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

CENTER FOR ENVIRONMENTAL HEALTH,)	Case No. RG 18-928947
)	
Plaintiff,)	[PROPOSED] CONSENT JUDGMENT
)	AS TO MCCAIN FOODS USA, INC.
v.)	
)	
GALLERIA MARKET, LP, <i>et al.</i> ,)	
)	
Defendants.)	
)	
)	
)	

1. DEFINITIONS

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

1.2 “Compliance Date” shall mean the date that is six months after the Effective Date.

1 Product (or the maximum number of lots available for testing if fewer than five (5)) during a testing
2 period of at least sixty (60) days. The mean and standard deviation shall be calculated using the
3 sampling data. Any data points that are more than three standard deviations outside the mean shall
4 be discarded once, and the mean and standard deviation recalculated using the remaining data
5 points. The mean determined in accordance with this procedure shall be deemed the “Average
6 Level.”

7 3.1.2 The acrylamide concentration of any individual unit, as used per cooking
8 instructions, shall not exceed 400 ppb by weight (the “Unit Level”), based on a representative
9 composite sample taken from the individual unit being tested.

10 3.2 **Compliance Testing.** Compliance with the Reformulation Levels shall be
11 determined by use of a test performed by an accredited laboratory using either GC/MS (Gas
12 Chromatograph/Mass Spectrometry), LC-MS/MS (Liquid Chromatograph-Mass Spectrometry), or
13 any other testing method agreed upon by the Parties. Sampling shall be performed in accordance
14 with the sampling protocol attached hereto as Exhibit A, or any other sampling protocol agreed to
15 by Settling Defendant and CEH. Compliance with the Reformulation Levels shall be determined
16 after cooking a Covered Product as if prepared for consumption in accordance with the instructions
17 on the packaging label of that Covered Product. If the label’s recommended method includes a
18 range of cooking temperatures or times, the midpoint of those ranges shall be used in evaluating
19 compliance with the Reformulation Levels. Any samples of a Covered Product tested under
20 Sections 3.1.1 and 3.1.2 shall be homogenized before testing for acrylamide content.

21 **4. ENFORCEMENT**

22 4.1 **General Enforcement Provisions.** CEH may, by motion or application for an order
23 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 of
26 Section 4.2.5, if applicable.

1 total Notices of Violation to Settling Defendant in the first twelve (12) months after the Compliance
2 Date.

3 4.2.8 Payments. Any payments under Section 4.2 shall be made by check
4 payable to the “Lexington Law Group” and shall be paid within thirty (30) days of service of a
5 Notice of Election triggering a payment and which shall be used as reimbursement for costs for
6 investigating, preparing, sending, and prosecuting Notices of Violation, and to reimburse attorneys’
7 fees and costs incurred in connection with these activities, and shall be the extent of all monetary
8 remedies available to CEH under this Consent Judgment for a non-contested Notice of Violation.

9 4.3 **Repeat Violations**. If Settling Defendant has received five (5) or more Notices of
10 Violation concerning the same type of Covered Product that were not successfully contested or
11 withdrawn, as to the fifth and subsequent Notices of Violation, at CEH’s option, CEH may seek
12 from Settling Defendant whatever fines, costs, penalties, attorneys’ fees, or other remedies that are
13 provided by law for failure to comply with the Consent Judgment. Prior to seeking such relief,
14 CEH shall meet and confer with Settling Defendant for at least thirty (30) days to determine if
15 Settling Defendant and CEH can agree on measures that Settling Defendant can undertake to
16 prevent future violations.

17 **5. PAYMENTS**

18 5.1 **Payments by Settling Defendant**. Within thirty (30) calendar days of the Effective
19 Date, Settling Defendant shall pay the total sum of \$180,000 as a settlement payment as further set
20 forth in this Section.

21 5.2 **Allocation of Payments**. The total settlement amount for Settling Defendant shall
22 be paid in four (4) separate checks in the amounts specified below and delivered as set forth below.
23 Any failure by Settling Defendant to comply with the payment terms herein shall be subject to a
24 stipulated late fee to be paid by Settling Defendant in the amount of \$100 for each day the full
25 payment is not received after the applicable payment due date set forth in Section 5.1. The late fees
26 required under this Section shall be recoverable, together with reasonable attorneys’ fees, in an
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1 enforcement proceeding brought pursuant to Section 4.1 of this Consent Judgment. The funds paid
2 by Settling Defendant shall be allocated as set forth below between the following categories and
3 made payable as follows:

4 5.2.1 \$31,440 as a civil penalty pursuant to Health & Safety Code § 25249.7(b).

5 The civil penalty payment shall be apportioned in accordance with Health & Safety Code §
6 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard
7 Assessment (“OEHHA”). Accordingly, the OEHHA portion of the civil penalty payment for
8 \$23,580 shall be made payable to OEHHA and associated with taxpayer identification number 68-
9 0284486. This payment shall be delivered as follows:

10 For United States Postal Service Delivery:

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

16 For Non-United States Postal Service Delivery:

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

22 The CEH portion of the civil penalty payment for \$7,860 shall be made payable to the
23 Center for Environmental Health and associated with taxpayer identification number 94-3251981.
24 This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco,
25 CA 94117.

26 5.2.2 \$23,580 as an Additional Settlement Payment (“ASP”) to CEH pursuant to
27 Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3204. CEH
28 intends to restrict use of the ASPs received from the Consent Judgment before the Court to the
following 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

1 other final regulatory action for products similar to the Covered Products in a manner that impacts
2 the Reformulation Levels or determines that warnings for acrylamide are not required for such
3 products, then Settling Defendant may seek to modify this Consent Judgment to modify the
4 Reformulation Levels. The Parties recognize that the Reformulation Levels are based on a
5 compromise of a number of issues, and that a change to the “safe harbor no significant risk level”
6 for acrylamide would not necessarily entitle a Party to a modification of the terms of this Consent
7 Judgment corresponding to a linear relationship with such a change.

8 **6.4 Other Court Decisions.** If a final decision of a court determines that warnings for
9 acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide exposures are
10 preempted or otherwise unlawful or unconstitutional with respect to products similar to the Covered
11 Products, then Settling Defendant may move to modify this Consent Judgment to conform to such
12 ruling in order to avoid unfair, inconsistent, or anti-competitive results.

13 **6.5 Federal Agency Action and Preemption.** If a court of competent jurisdiction or an
14 agency of the federal government, including, but not limited to, the U.S. Food and Drug
15 Administration, states through any guidance, regulation or legally binding act that federal law has
16 preemptive effect on any of the requirements of this Consent Judgment, then this Consent Judgment
17 may be modified in accordance with the procedure for noticed motions set forth in Section 6.1 to
18 bring it into compliance with or avoid conflict with federal law. Any such modification shall be
19 limited to those changes that are necessary to bring this Consent Judgment into compliance with or
20 avoid conflict with federal law.

21 **6.6** Before filing any motion to modify the Consent Judgment, Settling Defendant shall
22 provide written notice to CEH to initiate the meet and confer procedure in Section 6.2. If the
23 Parties do not agree on the proposed modification during informal meet and confer efforts, Settling
24 Defendant may file a motion to modify the Consent Judgment within sixty (60) days of the date of
25 the written notice that Settling Defendant provides to CEH under this Section 6.

1 arising out of alleged or actual exposures to acrylamide in the Covered Products manufactured,
2 distributed, or sold by Settling Defendant prior to the Compliance Date.

3 7.3 Provided that Settling Defendant complies in full with its obligations under Section 5
4 hereof, compliance with the terms of this Consent Judgment by Settling Defendant and Defendant
5 Releasees shall constitute compliance with Proposition 65 by Settling Defendant, Defendant
6 Releasees, and Downstream Defendant Releasees with respect to any alleged failure to warn about
7 acrylamide in Covered Products manufactured, distributed, or sold by Settling Defendant after the
8 Compliance Date.

9 **8. PROVISION OF NOTICE**

10 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the notice
11 shall be sent by first class and electronic mail to:

12 Howard Hirsch
13 Lexington Law Group
14 503 Divisadero Street
15 San Francisco, CA 94117
16 hhirsch@lexlawgroup.com

17 8.2 When Settling Defendant is entitled to receive any notice under this Consent
18 Judgment, the notice shall be sent by first class and electronic mail to:

19 Ian Mitchell
20 McCain Foods USA, Inc.
21 One Tower Lane
22 Oakbrook Terrace, Illinois 60181
23 ian.mitchell@mccain.com

24 and

25 Sarah Esmaili
26 Arnold & Porter Kaye Scholer LLP
27 3 Embarcadero Center, Suite 1000
28 San Francisco, CA 94111
Sarah.Esmaili@arnoldporter.com

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

1 affects the Court's authority to modify this Consent Judgment as provided by law.

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

3 14.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
4 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and execute
5 the Consent Judgment on behalf of the Party represented and legally to bind that Party.

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

7 15.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
8 against any entity other than Settling Defendant on terms that are different from those contained in
9 this Consent Judgment. Settling Defendant may move to modify this Consent Judgment pursuant to
10 Section 6 to substitute higher Reformulation Levels that CEH agrees to in a future consent judgment
11 applicable to products substantially similar to the Covered Products, and CEH agrees not to oppose
12 any such motion except for good cause shown.

13 **16. SUCCESSORS AND ASSIGNS**

14 16.1 This Consent Judgment shall apply to and be binding upon CEH and Settling
15 Defendant, and their respective divisions, subdivisions, and subsidiaries, and the successors or
16 assigns of any of them.

17 **17. COMPLIANCE WITH REPORTING REQUIREMENTS; DISMISSAL**

18 17.1 CEH agrees to comply with the reporting form requirements referenced in Health
19 and Safety Code section 25249.7(f).

20 17.2 Within ten (10) days of receiving the payments required by Section 5, CEH shall file
21 a request for dismissal without prejudice as to Defendant Aldi, Inc. from this action, and Aldi, Inc.
22 shall waive all costs in this action.

23 **18. EXECUTION IN COUNTERPARTS**

24 18.1 The stipulations to this Consent Judgment may be executed in counterparts and by
25 means of facsimile or portable document format (pdf), which taken together shall be deemed to
26 constitute one document.

1 **IT IS SO STIPULATED:**

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3 Dated: 2/7, 2020

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6 **CENTER FOR ENVIRONMENTAL HEALTH**

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8 Signature

9 Michael Green

10 Printed Name

11 CEO

12 Title

13 Dated: _____, 2020

14

15

16 **MCCAIN FOODS USA, INC.**

17

18 Signature

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20 Printed Name

21 Title

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23 **IT IS SO ORDERED, ADJUDGED,**

24 **AND DECREED**

25 Dated: _____

26 _____
Judge of the Superior Court

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IT IS SO STIPULATED:

Dated: _____, 2020	<p>CENTER FOR ENVIRONMENTAL HEALTH</p> <hr/> Signature <hr/> Printed Name <hr/> Title
Dated: <u>1/27</u> , 2020	<p>MCCAIN FOODS USA, INC.</p>  <hr/> Signature <hr/> Printed Name <p><u>Kurt A. Kinsy</u></p> <hr/> Title <p><u>1/27/20 VP Finance</u></p>

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

Dated: _____
Judge of the Superior Court

EXHIBIT A
Sampling and Testing Methodology – Oven Baked Products

Note: where more than one preparation method is included in addition to the conventional oven preparation method, the product should be tested using the conventional oven method.

- I. Sample
 - a. A single retail package, as prepared under Section IV below.

- II. Sampling Frequency and Mathematical Averaging for “Average Level” Analysis
 - a. Collect and prepare, per the instructions below, at least 1 sample each from 5 or more different lots of a particular SKU of Covered Product (or the maximum number of lots available for testing if fewer than 5). A product lot is defined as a 24-hour production period.
 - b. As provided in Section 3.1.1 of the consent judgment, average the results of all samples to determine the “Average Level” for the specific product identified in the Notice of Violation. The mean and standard deviation shall be calculated using the sampling data. Any data points that are more than three standard deviations outside the mean shall be discarded once, and the mean and standard deviation recalculated using the remaining data points. The mean determined in accordance with this procedure shall be deemed the “Average Level.”

- III. Equipment Preparation

A conventional household 30 inch electric standard size oven should be used to prepare all samples for acrylamide analysis.

 - a. Oven Calibration
 - i. The oven is to be preheated to the baking temperature specified in the cooking instruction for the product, and then calibrated through three heating cycles. The midpoint of the heating cycle should be the recommended preparation temperature. The oven’s heating cycles range must not exceed 50°F. The ovens must be calibrated monthly.
 - ii. Thermometers used to calibrate ovens should be calibrated prior to use according to a standard ice point and boiling point method.
 - b. Preheat a calibrated oven for at least 30 minutes prior to preparing products.
 - c. Use 17” x 11” baking sheet and follow all cooking instructions provided on the packaging for the product being tested.
 - d. Use oven rack in the middle of the oven.
 - e. Allow oven to return to baking temperature 10 minutes after removing prior sample product from oven prior to baking next sample

- IV. Product Preparation
 - a. Record temperature of product prior to cooking. All products must be between 0°F and 15°F when preparation is begun.

- 1 b. Distribute the product evenly on the baking tray.
- 2 c. Remove any fragments from the baking tray.
- 3 i. Fragments are defined as:
- 4 1. French fries - a strip that is < 2” in length, or any strips less than half
- 5 of a full cut dimension.
- 6 2. Formed products, if applicable – units not exhibiting the full shape
- 7 dimensions shown on the product packaging.
- 8 d. Bake according to the cooking instructions for the specific quantity of product
- 9 selected. If a label’s recommended method includes a range of cooking temperatures
- 10 or times, the midpoint of those ranges shall be used.
- 11 e. When cooking time expires, immediately remove product from oven, and transfer
- 12 from the baking sheet to a container that is at room temperature. Cool product 5
- 13 minutes at room conditions and then place uncovered in a freezer.
- 14 f. Once product is frozen, if the sample is to be transported to a laboratory, transfer to
- 15 an appropriately labeled, sealed container and keep frozen until analyzed for
- 16 acrylamide.
- 17 g. The directions to the testing laboratory shall provide for the sample to be
- 18 homogenized prior to analysis.

19 The Unit Level or levels in samples grouped for Average-Level computation shall be determined

20 based on a representative, composite sample taken from each unit tested.

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