

## SETTLEMENT AND RELEASE AGREEMENT

### 1. **INTRODUCTION**

#### 1.1. **Ecological Alliance, LLC and McKee Foods Corporation**

This Settlement and Release Agreement (“Agreement”) is entered into by and between Ecological Alliance, LLC (“Ecological”), on the one hand, and McKee Foods Corporation (“McKee”), on the other hand, with Ecological and McKee collectively referred to as the “Parties.”

#### 1.2. **General Allegations**

The “Matter” arises out of the Notices of Violations of California Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”) that Ecological served to McKee on March 25, 2021 (the “Notice”). In the Notice, Ecological alleges that the Sunbelt Bakery apple cinnamon bars McKee manufactured for distribution and sale in the State of California require a warning for lead under Proposition 65. McKee denies the claims in the Notice and denies any liability under Proposition 65.

#### 1.3. **Product Description**

The products that are covered by this Agreement are defined as Sunbelt Bakery apple cinnamon bars, including but not limited to UPC #024300031816, that McKee has sold, offered for sale or distributed in California. All such items shall be referred to herein as the “Products.”

#### 1.4. **Notice of Violation**

On March 25, 2021, Ecological served McKee, WinCo Foods, LLC, and the requisite public enforcement agencies eligible to initiate Proposition 65 actions on behalf of the People of the State of California with a document entitled “60-Day Notice of Violation” (“Notice”) that provided McKee and such public enforcers with notice that McKee was allegedly in violation of

California Health & Safety Code section 25249.6 for failing to warn consumers and customers that the Products exposed users in California to lead. To the best of the Parties' knowledge, no public enforcer has commenced or is diligently prosecuting the allegations set forth in the Notice.

**1.5. No Admission**

The Parties enter into this Agreement to resolve all claims between them as set forth herein and in the Notice concerning McKee's compliance with Proposition 65 for the purpose of avoiding prolonged litigation. McKee denies the material factual and legal allegations contained in Ecological's Notice and maintains that all products that it has manufactured for sale and distribution in California, including the Products, have been and are in compliance with Proposition 65 or any other statutory, regulatory, common law or equitable doctrine. Nothing in this Agreement shall be construed as an admission by McKee of any fact, finding, issue of law, or violation of law; nor shall compliance with this Agreement constitute or be construed as an admission by McKee of any fact, finding, conclusion, issue of law, or violation of law, including but not limited to Proposition 65. Nothing in this Agreement or any document referenced shall be construed as giving rise to any presumption or inference of admission or concession by McKee as to any fault, wrongdoing or liability. However, nothing in this section shall diminish or otherwise affect the obligations, responsibilities, and duties of McKee under this Agreement.

**1.6. Effective Date**

For purposes of this Agreement, the term "Effective Date" shall mean the date this Agreement is fully executed by the Parties.

**1.7. Compliance Date**

For purposes of this Agreement, the term “Compliance Date” shall mean 90 days after the Effective Date. Provided, however for any internet warnings that are required under this Agreement, the Compliance Date shall refer to 20 days after the Effective Date for McKee’s website and 45 days after the Effective Date for other 3<sup>rd</sup> party websites that are selling these products at the direction of McKee.

**1.8. Distribute into the State of California**

For the purposes of this Agreement, the term “Distribute into the State of California” means that the actual sale of the Covered Product has occurred in California.

**2. INJUNCTIVE RELIEF: SALES AND WARNINGS**

**2.1. In-store sales in California**

For in-store sales in California, McKee will cease the sale, offer for sale, or distribution of the Products to brick and mortar stores in California by the Compliance Date. However, Products manufactured, supplied, or contracted to be supplied to third parties by McKee prior to the Compliance Date shall be permitted to be sold through as previously manufactured, packaged and labeled.

**2.2. Internet Sales fulfilled by McKee**

For internet sales fulfilled by McKee to purchasers with a California shipping address, McKee will provide the following Proposition 65 warning statement beginning on or before the applicable Compliance Date in Section 1.7 either on the product page, at the checkout page or both, which shall appear on the internet page or by way of a hyperlink in bold capitalization stating “WARNING” which links to the warning:

**WARNING:** Consuming this product can expose you to [chemicals including] lead, which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food)

**2.3. Internet Sales Not Fulfilled by McKee**

For internet sales not fulfilled by McKee, McKee shall bear no responsibility to provide Proposition 65 warnings or ensure that the website or selling party does so.

**3. SETTLEMENT PAYMENTS**

**3.1. Settlement amount**

In satisfaction of all the claims for civil penalties and attorneys' fees and costs related to the Notice, McKee shall pay a total settlement amount of \$44,0000 (the "Settlement Amount") within 10 business days of the Effective Date to Ecological's counsel. Ecological shall be solely responsible for allocating the Settlement Amount pursuant to Section 3. Upon request, Ecological or its legal counsel shall supply McKee with a completed W-9 form. The Settlement Amount shall be allocated as follows:

**3.2. Penalties pursuant to Health & Safety Code Section 25249.7(b)**

In settlement of all the claims referred to in this Agreement, McKee shall pay a total of \$2,000 in civil penalties in accordance with Section 25249.7(b). The penalty payment will be allocated in accordance with California Health & Safety Code section 25249.12(c)(1) & (d), with 75% of the funds remitted to the "Safe Drinking Water and Toxic Enforcement Fund" managed by the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Ecological. Ecological's counsel shall be responsible for delivering OEHHA's portion of any penalty payment made under this Agreement.

**3.3. Reimbursement of fees and costs**

The Parties reached an accord on the compensation due to Ecological and its counsel under the private attorney general doctrine and principles of contract law. Under these legal principles, McKee shall reimburse Ecological's counsel for fees and costs, incurred as a result of investigating and bringing this matter to McKee's attention. McKee shall pay Ecological's counsel \$42,000 for all attorneys' fees, expert and investigation fees, and related costs associated with this matter and the Notice.

**4. PAYMENT INFORMATION**

Within 10 business days of the Effective Date, McKee shall make a total payment of Forty-Four Thousand Dollars (\$44,000) for the civil penalties and attorney's fees / costs by wire transfer to Plaintiff's counsel Custodio & Dubey LLP:

Bank: Bank of America, N.A.

Routing No.: 026009593

Account No.: 325132729125

Beneficiary: Custodio & Dubey LLP

Other than this payment, each side is to bear its own attorneys' fees and costs.

**5. RELEASE OF ALL CLAIMS**

**5.1. Release of McKee, Downstream Customers and Upstream Vendors**

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4 above, Ecological, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and fully releases all claims including, without limitation, all actions, and causes of action, in law or in

equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against (a) McKee and its parents, subsidiaries, affiliates, (b) McKee's manufacturers, (c) each of McKee's upstream suppliers and downstream distributors (including but not limited to WinCo Foods, LLC), wholesalers, vendors, licensors, licensees, auctioneers, retailers, franchisees, dealers, shareholders, cooperative members, customers, owners, purchasers, users, (d) McKee's parent companies, corporate affiliates, subsidiaries, doing business as entities ("DBAs"), successor companies, and their respective officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and parent entities, (e) any third party purchaser (and its parent companies, corporate affiliates, subsidiaries, DBAs, successor companies, and their respective officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and parent entities) of the Products and related business from McKee, and (f) any third-party re-seller(s) who sold, offered for sale or distributed the Products in California, whether such actions were authorized by McKee or unauthorized (collectively "Releasees").

Ecological also, on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees and *not* in its representative capacity, provides a general release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of any nature, character or kind, known or unknown, suspected or unsuspected, against McKee and the Releasees. Ecological acknowledges that it is familiar with California Civil Code section 1542, which provides 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, in its capacity only, and on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees expressly waives and relinquishes any and all rights and benefits which it may have under, or which may be conferred on it by the provisions of California Civil Code section 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters.

**5.2. McKee's Release of Ecological**

McKee waives any and all claims against Ecological, its attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Ecological and its attorneys and other representatives, whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the Products.

**6. GOVERNING LAW**

The terms of this Agreement shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed, amended, modified, or is otherwise rendered inapplicable for any reason, including but not limited to changes in the law regarding concentration levels for lead, then McKee shall have no further obligations pursuant to this Agreement with respect to, and to the extent that, the Products are so affected.

**7. NOTICES**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Agreement shall be in writing and personally delivered or sent by: (i) electronic mail; or (ii) overnight courier on any party by the other party at the following addresses:

For McKee: Christopher J. Cox, Esq.  
Hogan Lovells US LLP  
4085 Campbell Ave #100  
Menlo Park, CA 94025

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

Any party, from time to time, may specify in writing to the other party a change of address or electronic mail to which all notices and other communications shall be sent.

**8. COUNTERPARTS; FACSIMILE/E-SIGNATURES**

This Agreement may be executed in counterparts and by facsimile or e-signatures, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

**9. COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(f)**

Ecological agrees to comply with the reporting form requirements referenced in California Health & Safety Code § 25249.7(f).

**10. ENTIRE AGREEMENT**

This Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and all related prior discussions, negotiations, commitments and understandings. No other agreements, oral or otherwise, exist to bind either of the Parties.





11. MODIFICATION

This Agreement may be modified only by a written agreement signed by the Parties.

12. AUTHORIZATION

The undersigned are authorized to execute this Agreement on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this Agreement.

<p style="text-align: center;"><b>AGREED TO:</b></p> <p>Date: September <u>14</u>, 2021</p> <p>By: <u></u> On Behalf of Ecological Alliance, LLC</p>	<p style="text-align: center;"><b>AGREED TO:</b></p> <p>Date: September <u>14</u>, 2021</p> <p>By: <u></u> On Behalf of McKee Foods Corporation</p>
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