

## **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release (the “Agreement”) is between the Center for Environmental Health (“CEH”) and Sam Mills USA, LLC (“Settling Entity”). CEH and Settling Entity 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 July 21, 2017, 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 Settling Entity (the “Notice”). The Notice alleges that Settling Entity violated Proposition 65 by exposing persons to acrylamide, a chemical known to the State of California to cause cancer, contained in animal crackers 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 animal crackers that are sold, distributed, or offered for sale by Settling Entity (“Covered Products”), including but not limited to Sam Mills Gluten Free Animal Crackers in Vanilla (Sku No. 8-56688-00410-2).

**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.** After the Effective Date, Settling Entity shall not manufacture, ship, sell, or offer for sale any Covered Products that will be sold or offered for sale in California that exceed the following acrylamide concentration limits (the “Reformulation Levels”), 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 75 parts per billion (“ppb”) by weight (the “Average Level”). The Average Level is determined by randomly selecting at least 1 sample each 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 100 ppb by weight (the “Unit Level”), based on a representative composite sample taken from the individual unit being tested.

## **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 Entity 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 Effective 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 Entity, and must be served within sixty (60) days of the later of the date the Covered Product at issue was purchased or otherwise acquired by CEH or the date that CEH can reasonably determine that the Covered Product at issue was manufactured, shipped, sold, or offered for sale by Settling Entity, 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 Product was purchased; (b) the location at which the Covered Product was purchased; (c) a description of the Covered Product 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 Product 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 Product.

**3.2.3.** Notice of Election of Response. No more than thirty (30) days after effectuation of service of a Notice of Violation, Settling Entity shall provide written notice to CEH whether it elects 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 Entity may have up to an additional sixty (60) days to elect if, notwithstanding Settling Entity’s good faith efforts, Settling Entity is 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 Entity is relying to contest the alleged violation, including all available test data. If Settling Entity or CEH later acquires additional test or other data regarding the alleged violation during the meet and confer period described in Section 3.2.4, 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 Entity 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 Entity 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 Entity 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 Entity elects to not contest the allegations in a Notice of Violation, it shall undertake corrective action(s) and make payments, if any, as set forth below.

**3.2.5.1.** Settling Entity shall include in its Notice of Election a detailed description with supporting documentation of the corrective action(s) that it has 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 Entity and that Settling Entity has 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 Entity if Settling Entity has reason to believe the Noticed Covered Products are still offered for sale to California consumers. Settling Entity 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 Entity 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 Effective Date.

**3.2.5.2.** If the Notice of Violation is the first, second, third, or fourth Notice of Violation received by Settling Entity under Section 3.2.2 that was not successfully contested or withdrawn, then Settling Entity shall pay \$15,000 for each Notice of Violation. If Settling Entity has received more than four (4) Notices of Violation under Section 3.2.2 that were not successfully contested or withdrawn, then Settling Entity shall pay \$25,000 for each Notice of Violation. If Settling Entity produces with its 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 Entity 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.

**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 Entity has 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 Entity for at least thirty (30) days to determine if Settling Entity and CEH can agree on measures that Settling Entity 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 ten (10) days of the Effective Date, Settling Entity shall pay a total of \$25,000 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 Entity to comply with the payment terms herein shall be subject to a stipulated late fee to be paid by Settling Entity 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 Entity shall be allocated as set forth below between the following categories and made payable as follows:

**4.2. Civil Penalty.** Settling Entity shall pay \$3,140 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 \$2,355 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 \$785 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 Entity shall pay \$21,860 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 Entity’ 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) \$16,665 payable to the Lexington Law Group and associated with taxpayer identification number 94-3317175; and (b) \$5,195 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.

**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 Defendant complies in full with its obligations under Section 4 hereof, CEH on behalf of itself and its successors and assigns discharges, waives, and releases Settling Entity and its 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 Entity on or before the Effective Date. Downstream Releasees specifically includes Wal-Mart.com USA, LLC and each of its affiliates, subsidiaries, or entities under common control with it. Accordingly, within fifteen (15) days following the Effective Date, and provided that Settling Defendant complies in full with its obligations under Section 4 hereof, and provided further that such Downstream Releasees agree to waive their rights to pursue costs, CEH shall dismiss Wal-Mart.com USA, LLC and any other Downstream Releasees from any

litigation CEH has brought concerning the Covered Products, or shall formally restrict any such litigation to products other than the Covered Products.

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

## **8. SPECIFIC PERFORMANCE**

**8.1.** The Parties expressly recognize that Settling Entity's obligations under this Agreement are unique. In the event that Settling Entity is 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, CEH, in addition to any other available rights or remedies, may sue in equity for specific performance, and Settling Entity expressly waives 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 Entity:

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

Either 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. Settling Defendant may request that CEH modify this Agreement pursuant to Section 5 to substitute higher Reformulation Levels that CEH agrees to in a future consent judgment applicable to products identical to the Covered Products, and CEH agrees that it will consent to such modification except for good cause shown.

## **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

**SAM MILLS USA, LLC**

\_\_\_\_\_  
Mihaela Paraschivoiu  
Director of Finance

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

**AGREED TO:**

**CENTER FOR ENVIRONMENTAL HEALTH**

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

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

**SAM MILLS USA, LLC**

  
\_\_\_\_\_  
Mihaela Paraschivoiu  
Director of Finance

Dated: 04/12/2018