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

CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 17-881957
)
Plaintiff,) **[PROPOSED] CONSENT**
) **JUDGMENT AS TO IDAHOAN**
v.) **FOODS, LLC**
)
IDAHOAN FOODS, LLC, *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” means hash brown potato products, including but not limited to hash browns, hash brown patties, tater tots, and tater puffs. An initial list of the Covered Products is attached as Exhibit A hereto.

1.3 “Effective Date” means the date on which the Court enters this Consent Judgment.

2. INTRODUCTION

2.1 The Parties to this Consent Judgment are the Center for Environmental Health, a California non-profit corporation (“CEH”), and Idahoan Foods, LLC (“Settling Defendant”).

1 CEH and Settling Defendant (the “Parties”) enter into this Consent Judgment to settle certain
2 claims asserted by CEH against Settling Defendant as set forth in the Complaint.

3 2.2 On or about April 24, 2017, CEH provided a 60-day Notice of Violation of
4 Proposition 65 (the “Notice”) to the California Attorney General, to the District Attorneys of
5 every county in California, to the City Attorneys of every California city with a population
6 greater than 750,000, and to Settling Defendant, alleging that Settling Defendant violated
7 Proposition 65 by exposing persons in California to acrylamide contained in Covered Products
8 without first providing a clear and reasonable Proposition 65 warning.

9 2.3 Settling Defendant is a corporation or other business entity that manufactures,
10 distributes, sells, or offers for sale Covered Products that are sold in the State of California or has
11 done so at times relevant to the Complaint.

12 2.4 On November 9, 2017, CEH filed the initial complaint in the above-captioned
13 matter, naming Settling Defendant as an original defendant.

14 2.5 For purposes of this Consent Judgment only, the Parties stipulate that this Court
15 has jurisdiction over the allegations of violations contained in the Complaint and personal
16 jurisdiction over Settling Defendant as to the acts alleged in the Complaint, that venue is proper in
17 the County of Alameda, and that this Court has jurisdiction to enter and enforce this Consent
18 Judgment as a full and final resolution of all claims which were or could have been raised in the
19 Complaint based on the facts alleged therein and in the Notice with respect to Covered Products
20 manufactured, distributed, and/or sold by Settling Defendant.

21 2.6 Nothing in this Consent Judgment is or shall be construed as an admission by the
22 Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall compliance with
23 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
24 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
25 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
26 other pending or future legal proceedings. This Consent Judgment is the product of negotiation
27 and compromise and is accepted by the Parties solely for purposes of settling, compromising, and
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1 resolving issues disputed in this action.

2 **3. INJUNCTIVE RELIEF**

3 **3.1 Reformulation of Covered Products.** As of the Effective Date, Settling
4 Defendant shall not purchase, manufacture, ship, sell, or offer for sale any Covered Products that
5 will be sold or offered for sale in California that exceed the following acrylamide concentration
6 levels (the “Reformulation Levels”), such concentration to be determined by use of a test
7 performed by an accredited laboratory using either GC/MS (Gas Chromatograph/Mass
8 Spectrometry), LC-MS/MS (Liquid Chromatograph-Mass Spectrometry), or any other testing
9 method agreed upon by the Parties:

10 3.1.1 The average acrylamide concentration of Covered Products, as used per
11 cooking instructions, shall not exceed, on average, 350 parts per billion (“ppb”) by weight (the
12 “Average Level”). The Average Level is determined by randomly selecting and testing at least 1
13 sample each from 5 different lots of a particular type of Covered Product (or the maximum
14 number of lots available for testing if less than 5) during a testing period of at least 60 days.

15 3.1.2 The acrylamide concentration of any individual unit, as used per cooking
16 instructions, shall not exceed 500 ppb by weight (the “Unit Level”), based on a representative
17 composite sample taken from the individual unit being tested.

18 **3.2 Compliance Testing.** Compliance with the Reformulation Levels shall be
19 determined after cooking each Covered Product as if prepared for consumption in accordance
20 with the instructions on the packaging label of that Covered Product.

21 **3.3 Technology Licensing.** The requirements in this Consent Judgment are not
22 contingent upon the use of any particular method to achieve the Reformulation Levels, but
23 Settling Defendant shall license any patented technology used to meet the Reformulation Levels,
24 whether existing or in the future, to others for use in other food products, at a commercially
25 reasonable price, and using other commercially reasonable terms.

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 by Settling Defendant to California consumers with a best-by or
10 sell-by (or equivalent) date or other code that reflects that the Covered Product was manufactured
11 on or after the Effective Date, and for which CEH has laboratory test results showing that the
12 Covered Product, as prepared for consumption in accordance with the instructions on the
13 packaging label of that Covered Product, has an acrylamide level exceeding the Unit Level, then
14 CEH may issue a notice of violation (“Notice of Violation”) pursuant to this Section.

15 4.2.2 Service of Notice of Violation and Supporting Documentation.

16 4.2.2.1 The Notice of Violation shall be sent to the person(s) identified
17 in Section 8.2 to receive notices for Settling Defendant, and must be served within sixty (60) days
18 of the later of the date the Covered Product at issue was purchased or otherwise acquired by CEH
19 or the date that CEH can reasonably determine that the Covered Product at issue was
20 manufactured, shipped, sold, or offered for sale by Settling Defendant, provided, however, that
21 CEH may have up to an additional sixty (60) days to send the Notice of Violation if,
22 notwithstanding CEH’s good faith efforts, the test data required by Section 4.2.2.2 below cannot
23 be obtained by CEH from its laboratory before expiration of the initial sixty (60) day period.

24 4.2.2.2 The Notice of Violation shall, at a minimum, set forth: (a) the
25 date the Covered Product was purchased; (b) a description of the Covered Product giving rise to
26 the alleged violation, including the name and address of the retail entity from which the sample
27 was obtained and pictures of the product packaging from all sides, which identifies the product
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1 lot; and (c) all test data obtained by CEH regarding the Covered Product and supporting
2 documentation sufficient for validation of the test results, including any laboratory reports,
3 quality assurance reports, and quality control reports associated with testing of the Covered
4 Product.

5 4.2.3 Notice of Election of Response. No more than thirty (30) 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 thirty (30) 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 documents upon which Settling Defendant is relying to contest the alleged violation,
12 including all available test data. If Settling Defendant or CEH later acquires additional test or
13 other data regarding the alleged violation during the meet and confer period described in Section
14 4.2.4, it shall notify the other Party and promptly provide all such data or information to the Party,
15 unless either the Notice of Violation or Notice of Election has been withdrawn.

16 4.2.4 Meet and Confer. If a Notice of Violation is contested, CEH and Settling
17 Defendant shall meet and confer to attempt to resolve their dispute. Within thirty (30) days of
18 serving a Notice of Election contesting a Notice of Violation, Settling Defendant may withdraw
19 the original Notice of Election contesting the violation and serve a new Notice of Election to not
20 contest the violation, provided, however, that, in this circumstance, Settling Defendant shall pay
21 \$2,500 in addition to any other payment required under this Consent Judgment. At any time,
22 CEH may withdraw a Notice of Violation, in which case for purposes of this Section 4.2 the
23 result shall be as if CEH never issued any such Notice of Violation. If no informal resolution of a
24 Notice of Violation results within thirty (30) days of a Notice of Election to contest, CEH may
25 file an enforcement motion or application pursuant to Section 4.1. In any such proceeding, CEH
26 may seek whatever fines, costs, penalties, attorneys’ fees, or other remedies are provided by law
27 for a 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
5 detailed description with supporting documentation of the corrective action(s) that it has
6 undertaken or proposes to undertake to address the alleged violation. Any such correction shall,
7 at a minimum, provide reasonable assurance that all Covered Products having the same lot
8 number as that of the Covered Product identified in CEH’s Notice of Violation (the “Noticed
9 Covered Products”) will not be thereafter sold in California or offered for sale to California
10 consumers, and that Settling Defendant has sent instructions to any retailers or customers that
11 offer the Noticed Covered Products for sale to cease offering the Noticed Covered Products for
12 sale to California consumers and to return all such Noticed Covered Products to Settling
13 Defendant. Settling Defendant shall keep for a period of one year and make available to CEH
14 upon reasonable notice (which shall not exceed more than one request per year) for inspection
15 and copying records of any correspondence regarding the foregoing. If there is a dispute over the
16 corrective action, Settling Defendant and CEH shall meet and confer before seeking any remedy
17 in court. In no case shall CEH issue more than one Notice of Violation per manufacturing lot of a
18 type of Covered Product, nor shall CEH issue more than two Notices of Violation in the first
19 calendar year following the Effective Date.

20 4.2.5.2 If the Notice of Violation is the first, second, third, or fourth
21 Notice of Violation received by Settling Defendant under Section 4.2.1 that was not successfully
22 contested or withdrawn, then Settling Defendant shall pay \$15,000 for each Notice of Violation.
23 If Settling Defendant has received more than four (4) Notices of Violation under Section 4.2.1
24 that were not all successfully contested or withdrawn, then Settling Defendant shall pay \$25,000
25 for each Notice of Violation. If Settling Defendant produces with its Notice of Election test data
26 for the Covered Product that: (i) was conducted prior to the date CEH gave Notice of Violation;
27 (ii) was conducted on the same type of Covered Product; and (iii) demonstrates acrylamide levels
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1 below the Unit Level, then any payment under this Section shall be reduced by 100 percent
2 (100%) for the first Notice of Violation, by seventy-five percent (75%) for the second Notice of
3 Violation, and by fifty percent (50%) for any subsequent Notice of Violation. In no case shall
4 Settling Defendant be obligated to pay more than \$100,000 for all Notices of Violation not
5 successfully contested or withdrawn in any calendar year irrespective of the total number of
6 Notices of Violation issued.

7 4.2.6 Payments. Any payments under Section 4.2 shall be made by check
8 payable to the “Lexington Law Group” and shall be paid within thirty (30) days of service of a
9 Notice of Election triggering a payment. Such payments shall be used as reimbursement for costs
10 for investigating, preparing, sending, and prosecuting Notices of Violation, and to reimburse
11 attorneys’ fees and costs incurred in connection with these activities.

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, costs,
15 penalties, attorneys’ fees, or other remedies that are provided by law for failure to comply with
16 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**. Within ten (10) calendar days of the Effective
21 Date, Settling Defendant shall pay the total sum of \$79,000 as a settlement payment as further set
22 forth in this Section.

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

5 5.2.1 \$10,548 as a civil penalty pursuant to Health & Safety Code § 25249.7(b).

6 The civil penalty payment shall be apportioned in accordance with Health & Safety Code §
7 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health
8 Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of the civil penalty
9 payment for \$7,911 shall be made payable to OEHHA and associated with taxpayer identification
10 number 68-0284486. This payment shall be delivered as follows:

11 For United States Postal Service Delivery:

12 Attn: Mike Gyurics
13 Fiscal Operations Branch Chief
14 Office of Environmental Health Hazard Assessment
15 P.O. Box 4010, MS #19B
16 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
21 1001 I Street, MS #19B
22 Sacramento, CA 95814

23 The CEH portion of the civil penalty payment for \$2,637 shall be made payable to
24 the Center for Environmental Health and associated with taxpayer identification number 94-
25 3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San
26 Francisco, CA 94117.

27 5.2.2 \$7,910 as an Additional Settlement Payment ("ASP") to CEH pursuant to
28 Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3204. CEH
intends to restrict use of the ASPs received from this Consent Judgment to the following
purposes: the funds will be placed in CEH's Toxics in Food Fund and used to support CEH

1 programs and activities that seek to educate the public about acrylamide and other toxic
2 chemicals in food, to work with the food industry and agriculture interests to reduce exposure to
3 acrylamide and other toxic chemicals in food, and to thereby reduce the public health impacts and
4 risks of exposure to acrylamide and other toxic chemicals in food sold in California. CEH shall
5 obtain and maintain adequate records to document that ASPs are spent on these activities and
6 CEH agrees to provide such documentation to the Attorney General within thirty (30) days of any
7 request from the Attorney General. The payment pursuant to this Section shall be made payable
8 to the Center for Environmental Health and associated with taxpayer identification number 94-
9 3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San
10 Francisco, CA 94117.

11 5.2.3 \$60,542 as a reimbursement of a portion of CEH’s reasonable attorneys’
12 fees and costs. The attorneys’ fees and cost reimbursement shall be made in two separate checks
13 as follows: (a) \$51,227 payable to the Lexington Law Group and associated with taxpayer
14 identification number 94-3317175; and (b) \$9,315 payable to the Center for Environmental
15 Health and associated with taxpayer identification number 94-3251981. These payments shall be
16 delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

17 **6. MODIFICATION AND DISPUTE RESOLUTION**

18 6.1 **Modification.** This Consent Judgment may be modified from time to time by
19 express written agreement of the Parties, with the approval of the Court and prior notice to the
20 Attorney General’s Office, or by an order of this Court upon motion and prior notice to the
21 Attorney General’s Office and in accordance with law.

22 6.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
23 shall attempt in good faith to meet and confer with the other Party prior to filing a motion to
24 modify the Consent Judgment.

25 **7. CLAIMS COVERED AND RELEASE**

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

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

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

23 **8. PROVISION OF NOTICE**

24 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
25 notice shall be sent by first class and electronic mail to:
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Howard Hirsch
Lexington Law Group
503 Divisadero Street
San Francisco, CA 94117
hhirsch@lexlawgroup.com

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

Ari N. Rothman
Venable LLP
2049 Century Park East
Suite 2300
Los Angeles, CA 90067
ANRothman@Venable.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.

9. COURT APPROVAL

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

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

10. GOVERNING LAW AND CONSTRUCTION

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

11. ATTORNEYS' FEES

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

1 11.2 Nothing in this Section 11 shall preclude a party from seeking an award of
2 sanctions pursuant to law.

3 **12. ENTIRE AGREEMENT**

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

18 **13. RETENTION OF JURISDICTION**

19 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
20 Consent Judgment.

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

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

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

26 15.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
27 against any entity other than Settling Defendant on terms that are different from those contained
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1 in this Consent Judgment.

2 **16. EXECUTION IN COUNTERPARTS**

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

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7 **IT IS SO ORDERED, ADJUDGED, AND**
8 **DECREED.**

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11 Dated: _____

Judge of the Superior Court

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IT IS SO STIPULATED:

Dated: 27 JUNE, 2018

CENTER FOR ENVIRONMENTAL HEALTH



Signature



Printed Name



Title

Dated: _____, 2018

IDAHOAN FOODS, LLC

Signature

Printed Name

Title

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IT IS SO STIPULATED:

Dated: _____, 2018

CENTER FOR ENVIRONMENTAL HEALTH

Signature

Printed Name

Title

Dated: June, 26, 2018

IDAHOAN FOODS, LLC

Signature 

Drew Fuller
Printed Name

President + CEO
Title

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EXHIBIT A

Covered Products

- Idahoan Regular Hash Brown Instant Potato Mix Shredded 3 oz.
- Idahoan Regular Hash Brown Instant Potato Mix Shredded 34 oz.
- Idahoan Steakhouse Cheesy Hashbrown Instant Potato Mix Shredded 5.5 oz.