settling Defendant.

24 2.6 Nothing in this Consent Judgment is or shall be construed as an admission against
25 interest by the Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall
26 compliance with the Consent Judgment constitute or be construed as an admission against interest
27 by the Parties of any fact, conclusion of law, issue of law, or violation of law. Nothing in this
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1 Consent Judgment shall prejudice, waive or impair any right, remedy, argument, or defense the
2 Parties may have in any other pending or future legal proceedings. This Consent Judgment is the
3 product of negotiation and compromise and is accepted by the Parties solely for purposes of
4 settling, compromising, and resolving issues disputed in this action.

5 **3. INJUNCTIVE RELIEF**

6 3.1 **Reformulation of Covered Products.** Commencing on the Effective Date, and
7 subject to the provisions of Section 4.2.1 herein, Settling Defendant shall not purchase,
8 manufacture, ship, sell, or offer for sale Covered Products that will be sold or offered for sale in
9 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 shall not exceed 75 parts per
14 billion (“ppb”) by weight (the “Average Level”). The Average Level is determined by randomly
15 selecting and testing at least 1 sample each from 5 different lots (a lot is a single production run
16 on a single production line) of Covered Products (or the maximum number of lots available for
17 testing if less than 5) during a testing period of at least 60 days.

18 3.1.2 The acrylamide concentration of any individual unit of Covered Products
19 shall not exceed 100 ppb by weight (the “Unit Level”), based on a representative composite
20 sample taken from the individual unit (e.g. bag or box of Covered Products) being tested.

21 **4. ENFORCEMENT**

22 4.1 **General Enforcement Provisions.** CEH may, by motion or application for an
23 order to show cause before this Court, enforce the terms and conditions contained in this Consent
24 Judgment. Any action to enforce alleged violations of Section 3.1 by Settling Defendant shall be
25 brought exclusively pursuant to this Section 4, and be subject to the meet and confer requirement
26 of Section 4.2.4 if applicable.

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1 **4.2 Enforcement of Reformulation Commitment.**

2 4.2.1 Notice of Violation. In the event that CEH purchases a Covered Product
3 in California that was sold or offered for sale by Settling Defendant with a best-by or sell-by (or
4 equivalent) date more than 9 months after the Effective Date, and for which CEH has laboratory
5 test results showing that the Covered Product exceeds the Unit Level, CEH may issue a Notice of
6 Violation pursuant to this Section.

7 4.2.2 Service of Notice of Violation and Supporting Documentation.

8 4.2.2.1 The Notice of Violation shall be sent to the person(s) identified in
9 Section 8.2 to receive notices for Settling Defendant, and must be served within sixty (60) days of
10 the later of the date the Covered Product at issue was purchased or otherwise acquired by CEH or
11 the date that CEH can reasonably determine that the Covered Product at issue was manufactured,
12 shipped, sold, or offered for sale by Settling Defendant, provided, however, that CEH may have
13 up to an additional sixty (60) days to send the Notice of Violation if, notwithstanding CEH’s
14 good faith efforts, the test data required by Section 4.2.2.2 below cannot be obtained by CEH
15 from its laboratory before expiration of the initial sixty (60) day period.

16 4.2.2.2 The Notice of Violation shall, at a minimum, set forth: (a) the date
17 the Covered Product was purchased; (b) the location at which the Covered Product was
18 purchased; (c) a description of the Covered Product giving rise to the alleged violation, including
19 the name and address of the retail entity from which the sample was obtained and pictures of the
20 product packaging from all sides, which identifies the product lot; and (d) all test data obtained
21 by CEH regarding the Covered Product and supporting documentation sufficient for validation of
22 the test results, including any laboratory reports, quality assurance reports, and quality control
23 reports associated with testing of the Covered Product.

24 4.2.3 Notice of Election of Response. No more than sixty (60) days after
25 effectuation of service of a Notice of Violation, Settling Defendant shall provide written notice to
26 CEH whether or not it elects to contest the allegations contained in a Notice of Violation (“Notice
27 of Election”). Failure to provide a Notice of Election within sixth (60) days of effectuation of
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1 service of a Notice of Violation shall be deemed an election to contest the Notice of Violation.
2 Upon notice to CEH, Settling Defendant may have up to an additional sixty (60) days to elect if,
3 notwithstanding Settling Defendant's good faith efforts, Settling Defendant is unable to verify the
4 test data provided by CEH before expiration of the initial sixty (60) day period.

5 4.2.3.1 If a Notice of Violation is contested, the Notice of Election shall
6 include all documents upon which Settling Defendant is relying to contest the alleged violation,
7 including all available test data. If Settling Defendant or CEH later acquires additional test or
8 other data regarding the alleged violation during the meet and confer period described in Section
9 4.2.4, it shall notify the other Party and promptly provide all such data or information to the Party
10 unless either the Notice of Violation or Notice of Election has been withdrawn.

11 4.2.4 Meet and Confer. If a Notice of Violation is contested, CEH and Settling
12 Defendant shall meet and confer to attempt to resolve their dispute. Within sixty (60) days of
13 serving a Notice of Election contesting a Notice of Violation, Settling Defendant may withdraw
14 the original Notice of Election contesting the violation and serve a new Notice of Election to not
15 contest the violation, provided, however, that, in this circumstance, Settling Defendant shall pay
16 \$2,500 in addition to any other payment required under this Consent Judgment. At any time,
17 CEH may withdraw a Notice of Violation, in which case for purposes of this Section 4.2 the
18 result shall be as if CEH never issued any such Notice of Violation. If no informal resolution of a
19 Notice of Violation results within sixty (60) days of a Notice of Election to contest, CEH may file
20 an enforcement motion or application pursuant to Section 4.1. In any such proceeding, CEH may
21 seek whatever fines, costs, penalties, attorneys' fees, or other remedies are provided by law for an
22 alleged failure to comply with the Consent Judgment, and Settling Defendant shall reserve all of
23 its rights to contest, dispute and defend the Notice of Violation, including all allegations therein,
24 in the enforcement motion or application proceeding.

25 4.2.5 Non-Contested Notices. If Settling Defendant elects to not contest the
26 allegations in a Notice of Violation, it shall undertake corrective action(s) and make payments, if
27 any, as set forth below.

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1 4.2.5.1 Settling Defendant shall include in its Notice of Election a detailed
2 description with supporting documentation of the corrective action(s) that it has undertaken or
3 proposes to undertake to address the alleged violation. Any such correction shall, at a minimum,
4 provide reasonable assurance that all Covered Products having the same lot number as that of the
5 Covered Product identified in CEH’s Notice of Violation (the “Noticed Covered Products”) will
6 not be thereafter sold in California or offered for sale to California customers by Settling
7 Defendant, and that Settling Defendant has sent instructions to any retailers or customers that
8 offer the Noticed Covered Products for sale to cease offering the Noticed Covered Products for
9 sale to California consumers and to return all such Noticed Covered Products to Settling
10 Defendant if Settling Defendant has reason to believe the Noticed Covered Products are still
11 offered for sale to California consumers. Settling Defendant shall keep for a period of one year
12 after the Notice of Violation and make available to CEH upon reasonable notice during the one
13 year period for inspection and copying records of any correspondence regarding the foregoing. If
14 there is a dispute over the corrective action, Settling Defendant and CEH shall meet and confer
15 before seeking any remedy in court. In no case shall CEH issue more than one Notice of
16 Violation per manufacturing lot of a type of Covered Product, nor shall CEH issue more than two
17 Notices of Violation in the first year following the Effective 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 \$15,000 for each Notice of Violation.
21 If Settling Defendant has received more than four (4) Notices of Violation under Section 4.2.1
22 that were not successfully contested or withdrawn, then Settling Defendant shall pay \$25,000 for
23 each Notice of Violation. If Settling Defendant produces with its Notice of Election test data for
24 the Covered Product that: (i) was conducted prior to the date CEH gave Notice of Violation;
25 (ii) was conducted on the same type of Covered Product; and (iii) demonstrates acrylamide levels
26 below the Unit Level, then any payment under this Section shall be reduced by 100 percent
27 (100%) for the first Notice of Violation, by seventy-five percent (75%) for the second Notice of
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1 Violation, and by fifty percent (50%) for any subsequent Notice of Violation. In no case shall
2 Settling Defendant be obligated to pay more than \$100,000 for all Notices of Violation not
3 successfully contested or withdrawn in any calendar year irrespective of the total number of
4 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 by agreement, and shall be used as reimbursement for
8 costs for investigating, preparing, sending, and prosecuting Notices of Violation, and to
9 reimburse attorneys’ fees and costs incurred in connection with these activities.

10 4.3 **Repeat Violations**. If Settling Defendant has received four (4) or more Notices of
11 Violation concerning the same type of Covered Product that were not successfully contested or
12 withdrawn in any one (1) year period then, at CEH’s option, CEH may seek whatever fines, costs,
13 penalties, attorneys’ fees, or other remedies that are provided by law for failure to comply with
14 the Consent Judgment. Prior to seeking such relief, CEH shall meet and confer with Settling
15 Defendant for at least sixty (60) days to determine if Settling Defendant and CEH can agree on
16 measures that Settling Defendant can undertake to prevent future alleged violations.

17 **5. PAYMENTS**

18 5.1 **Payments by Settling Defendant**. Within ten (10) calendar days after the
19 Effective Date, Settling Defendant shall pay the total sum of \$100,000 as a settlement payment as
20 further set forth in this Section.

21 5.2 **Allocation of Payments**. The total settlement amount shall be paid in five (5)
22 separate checks in the amounts specified below and delivered as set forth below. Any failure by
23 Settling Defendant to comply with the payment terms herein shall be subject to a stipulated late
24 fee to be paid by Settling Defendant to CEH in the amount of \$100 for each day the full payment
25 is not received after the payment due date set forth in Section 5.1. The late fees required under
26 this Section shall be recoverable, together with reasonable attorneys’ fees, in an enforcement
27 proceeding brought pursuant to Section 4 of this Consent Judgment. The funds paid by Settling
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1 Defendant shall be allocated as set forth below between the following categories and made
2 payable as follows:

3 5.2.1 \$13,420 as a civil penalty pursuant to Health & Safety Code § 25249.7(b).

4 The civil penalty payment shall be apportioned in accordance with Health & Safety Code §
5 25249.12 (25% to CEH and 75% to the State of California’s Office of Environmental Health
6 Hazard Assessment (“OEHHA”). Accordingly, the OEHHA portion of the civil penalty
7 payment for \$10,072.50 shall be made payable to OEHHA and associated with taxpayer
8 identification number 68-0284486. This payment to OEHHA shall be delivered as follows:

9 For United States Postal Service Delivery:

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

15 For Non-United States Postal Service Delivery:

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

21 The CEH portion of the civil penalty payment for \$3,357.50 shall be made
22 payable to the Center for Environmental Health and associated with taxpayer identification
23 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero
24 Street, San Francisco, CA 94117.

25 5.2.2 \$10,070 as an Additional Settlement Payment (“ASP”) to CEH pursuant to
26 Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3204. CEH
27 intends to restrict use of the ASPs received from this Consent Judgment to the following
28 purposes: the funds will be placed in CEH’s Toxics in Food Fund and used to support CEH
programs and activities that seek to educate the public about acrylamide and other toxic
chemicals in food, to work with the food industry and agriculture interests to reduce exposure to

1 acrylamide and other toxic chemicals in food, and to thereby reduce the public health impacts and
2 risks of exposure to acrylamide and other toxic chemicals in food sold in California. CEH shall
3 obtain and maintain adequate records to document that ASPs are spent on these activities and
4 CEH agrees to provide such documentation to the Attorney General within thirty (30) days of any
5 request from the Attorney General. The payment pursuant to this Section shall be made payable
6 to the Center for Environmental Health and associated with taxpayer identification number 94-
7 3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San
8 Francisco, CA 94117.

9 5.2.3 \$76,500 as a reimbursement of a portion of CEH’s reasonable attorneys’
10 fees and costs. The attorneys’ fees and cost reimbursement shall be made in two separate checks
11 as follows: (a) \$64,665 payable to the Lexington Law Group and associated with taxpayer
12 identification number 94-3317175; and (b) \$11,835 payable to the Center for Environmental
13 Health and associated with taxpayer identification number 94-3251981. These payments shall be
14 delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

15 **6. MODIFICATION AND DISPUTE RESOLUTION**

16 6.1 **Modification.** This Consent Judgment may be modified from time to time by
17 express written agreement of the Parties, with the approval of the Court, or by an order of this
18 Court upon motion and in accordance with law.

19 6.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
20 shall attempt in good faith to meet and confer with the other Party prior to filing a motion to
21 modify the Consent Judgment.

22 **7. CLAIMS COVERED AND RELEASE**

23 7.1 Provided that Settling Defendant complies in full with its obligations under
24 Section 5 hereof, this Consent Judgment is a full, final and binding resolution between CEH on
25 behalf of itself and the public interest and Settling Defendant and its parents, subsidiaries,
26 affiliated entities that are under common ownership, directors, officers, employees, agents,
27 shareholders, predecessors, successors, assigns, and attorneys (“Defendant Releasees”), and all
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1 entities to which Settling Defendant directly or indirectly distributes or sells Covered Products,
2 including but not limited to distributors, wholesalers, customers, retailers, franchisees, licensors,
3 and licensees, including, but not limited to, Wal-Mart Stores, Inc., (“Downstream Defendant
4 Releasees”), of any violation of Proposition 65 based on failure to warn about alleged exposure to
5 acrylamide contained in Covered Products that were sold, distributed, or offered for sale by
6 Settling Defendant prior to the Effective Date.

7 7.2 Provided that Settling Defendant complies in full with its obligations under
8 Section 5 hereof, CEH, for itself, its agents, predecessors, successors and assigns, releases,
9 waives, and forever discharges any and all claims against Settling Defendant, Defendant
10 Releasees, and Downstream Defendant Releasees arising from any violation of Proposition 65 or
11 any other statutory or common law claims that have been or could have been asserted by CEH
12 individually or in the public interest regarding the failure to warn about exposure to acrylamide
13 arising in connection with Covered Products manufactured, distributed or sold by Settling
14 Defendant prior to the Effective Date.

15 7.3 Provided that Settling Defendant complies in full with its obligations under
16 Section 5 hereof, compliance with the terms of this Consent Judgment by Settling Defendant
17 shall constitute compliance with Proposition 65 by Settling Defendant, Defendant Releasees and
18 Downstream Defendant Releasees with respect to any alleged failure to warn about acrylamide in
19 Covered Products manufactured, distributed, or sold by Settling Defendant after the Effective
20 Date.

21 **8. PROVISION OF NOTICE**

22 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
23 notice shall be sent by first class and electronic mail to:

24 Howard Hirsch
25 Lexington Law Group
26 503 Divisadero Street
27 San Francisco, CA 94117
 hhirsch@lexlawgroup.com

28 8.2 When Settling Defendant is entitled to receive any notice under this Consent

1 Judgment, the notice shall be sent by first class and electronic mail to:

2 Robert Parks
3 Parks & Solar LLP
4 501 West Broadway, Suite 1540
5 San Diego, CA 92101
6 rparks@parksandsolar.com

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

9 **9. COURT APPROVAL**

10 9.1 This Consent Judgment shall become effective upon the date signed by CEH and
11 Settling Defendant, whichever is later, and approval by the Court, provided however, that CEH
12 shall prepare and file a Motion for Approval of this Consent Judgment, and Settling Defendant
13 shall support entry of this Consent Judgment by the Court.

14 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
15 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
16 purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

17 9.3 If this Consent Judgment is approved by the Court, CEH shall dismiss Wal-Mart
18 Stores, Inc., from this action without prejudice within ten (10) business days of the Court's entry
19 of the Consent Judgment, and Wal-Mart Stores, Inc. shall waive all costs in this action.

20 **10. GOVERNING LAW AND CONSTRUCTION**

21 10.1 The terms of this Consent Judgment shall be governed by the laws of the State of
22 California.

23 **11. ATTORNEYS' FEES**

24 11.1 A Party who unsuccessfully brings or contests an action, motion, or application
25 arising out of this Consent Judgment shall be required to pay the prevailing Party's reasonable
26 attorneys' fees and costs.

27 11.2 Nothing in this Section 11 shall preclude a party from seeking an award of
28 sanctions pursuant to law.

1 **12. ENTIRE AGREEMENT**

2 12.1 This Consent Judgment contains the sole and entire agreement and understanding
3 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
4 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
5 and therein. There are no warranties, representations, or other agreements between the Parties
6 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
7 other than those specifically referred to in this Consent Judgment have been made by any Party
8 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
9 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
10 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
11 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
12 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
13 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
14 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
15 whether or not similar, nor shall such waiver constitute a continuing waiver.

16 **13. RETENTION OF JURISDICTION**

17 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
18 Consent Judgment.

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

20 14.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
21 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
22 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

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

24 15.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
25 against an entity that is not Settling Defendant on terms that are different than those contained in
26 this Consent Judgment.

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1 **16. EXECUTION IN COUNTERPARTS**

2 16.1 The stipulations to this Consent Judgment may be executed in counterparts and by
3 means of facsimile or portable document format (pdf), which taken together shall be deemed to
4 constitute one document.

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**IT IS SO ORDERED, ADJUDGED,
AND DECREED**

Dated: _____

Judge of the Superior Court

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IT IS SO STIPULATED:

Dated: <u>5 March</u> , 2018	CENTER FOR ENVIRONMENTAL HEALTH  _____ Signature <u>CHARLIE PIZANO</u> _____ Printed Name <u>ASSOCIATE DIRECTOR</u> _____ Title
Dated: _____, 2018	D.F. STAUFFER BISCUIT CO., INC. _____ Signature _____ Printed Name _____ Title

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IT IS SO STIPULATED:

Dated: _____, 2018	CENTER FOR ENVIRONMENTAL HEALTH _____ Signature _____ Printed Name _____ Title
Dated: <u>March 1</u> , 2018	D.F. STAUFFER BISCUIT CO., INC. <u>Ronald E. Fink</u> _____ Signature <u>RONALD E FINK</u> _____ Printed Name <u>COO</u> _____ Title

Covered Products

ANIMAL CRACKERS

EXHIBIT "A"

Original Animal Crackers Cookies manufactured, distributed, shipped, sold or offered for sale by Settling Defendant, D.F. Stauffer Biscuit Co., Inc., including, but not limited to, the following:

Stauffer's Animal Crackers, Original, including but not limited to SKU No. 0-72320-91022-2