

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“Agreement”) is made effective on the date on which it is fully executed (the “Effective Date”) by and between Ecological Alliance, LLC (“Ecological Alliance”) and PepsiCo, Inc. (“PepsiCo”). Ecological Alliance and PepsiCo are referred to individually as a “Party” and collectively as the “Parties.” The Parties agree as follows:

1. INTRODUCTION

1.1 This Agreement resolves all claims and allegations asserted in the Notice of Violation of California Health & Safety Code Sections 25249.5 *et seq.* (“Proposition 65”) to Bare Foods Company dated January 25, 2021 that was served on Bare Foods Company, the California Attorney General, and other public enforcers (“Notice”). In the Notice, Ecological Alliance alleges that Bare Carrot Chips (“Covered Product” or “Covered Products”) contain lead and that Proposition 65 warnings are required for the Covered Product. PepsiCo denies Ecological Alliance’s Proposition 65 claim and material allegations in the Notice.

1.2 More than 60 days have passed since the Notice was served on the Attorney General, public enforcers, and PepsiCo and no designated governmental entity has filed a complaint against PepsiCo with regard to the Covered Products or the alleged violations.

1.3 The Parties enter into this Agreement in order to achieve a settlement of the claims as stated in Section 1.1 for the purpose of avoiding prolonged litigation. Nothing in this Agreement shall be construed as an admission of PepsiCo or Ecological Alliance of any fact, issue of law, or violation of law, nor shall compliance with this Agreement constitute or be construed as an admission by PepsiCo of any fact, issue of law or violation of law. Nothing in this Agreement or any document referred to herein, shall be construed as giving rise to any presumption or inference of admission or concession by PepsiCo as to any fault, wrongdoing or liability whatsoever. Nothing in this Agreement nor compliance with this Agreement shall constitute or be construed as an admission by any of the Parties or by any of their respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, franchisees, licensees, customers, suppliers, distributors, wholesalers, or retailers of any fact, issue of law, or violation of law. This Agreement is the product of negotiation and compromise and is accepted by the Parties solely for purposes of settling, compromising, and resolving issues disputed in this matter and shall not be used for any purpose except to enforce the terms of this Agreement. The Parties agree that this Section shall not diminish or otherwise affect the obligations, responsibilities, and duties of the Parties under this Agreement.

1.4 Except as expressly set forth herein, nothing in this Agreement shall prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any current or future legal proceeding unrelated to the Notice.

1.5 PepsiCo refers to PepsiCo, Inc. and its subsidiary Bare Foods Company and other subsidiaries and affiliates under common ownership.

1.6 The Effective Date of this Agreement is the date on which it is fully executed by all Parties. The Compliance Date is six months after the Effective Date.

2. PEPSICO'S DUTIES

2.1 By the Compliance Date, PepsiCo agrees to discontinue manufacturing or purchasing the Covered Products.

2.2 Covered Products that were manufactured or purchased by PepsiCo prior to the Compliance Date shall be subject to the release provisions of Section 6, without regard to when such Covered Products were, or are in the future, distributed or sold to customers or consumers. As a result, the obligations of Section 2.1 do not apply to Covered Products manufactured or purchased prior to the Compliance Date and put into the stream of commerce after the Compliance Date.

3. SETTLEMENT PAYMENT

3.1 In full satisfaction of all potential civil penalties, additional settlement payments, attorney's fees and costs (including, but not limited to, fees and costs incurred by attorneys, experts, and investigators), Defendant shall pay a total settlement amount \$31,500. This includes civil penalties in the amount of \$500 pursuant to Health and Safety Code section 25249.7(b) and attorney's fees and costs in the amount of \$31,000 pursuant to Code of Civil Procedure section 1021.5 and Health and Safety Code section 25249 et seq.

3.2 The portion of the settlement attributable to civil penalties shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining twenty-five percent (25%) of the penalty paid to Ecological Alliance.

All portion of the civil penalty owed Ecological Alliance shall be delivered to the following payment address and made payable to Ecological Alliance:

Custodio & Dubey LLP
Attn: Vineet Dubey, Esq.
445 S. Figueroa St., Suite 2520
Los Angeles, CA 90071

The portion of the civil penalty owed to OEHHA shall be delivered directly to OEHHA at the following addresses and made payable to OEHHA:

For United States Postal Delivery:

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:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

3.3 Attorney's Fees and Costs

In settlement of all of Ecological Alliance's attorneys' fees and costs shall incurred in this matter, including but not limited to investigating potential violations, bringing this matter to Defendant's attention, as well as litigating and negotiating a settlement in the public interest, Defendant shall pay \$31,000 by check payable to Custodio & Dubey LLP to the address in Section 9, below.

3.4 Timing

The above -mentioned payments will be issued within twenty-one days from the Effective Date.

4. ENFORCEMENT

4.1 If Ecological Alliance purchases a Covered Product in California that has a best-by or sell-by (or equivalent) date or other code that reflects that the Covered Product was manufactured by or for Settling Defendant on or after the Compliance Date, or if the manufacture date is not apparent from the label, Ecological Alliance shall inform PepsiCo in a reasonably prompt manner, including information sufficient to permit PepsiCo to identify the alleged violation of this Agreement. PepsiCo shall, within thirty (30) days following such notice, provide Ecological Alliance with documentation that the Covered Products are in fact being discontinued in the State of California or other information to demonstrate that PepsiCo is in compliance with the terms of this Agreement. The Parties shall first attempt to resolve the matter prior to Ecological Alliance taking any further legal action.

4.2 Any Party that fails to meet and confer or otherwise attempt in good faith to resolve any dispute arising under this Agreement prior to seeking judicial enforcement, shall forfeit any attorney's fees and cost to which that Party may otherwise be entitled.

5. APPLICATION

This Agreement may apply to, be binding upon, and benefit the Parties and their respective officers, directors, attorneys, shareholders, employees, agents, parent companies, subsidiaries, divisions, franchisees, licensees, customers (excluding private labelers), distributors, wholesalers, retailers (including but not limited to Nowhere Partners Corp.), predecessors, successors, and assigns. This Agreement shall have no application to any Covered Product which is distributed or sold outside the State of California.

6. BINDING EFFECT, CLAIMS COVERED AND RELEASED

6.1 This Agreement is a full, final, and binding resolution between Ecological Alliance, on behalf of itself and its representatives, attorneys, agents, and successors (collectively, the "Ecological Alliance Parties") and PepsiCo and its officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, suppliers, franchisees, licensees, customers, manufacturers, distributors, wholesalers, retailers (including but not limited to Target Corp.), and all other upstream and downstream entities in the distribution chain of any Covered Product, and the predecessors, successors, and assigns of any of them (collectively, "Released Parties"). Ecological Alliance, on behalf of itself and the Ecological Alliance Parties, releases and discharges the Released Parties from any and all claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees, costs, and expenses asserted, or that could have been asserted from the handling, use, or consumption of the Covered Products, as to any alleged violation of Proposition 65 or its implementing regulations arising from the failure to provide Proposition 65 warnings on the Covered Products regarding lead or any other listed chemical for Covered Products manufactured, distributed, or sold prior to the Compliance Date.

6.2 It is possible that other claims not known to the Parties, arising out of the facts alleged in the Notice, and relating to the Covered Products, will develop or be discovered. Ecological Alliance on behalf of itself only, and PepsiCo, on behalf of itself only, acknowledge that this Agreement is expressly intended to cover and include all such claims up through and including the Effective Date, including all rights of action therefore. Ecological Alliance and PepsiCo acknowledge that the claims released in Sections 6.1 and 6.2 above may include unknown claims, and nevertheless waive California Civil Code section 1542 as to any such unknown claims. California Civil Code section 1542 reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Ecological Alliance on behalf of itself only, and PepsiCo on behalf of itself only, acknowledge and understand the significance and consequences of this specific waiver of California Civil Code section 1542.

6.3 The Parties agree that compliance with the terms of this Agreement shall be deemed to constitute compliance with Proposition 65 by any Released Party regarding alleged exposures to lead or any other listed chemical in the Covered Products on or after the Compliance Date.

7. SEVERABILITY OF UNENFORCEABLE PROVISIONS

In the event that any of the provisions of this Agreement are held by a court to be unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.

8. GOVERNING LAW

The terms and conditions of this Agreement shall be governed by and construed in accordance with the laws of the State of California.

9. NOTICES

All notices required to be given to either Party to this Agreement by the other shall be in writing and sent to the following agents listed below via email and first-class mail.

For Ecological Alliance:

Custodio & Dubey LLP
Attn: Vineet Dubey, Esq.
445 S. Figueroa St., Suite 2520
Los Angeles, CA 90071
Email: dubey@cd-lawyers.com

For PepsiCo:

Sarah Esmaili
ARNOLD & PORTER
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
Email: sarah.esmaili@arnoldporter.com

10. MODIFICATION

10.1 Except as provided in Section 10.2, this Agreement may be modified by stipulation of the Parties or by an order of this Court on noticed motion by a Party in accordance with law. Any Party seeking to modify this Agreement must notify the other Party in writing, and the Parties shall thereafter attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the Agreement. If the Parties are unable to resolve their dispute informally within sixty (60) days after the date of the written notification, the Party that issued the written notification to seek the modification may bring a motion or proceeding to seek judicial relief as to the requested modification.

10.2. If, after the Compliance Date, PepsiCo intends to resume manufacturing or purchasing the Covered Products for sale in California, PepsiCo is entitled to do so provided that the Covered Product does not exceed a daily exposure level of 0.5 micrograms lead per day. The daily exposure level shall be calculated using the following formula: the average concentration of lead in the product in micrograms per gram, multiplied by grams of product per serving of the product (using the serving size appearing on the product label), multiplied by frequency of consumption of once every fourteen days.

11. EXECUTION AND COUNTERPARTS

This Agreement may be executed in counterparts, which taken together shall be deemed to constitute one document. A facsimile or .pdf signature shall be construed to be as valid as the original signature.

12. DRAFTING

The terms of this Agreement have been reviewed by the respective counsel for each Party prior to its signing, and each Party has had an opportunity to fully discuss the terms and conditions with legal counsel. The Parties agree that, in any subsequent interpretation and construction of this Agreement, no inference, assumption, or presumption shall be drawn, and no provision of this Agreement shall be construed against any Party, based on the fact that one of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all or any portion of the Agreement. It is conclusively presumed that all of the Parties participated equally in the preparation and drafting of this Agreement.

13. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES

If a dispute arises with respect to either Party's compliance with the terms of this Agreement, the Parties shall meet and confer in person, by telephone, and/or in writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be filed in the absence of such a good faith attempt to resolve the dispute beforehand.

14. ENTIRE AGREEMENT, AUTHORIZATION

14.1 This Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter herein, and any and all prior discussions, negotiations, commitments, and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any Party. No other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.

14.2 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.

AGREED:

Dated: April 26, 2021

ECOLOGICAL ALLIANCE, LLC

By: 

Print name: Harmony Welsh

Title: Managing Member

Dated: 1 May 2021, 2021

PEPSICO, INC.

By: 

Print name: Paul W. Schrier

Title: Assistant Secretary