

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the “Agreement”) is between the Center for Environmental Health (“CEH”) on the one hand and Mishima Foods U.S.A., Inc. (“Mishima”) on the other hand (together, the “Parties”).

1. DEFINITIONS

1.1 “Covered Products” means fried or baked potato or sweet potato based snack foods, including Sliced Chips and Extruded Products (as defined below). An initial list of the Covered Products (divided as to Sliced Chips and Extruded Products) is attached hereto as Exhibit A.

1.2 “Sliced Chips” means sliced potato chips.

1.3 “Extruded Products” means all Covered Products other than Sliced Chips. It is the Parties’ intent that the Covered Products in this Agreement are the kind of products falling within Type 4 in the “extruded, pellet, and baked products” category in the Consent Judgment as to Defendant Snak King Corporation, entered August 31, 2011, in *People v. Snyder’s of Hanover*, Alameda County Superior Court Case No. RG09455286.¹

1.4 “Effective Date” means the date on which this Agreement is fully executed by the Parties.

2. INTRODUCTION

2.1 On May 18, 2018, CEH, a non-profit corporation acting in the public interest, provided a “Notice of Violation of Proposition 65” (the “Notice”) 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 Mishima regarding the presence of acrylamide in the Covered Products.

2.2 The Notice alleges that the Covered Products contain acrylamide, a chemical known to the State of California to cause cancer. The Notice alleges that the Covered Products expose consumers of the Covered Products to acrylamide without first providing clear and reasonable warning to such persons regarding the carcinogenic toxicity of acrylamide. The Notice alleges that such conduct violates Health & Safety Code § 25249.6, the warning provision of Proposition 65.

2.3 The Parties enter into this Agreement for the purpose of avoiding prolonged and costly litigation regarding the Covered Products. 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. Except as released herein, 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.

3. INJUNCTIVE RELIEF

3.1 **Reformulation of Covered Products.** After the Effective Date, Mishima 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, such concentration to be determined by use of a test performed by an accredited laboratory using either GC/MS (Gas

¹ These products are referred to as “Group C, Type 4” products in Exhibit A to the Snak King Consent Judgment, which is available on the Attorney General’s website, at

Chromatograph/Mass Spectrometry), LC-MS/MS (Liquid Chromatograph-Mass Spectrometry), or any other testing method agreed upon by the Parties:

3.1.1 For Sliced Chips

3.1.1.1 The average acrylamide concentration shall not exceed 281 parts per billion (“ppb”) by weight (the “Sliced Chips Average Level”). The Average Level is determined by randomly selecting at least 5 samples from 5 different lots of a particular type of Covered Product that is a Sliced Chip (or the maximum number of lots available for testing if less than 5) during a testing period of at least 60 days.

3.1.1.2 The acrylamide concentration of any individual unit shall not exceed 350 ppb by weight (the “Sliced Chips Unit Level”).

3.1.2 For Extruded Products

3.1.2.1 The average acrylamide concentration shall not exceed 350 parts per billion (“ppb”) by weight (the “Extruded Products Average Level”). The Average Level is determined by randomly selecting at least 5 samples from 5 different lots of a particular type of Covered Product that is an Extruded Product (or the maximum number of lots available for testing if less than 5) during a testing period of at least 60 days.

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

4. ENFORCEMENT OF SETTLEMENT AGREEMENT

4.1 General Enforcement Provisions.

4.1.1 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

<https://oag.ca.gov/prop65/litigation>.

Agreement, notwithstanding Section 2.3 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 3.1 shall be brought exclusively pursuant to Section 4.2, and be subject to the meet and confer requirement of Section 4.2.4, if applicable.

4.1.2 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.

4.2. Enforcement of Reformulation Commitment.

4.2.1 **Notice of Violation.** In the event that CEH identifies a Covered Product manufactured, distributed, or sold by Mishima that was sold or offered for sale to California consumers after the Effective Date, and for which CEH has laboratory test results showing that the Covered Product has an acrylamide level exceeding the applicable Unit Level, CEH may issue a Notice of Violation pursuant to this Section.

4.2.2 Service of Notice of Violation and Supporting Documentation.

4.2.2.1 Subject to Section 4.2.1, the Notice of Violation shall be sent to the person(s) identified in Section 11.1 to receive notices for Mishima, and must be served within sixty (60) days of the later of the date the Covered Products at issue were purchased or otherwise acquired by CEH or the date that CEH can reasonably determine that the Covered Products at issue were sold by Mishima 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 4.2.2.2 below cannot be obtained by CEH from its laboratory before expiration of the initial sixty (60) day period.

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

4.2.3 Notice of Election of Response. No more than thirty (30) days after effectuation of service of a Notice of Violation, Mishima 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, Mishima may have up to an additional sixty (60) days to elect if, notwithstanding Mishima’s good faith efforts, Mishima is unable to verify the test data provided by CEH before expiration of the initial thirty (30) day period.

4.2.3.1 If a Notice of Violation is contested, the Notice of Election shall include all then-available documentary evidence regarding the alleged violation, including all test data, if any is available. If Mishima or CEH later acquires additional test or other data

regarding the alleged violation, it shall notify the other Party and promptly provide all such data or information to the Party.

4.2.4 Meet and Confer. If a Notice of Violation is contested, CEH and Mishima 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, Mishima 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 Mishima 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 4.2 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 4.1. In any such proceeding, CEH may seek whatever fines, costs, penalties, attorneys' fees, or other remedies are provided by law for failure to comply with the Agreement.

4.2.5 Non-Contested Notices. If Mishima 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.

4.2.5.1 Mishima shall include in its Notice of Election a detailed description with supporting documentation of the corrective action(s) that it has undertaken or proposes 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 Mishima. If

there is a dispute over the corrective action, Mishima 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.

4.2.5.2 If the Notice of Violation is the first, second, third or fourth Notice of Violation received by Mishima under Section 4.2.1 that was not successfully contested or withdrawn, then Mishima shall pay \$15,000 for each Notice of Violation. If Mishima has received more than four (4) Notices of Violation under Section 4.2.1 that were not successfully contested or withdrawn, then Mishima shall pay \$25,000 for each Notice of Violation. If Mishima produces with its Notice of Election test data for the Covered Product that: (i) was conducted prior to the date CEH gave Notice of Violation; (ii) was conducted on the same or same type of Covered Product; and (iii) demonstrates acrylamide levels below the applicable 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 Mishima 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.

4.2.6 Payments. Any payments under Section 4.2 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 and 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.

4.3 **Repeat Violations.** If Mishima 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 Mishima for at least thirty (30) days to determine if Mishima and CEH can agree on measures that Mishima can undertake to prevent future violations.

5. SETTLEMENT PAYMENTS

5.1 **Payments by Mishima.** Within thirty (30) calendar days of the Effective Date, Mishima shall pay a total of \$47,500 as a settlement payment as further set forth in this Section.

5.2 **Allocation.** This total settlement amount for Mishima shall be paid in three (3) separate checks in the amounts specified below and delivered as set forth below. Any failure by Mishima to comply with the payment terms herein shall be subject to a stipulated late fee to be paid by Mishima in the amount of \$100 for each day the full payment is not received after the applicable payment due date set forth in Section 5.1. The late fees required under this Section shall be recoverable, together with reasonable attorneys' fees, in an enforcement proceeding brought pursuant to Section 4.2 of this Agreement. The funds paid by Mishima shall be allocated as set forth below between the following categories and made payable as follows:

5.3 **Civil Penalty.** Mishima shall pay \$8,060 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 \$6,045 shall be made payable to OEHHA and associated with taxpayer identification number 68-0284486. This payment shall be delivered as follows:

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

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

The CEH portion of the civil penalty payment for \$2,015 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.

5.4 Attorneys' Fees and Costs. Mishima shall pay \$39,440 to reimburse CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any other costs incurred as a result of investigating the alleged violations, bringing this matter to Mishima's attention, and negotiating a settlement in the public interest. The attorneys' fees and cost reimbursement shall be made payable to the Lexington Law Group and associated with taxpayer identification number 94-3317175. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

6. MODIFICATION OF SETTLEMENT AGREEMENT

6.1 This Agreement may be modified only by written agreement of the Parties.

7. APPLICATION OF SETTLEMENT AGREEMENT

7.1 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.

8. CLAIMS COVERED

8.1 This Settlement Agreement is a full, final and binding resolution between CEH on behalf of itself and the public interest and Mishima and its parents, subsidiaries, affiliated entities that are under common ownership, directors, officers, employees, agents, shareholders, successors, assigns, and attorneys (“Defendant Releasees”), and all entities to which Mishima directly or indirectly distributes or sells Covered Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees, licensors and licensees (“Downstream Defendant Releasees”), of any violation of Proposition 65 based on failure to warn about alleged exposure to acrylamide contained in Covered Products that were sold, distributed or offered for sale by Mishima prior to the Effective Date.

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

8.3 Compliance with the terms of this Agreement by Mishima constitutes compliance with Proposition 65 by Mishima, Defendant Releasees, and Downstream Defendant Releasees with respect to any alleged failure to warn about acrylamide in Covered Products manufactured, distributed or sold by Mishima after the Effective Date.

9. SPECIFIC PERFORMANCE

9.1 The Parties expressly recognize that Mishima's obligations under this Agreement are unique. In the event that Mishima is found to be in breach of this Agreement for failure to comply with the provisions of Section 3.1 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 Mishima expressly waives the defense that a remedy in damages will be adequate.

10. GOVERNING LAW

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

11. PROVISION OF NOTICE

11.1 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 Mishima:

Derrick K. Takeuchi
Greenberg, Whitcombe, Takeuchi, Gibson & Grayver, LLP
21515 Hawthorne Blvd., Suite 450
Torrance, California 90503
dtakeuchi@gwtllp.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.

12. ENTIRE AGREEMENT

12.1 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.

13. NO EFFECT ON OTHER SETTLEMENTS

13.1 Nothing in this Agreement shall preclude CEH from resolving any claim against any entity other than Mishima on terms that are different from those contained in this Agreement, except as provided in the release in Section 8.

14. EXECUTION IN COUNTERPARTS

14.1 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.

15. AUTHORIZATION

15.1 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



Michael Green
Executive Director

Dated: 2/15/19

MISHIMA FOOD U.S.A., INC.

Dated: _____

Name

Title

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AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH

Michael Green
Executive Director

Dated: _____

MISHIMA FOOD U.S.A., INC.



Dated: 2/5/2019

HIDZKI MORIMOTO
Name

PRESIDENT
Title

EXHIBIT A
COVERED PRODUCTS

Sliced Chips:

Shibuya Purple Sweet Potato Chips

Extruded:

Shibuya Original Sweet Potato Sticks (KEMPI)

Shibuya Sesame Seed Sweet Potato Sticks (GOMA)

Discontinued:

Shibuya Baked Sweet Potato Cake

Shibuya Baked Purple Sweet Potato Cake